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Freedom without Due Process of Law?

by Jacob G. Hornberger

No American should be too enthusiastic about the Pentagon's decision to permit accused terrorist Yaser Hamdi to speak to an attorney after some two years of incarceration in a military brig here in the United States. While some people might be tempted to be grateful to the Pentagon for finally permitting Hamdi, an American citizen, to consult with an attorney, make no mistake about it: the only reason Hamdi is now speaking to a lawyer is that Pentagon officials, in an act of pure discretion, are permitting him to do so.

We live in a country in which the military authorities are continuing to claim and exercise the same type of omnipotent power over the citizenry that the military does in China, Burma, and many Latin American countries — the arbitrary power to seize any citizen, either here or abroad, and punish him. All that is now needed here in our country is the mere assertion by military officials that a particular citizen is an “illegal combatant” in the government's metaphorical “war on terrorism,” and that now means: no attorney, no jury trial, no due process of law. And for any American accused by the Pentagon of being an “illegal terrorist,” no appeals. Just arrest and punishment.

That's in fact what the cases of Hamdi and Jose Padilla, another American accused of terrorism by the Pentagon, are all about. Americans would be well-served to take notice before it is too late, because what the government is doing in these cases quite possibly constitutes the most dangerous and audacious attack on the freedom of the American people in our lifetime.

This is especially true given that the government is also claiming the power to arbitrarily remove a criminal defendant accused of terrorism from the jurisdiction of the federal courts and to transfer him to the control of military tribunals run by the Pentagon — as they have done with accused terrorist Ali S. Marri and as they are threatening to do to accused terrorist Zacarias Moussaoui — if the civil courts don't go along with what the Pentagon wants. While at the moment the Pentagon is still applying military tribunals only to foreigners and not Americans, that decision, again, is an act of pure discretion and thus could be changed at the whim of Pentagon officials.

What's so bad about a military tribunal? It is nothing more than a kangaroo judicial proceeding to provide cover for the military to incarcerate or execute under pretense of law any person accused of

terrorism by military officials. That's in fact why the criminal defense bar has chosen to boycott the Pentagon's military tribunals in Cuba, rather than participate in a sham defense of the accused terrorists being held at Guantanamo Bay.

If the Pentagon has the power to do to Americans what it is doing to Padilla, Hamdi, and Marri, then what good are any other freedoms that we enjoy as Americans? Do they not all effectively become dead letters? After all, what good is freedom of speech, for example, if the Pentagon has the omnipotent power to accuse anyone and everyone, including critics and dissenters, of being "illegal combatants" in the "war on terrorism," incarcerate them in a military brig for any period of time, or even execute them after a sham judicial proceeding? What person would feel safe to speak the truth in the face of that kind of governmental power?

Ironically, even though the Pentagon is maintaining that the "war on terrorism" has subordinated our Constitution and Bill of Rights to military command, U.S. officials continue to assure us that the troops in Iraq are fighting to protect our "freedom." But to which freedom exactly are they referring? The "freedom" of living in a country where the military authorities have the omnipotent power to arbitrarily arrest and punish people and deny them such fundamental rights as the right to counsel and due process of law? Or the freedom of living in a country whose Constitution and Bill of Rights guarantees such rights to everyone, citizen and noncitizen alike?

In 1961, President Dwight Eisenhower warned us to "guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex" and advised us to "never let the weight of this combination endanger our liberties or democratic processes." The American people would have done well to heed Eisenhower's warning.

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This article was originally published in December of 2003.