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## **Does John Ashcroft Understand the Constitution?**

**by Jacob G. Hornberger**

Learning that the U.S. Supreme Court had upheld the rights of habeas corpus, right to counsel, and due process of law in the Yaser Hamdi, Jose Padilla, and Shafiq Rasul cases, U.S. Attorney General John Ashcroft commented, “The Supreme Court accorded to terrorists, in a variety of cases this week, a number of additional rights.” Ashcroft’s lament raises an important question: Does the attorney general of the United States understand the nature and meaning of the Constitution?

Many Americans honestly believe that the Constitution gives them rights. A few years ago, I was invited to give a speech to a student assembly at a public high school in Virginia. I began the discussion by asking the crowd, “How many of you believe that the First Amendment gives people the right of freedom of speech?” Just about everyone in the room raised his hand.

I announced, “Well, every one of you is wrong. Can anyone tell me why?”

That threw the crowd into a frenzy. “Mr. Hornberger, everyone knows that the First Amendment gives us freedom of speech,” one student stated. “I’ve got the First Amendment in front of me and I can categorically state that you are wrong, Mr. Hornberger,” another one said.

I stood my ground: “The First Amendment does not give anyone freedom of speech. Can anyone tell me why I’m right?”

After much discussion, a young woman finally said, “Yes, Mr. Hornberger, you are right. The First Amendment does not give people freedom of speech. Instead, it prohibits Congress from abridging freedom of speech.”

That distinction is the difference between night and day. Unfortunately, it is one that all too many people fail to appreciate. People’s rights are fundamental and inherent, and they preexist government. Thus, the Framers didn’t give people rights in the Constitution but rather prohibited the government from taking such rights away. That’s why the document uses the words “no” or “not” some 46 times.

Although most people understand the need for government to arrest and prosecute violent criminals, throughout the ages government officials have inevitably employed such power to

punish the innocent. Thus, civil liberties pertaining to the administration of criminal justice have arisen out of centuries of citizen struggle against the abuse of governmental power. These include such rights as due process of law (which stretches back to Magna Carta in 1217), habeas corpus, right to counsel, freedom from unreasonable searches and seizures, right to confront witnesses, and trial by jury. These rights and safeguards were such vitally important aspects of liberty that our ancestors decided to enumerate them in the Constitution and the Bill of Rights.

Note, however, that as with natural rights such as freedom of speech, freedom of the press, and the right to keep and bear arms, the Constitution does not give people civil liberties but instead guarantees such liberties from government infringement.

Until the Supreme Court's decisions in the Hamdi, Padilla, and Rasul cases, the U.S. military was claiming and wielding the most ominous power in our lifetime — the power to seize Americans and foreigners alike and incarcerate them in military brigs for the rest of their lives, denying them such rights as habeas corpus, right to counsel, and due process of law. The Pentagon had even claimed that the federal courts lacked the authority to interfere with its refusal to accord suspected terrorists these critically important rights. Even more ominous, the Pentagon was claiming the authority to put suspected terrorists on trial at its base in Guantanamo Bay before a Cuban-style, kangaroo-court military tribunal, subjecting the accused to the death penalty while denying them trial by jury and other due-process guarantees.

In a victory for freedom and the Constitution, the Supreme Court put the quietus to the Pentagon's unwarranted assumption and exercise of such dangerous powers. By according suspected terrorists the rights of habeas corpus, right to counsel, and due process of law, the Court wasn't giving "more rights" to terrorists, as John Ashcroft mistakenly thought. It was instead enforcing centuries-old procedural guarantees in the administration of justice that our ancestors had the wisdom and foresight to enumerate in the Constitution.

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