



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

fff@fff.org www.fff.org

Habeas Corpus: The Lynchpin of Freedom

by Jacob G. Hornberger

In the recently enacted Military Commissions Act, Congress acceded to President Bush's request to remove the power of federal courts to consider petitions for writ of habeas by foreign citizens held by U.S. officials on suspicion of having committed acts of terrorism. While it might be tempting to conclude that the writ of habeas corpus is some minor legal procedural device that the president and the Congress have now canceled, nothing could be further from the truth. The writ of habeas corpus is actually the lynchpin of a free society. Take away this great writ and all other rights — such as freedom of speech, freedom of religion, freedom of the press, gun ownership, due process, trial by jury, and protection from unreasonable searches and seizures and cruel and unusual punishments — become meaningless.

The Framers considered the writ of habeas corpus so important that they specifically provided for its protection in the Constitution: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” As Alexander Hamilton put it, the writ of habeas corpus, along with the prohibition against ex post facto laws, “are perhaps greater securities to liberty” than any others in the Constitution.

Let's assume that the president involves the nation in another foreign war but this time one in which there are significant military reversals involving the deaths of thousands of U.S. troops. Congress grants the president's request to enact a draft to replenish the Pentagon's human coffers. Federal spending, the national debt, income taxes, and inflation soar. To compound the crisis, terrorist bombs are exploded in a few American cities.

Assume also that this time the American people are angry and outraged over the president's and Congress's actions. They point out that the Constitution prohibits the president from starting and waging a war without an express declaration of war from Congress. They oppose subjecting themselves and their children to a draft and another foreign war. They point out that the terrorist bombs are a retaliatory response to U.S. foreign policy. Newspaper editorials protest the war. Demonstrations erupt across the nation.

At the height of the crisis, the president announces that criticism of federal policy is helping the terrorists. Congress grants his request to criminalize criticism of the federal government (much as the newly installed regime in Iraq, which U.S. officials continue to insist is now a free country, [has done](#)). The president issues an executive order as commander in chief extending the cancellation of habeas corpus in the Military Commission Act to U.S. citizens who aid and abet the enemy.

On orders of the president, FBI agents and U.S. military personnel begin rounding up recalcitrant newspaper editors, Internet critics, and anti-war protestors as “enemy combatants” for giving moral and intellectual aid to the enemy. The action, the president assures the nation, is temporary. The detentions will last only until the war on terrorism is won.

“But they couldn’t do that,” people might cry. “The First Amendment guarantees freedom of speech.”

Granted, but how is that provision enforced? Editors, critics, and protestors would be languishing in some military detention center, perhaps even the one at Guantanamo Bay. What good would it do to point out that people have the constitutional right to speak their mind, criticize government policy, and petition the government for redress of grievances? The president and the military would be in charge. They might listen politely, but then again they might simply take more people into custody in order to send a message: “Remain silent.” The doors to the cells would remain locked. The prisoners would be unconditionally subject to whatever treatment their jailers wished to impose. The prisoners would be prohibited from going to court to complain or to seek redress.

That’s where habeas corpus, a legal procedure whose use stretches back to 14th-century England, comes in. Over the centuries of struggle against royal tyranny, the English people came to the realization that rights were meaningless unless they could be enforced against government officials who jailed them for exercising them.

Moreover, the English people had learned what our American ancestors had learned — that the greatest threat to people’s fundamental rights and freedoms lay not with foreign enemies but rather with their own government officials. After all, don’t forget that the reason that our American ancestors expressly mentioned Congress in the First Amendment is that they recognized that Congress was an enormous threat to people’s freedom of speech and other fundamental rights.

Thus, the English people demanded and got the Habeas Corpus Act of 1679, which stated that “the writ of Habeas Corpus cannot be denied.” A hundred years later, Americans, who had just a few years before been Englishmen who had revolted against their own government, inserted a similar restriction in the U.S. Constitution.

In the absence of habeas corpus, the detainee must continue languishing in prison for having criticized the government, comforted only by the notion that he lives in a country in

which the Constitution says that people have freedom of speech. He has no way to get out of jail or force his jailers to treat him properly, other than to apologize, convince his jailers that he has reformed, promise that he will never do it again, and plead for mercy.

With habeas corpus, there is another alternative. The prisoner files a petition with the federal judiciary, which the Framers made a separate branch of government, equal to that of the executive and legislative branches. In the petition, he tells a federal judge, who is independent of presidential and congressional control, that he is being held without just cause. The judge issues a writ of habeas corpus, which commands the U.S. official who is holding the petitioner to appear in his courtroom post haste to show cause why he is holding the prisoner. If the jailer refuses to do so, the judge cites the official for contempt of court and issues a writ for his arrest. U.S. marshals are charged with serving the writs and enforcing them.

Under our system of government, the judicial branch's interpretation of law, including constitutional law, trumps that of the other two branches. Once a U.S. district judge issues a writ of habeas corpus or any other judicial writ, the other two branches must comply.

At the hearing on the writ of habeas corpus, the judge hears sworn testimony. If he determines that the prisoner is being held without just cause, he orders the jailer to release him, and the jailer is required to comply with the judge's order. In our example, the judge might say, "The First Amendment to the Constitution guarantees the right of people to criticize their government and its policies and there are no exceptions for crises or emergencies, including war. The law that converts government critics into aiders and abettors of terrorism is unconstitutional. You are hereby ordered to release the petitioner immediately." Absent appeals, the prisoner would go free at the conclusion of the hearing. In the event of appeals, petitions for writ of habeas corpus are usually given priority over most other appellate cases.

In the absence of the power of federal courts to issue writs of habeas corpus, all the other rights and guarantees in the Constitution and the Bill of Rights become dead letters. If there is no way to enforce the First Amendment, for example, through a writ of habeas corpus seeking the release from custody of a government critic, critical speech is inexorably suppressed. After all, how many newspaper editors, Internet critics, and war protesters would continue their criticism knowing that other critics were languishing in some dark, perhaps even secret, detention camp without hope of challenging their detention in court through a writ of habeas corpus?

Americans might feel comforted by the fact that the president and the Congress limited the removal of habeas corpus to foreign citizens and did not apply it to Americans. If so, they know little about the history of government oppression. Once people accede to the cancellation of judicial protections for "other people" — a grave wrong in and of itself — it is just a matter of time before the cancellation is extended to include them. After all, American officials would argue at the height of a new crisis, what is the difference between a foreign terrorist and an American terrorist? Shouldn't they be treated the same? Aren't they equally dangerous? Of course

the suspension of habeas corpus should be extended to American terrorists, the argument would go. After all, aren't American terrorists also traitors?

Consumed by fear that “the terrorists” are coming to get them, conquer the United States, and take over the federal government, Americans continue to blithely permit their government officials to erode their rights. Their indifference to the cancellation of the Great Writ — the writ of habeas corpus, the lynchpin of a free society — is an affront those who struggled for centuries to ensure its enshrinement and protection. It also constitutes one of the gravest and most ominous threats to freedom of the American people in the history of our nation.

Mr. Hornberger is founder and president of The Future of Freedom Foundation. He will be among the 22 speakers at FFF's upcoming conference on June 1-4 in Reston, Virginia: “Restoring the Constitution: Foreign Policy and Civil Liberties” (www.fff.org/whatsNew/conference.htm).

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