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The Pentagon's Power to Arrest, Torture, and Execute Americans **by Jacob G. Hornberger**

The president and the Pentagon now wield the omnipotent power to arrest, torture, and execute any American they label an “enemy combatant.” It is impossible to overstate the significance of this power. It has totally upended the relationship of the military and civilian in the United States. The assumption of this particular power easily constitutes one of the most monumental revolutions of liberty and power in history. It is a revolution that every American must confront now, not later. If people wait until later to confront the expanded use of this power, it will be too late, because by that time it will be too dangerous to do so.

As long as this particular power is permitted to stand, there is no possibility for Americans to be considered a free people. A necessary prerequisite for restoring freedom to our land is the removal of this power from the arsenal of government officials.

Everyone needs to understand the nature of this power and its enormous significance. Historically, the U.S. military has lacked the power to arrest, incarcerate, or inflict harm on American civilians. If Americans committed a federal crime, they were subject to being indicted by a federal grand jury and then prosecuted in U.S. District Court. The Bill of Rights guaranteed that the accused would be accorded certain rights of due process of law, such as the right to defend himself with the assistance of an attorney, to confront the witnesses whose testimony the prosecutors were relying on, to summon witnesses in his behalf, to remain silent, and to have a trial by jury. Everyone was presumed to be innocent and the government had to prove the defendant's guilt beyond a reasonable doubt.

Those constitutional protections and guarantees were upended on 9/11, without even the semblance of a constitutional amendment. On 9/11 the president and the Pentagon assumed to themselves the power to take any American into custody and inflict violence on him, without according him any of the protections provided by the Bill of Rights. Today, the Pentagon has the authority, on orders of its commander in chief, to send American soldiers into any neighborhood in the country and take into custody any American citizen and inflict harm on him simply by labeling him an “enemy combatant” in the “war on terror.”

Let me emphasize something important here, especially for libertarians, who have long committed their lives to the achievement of a free society: There is no way — none — to reconcile the assumption of this power with a free society. In fact, it is the most powerful government power of all — the ultimate power that can ever be wielded by a tyrannical government. No infringement on economic liberty — hyperinflation, confiscatory taxation, oppressive regulation, or the like — can compare in significance with the omnipotent power of a government official to arbitrarily pick up anyone he wants for any reason he wants and incarcerate him, torture him, and execute him.

Here's how this revolution of liberty and power occurred.

After 9/11, U.S. officials declared what they called a “war on terror.” They said that this was akin to a real war, such as World War I and World War II, despite the fact that terrorism was still listed on the federal statute books as a federal crime. The “war on terror” was a “global” war, they said, one in which the president, the CIA, and the Pentagon would have to fight terrorists all over the world. Since it was a real war against illegal combatants, the CIA and the Pentagon did not need to heed legal and constitutional procedures. They were “taking off the gloves” to keep Americans safe from the terrorists.

The CIA and the Pentagon assumed the authority to kidnap, capture, arrest, torture, “rendition,” and execute suspected terrorists all over the world. There were a few indictments, prosecutions, and convictions for terrorism in federal court, such as that of 9/11 conspirator Zacarias Moussaoui. But for the vast majority of foreigners U.S. officials picked up for terrorism, there was torture, indefinite incarceration, and in some cases extra-judicial executions. Sometimes the torture occurred at the hands of U.S. personnel. Other times, the torture was outsourced (“renditioned”) to police or intelligence forces of brutal, but friendly, foreign regimes.

Through it all, Americans innocently and naively assumed that the power now being exercised by the CIA and the Pentagon applied only to foreigners, not to Americans. Engaged in wishful thinking, they were blinding themselves to reality. As U.S. officials repeatedly emphasized after 9/11, the war on terror was *global* in nature, which meant that the military power to wage the war on terror included going after the terrorists right here inside the United States.

The war on terror's iron fist unleashed itself on an American citizen named Jose Padilla, whom U.S. officials arrested on American soil and accused of being a terrorist. Federal officials did not indict Padilla, prosecute him, or convict him, at least not at first. Instead, U.S. military officials took control over him and denied him any right to speak to an attorney, family, or friends. The U.S. attorney general announced to the American people that Padilla was an illegal “enemy combatant” in the “war on terror.”

For three years, Padilla was held in military custody. In a recent hearing in U.S. District Court, two psychologists testified that, as a result of having been in isolation for an extended

period of time and having been subjected to sensory deprivation, Padilla is now too mentally damaged to assist with his own case. Even though a government psychologist disputed Padilla's claim, the case is bringing to public eye what U.S. officials would undoubtedly prefer to keep secret from the American people — a method of “touchless” torture that the CIA and the Pentagon have long been employing involving isolation and sensory deprivation. As Alfred McCoy described in his book *A Question of Torture*, this particular type of torture technique is specifically intended to cause mental damage to its victims. The CIA learned the technique from the North Korean communists, who subjected American POWs to it during the Korean War.

What is so significant about the Jose Padilla case?

Its significance lies not only in what U.S. officials did to Padilla but also in the fact that what they did to him, they now wield the power to do to every other American. That is the post-9/11 revolution of liberty and power that Americans must now confront if they wish to live in a free society.

The president and the Pentagon faced one big problem, however. While they correctly assumed that Congress would do nothing to stop the assumption of this omnipotent power over the American people, there was still the possibility that the federal courts would declare it to be in violation of the U.S. Constitution.

So it's not surprising that they chose someone like Jose Padilla as their test case, rather than some middle-class high-school principal who was a member of Rotary. Federal officials knew that Americans would feel no sympathy for Padilla, especially after the U.S. attorney general went on television and announced that Padilla was planning to explode a nuclear bomb in the United States.

After keeping him three years in military custody, the Pentagon released Padilla from the South Carolina dungeon in which he had been incarcerated and transferred him to the control of the Justice Department, which proceeded to secure a grand-jury indictment against him for terrorist-related activities overseas. Significantly, the grand jury indictment didn't charge Padilla with the nuclear-bomb scheme that the U.S. attorney general had used to scare the American people.

Why did U.S. officials agree to prosecute Padilla in federal district court instead of continuing to treat him as an “enemy combatant” in the “war on terror”? After all, haven't they repeatedly told Americans that terrorism is an act of war, not a criminal act? Isn't that why Padilla was held in isolation in a military dungeon for three years? Why would they switch gears by moving him from “enemy-combatant” status to “criminal-defendant” status in federal district court?

The answer lies in the legal strategy employed by U.S. officials, a strategy that ultimately fortified the federal government's revolutionary assumption of military power over the American people.

While Padilla was still in military custody as an “enemy combatant,” his attorneys filed a petition for writ of habeas corpus. Habeas corpus is a legal remedy that stretches back centuries into American and English jurisprudence. Its purpose is to negate the power of government officials to arbitrarily incarcerate and punish people without just cause. Placing ultimate power in the hands of an independent judge, the writ commands the custodian to produce the prisoner and show cause for holding him. If the judge finds that the prisoner is being held without cause, he has the power to order his release. Under the law, the custodian — whether he’s a king, a president, or a military official — must comply with the judge’s order.

The district court ruled in favor of Padilla, essentially holding that in the United States of America the military doesn’t rule over the citizenry. If Padilla or any other American was accused of terrorism, the executive branch had a remedy under the Constitution — indict him and prosecute him. Essentially, the district court held: Charge Padilla with a crime or release him.

Meanwhile, attorneys for the foreigners held at Guantanamo, who also had been held for years without being charged, were litigating their own petitions for writ of habeas corpus in the federal courts, arguing that they too had the right to be either charged or released.

The government appealed the *Padilla* ruling to the Fourth Circuit Court of Appeals, one of the most conservative circuits in the country. Reversing the judgment of the district court, the Fourth Circuit issued one of the most ominous judicial decisions in the history of our country. Upholding the government’s concept of an “enemy combatant” in a “war on terror,” the court upended the relationship between military and civilian — and between liberty and power — that historically had existed in this country.

While the Court of Appeals judgment seemed to apply only to Jose Padilla, in actuality it applies to all Americans. On the day that judgment became final, the monumental legal revolution was complete, except for the possibility that the Supreme Court could still overrule the Fourth Circuit’s judgment.

What did the U.S. Supreme Court do? That was another part of the legal strategy that federal officials employed. Padilla’s attorneys, of course, fully intended to appeal the judgment of the Fourth Circuit to the Supreme Court, which very well might have reversed the judgment of the Court of Appeals. After all, by this time the Court had already ruled in favor of several of the Guantanamo detainees and against the government.

Before the Court could hear the case, however, federal officials transferred Padilla to federal-court jurisdiction to be indicted as a criminal defendant accused of having committed criminal acts of terrorism. Why had the government seemingly changed its position after years of claiming that Padilla was an “enemy combatant” subject to military control?

The answer was easy to see: The government had the Fourth Circuit’s judgment under its belt and it did not want to jeopardize a reversal of that judgment. Federal prosecutors knew that if

they could somehow prevent the Supreme Court from hearing the case — and possibly reversing the holding — the Fourth Circuit’s judgment in the government’s favor would be left standing.

There was one way for them to prevent the Supreme Court from hearing the case. There is a long-established legal principle that if a case or controversy becomes moot while the case is pending, a court loses jurisdiction to rule.

Federal officials figured that if they transferred Padilla out of military custody, his habeas corpus proceeding would become moot because he would no longer be in military custody. That’s why they transferred him to federal-court jurisdiction — to render his case moot and thereby deny the Supreme Court the power to reverse the Fourth Circuit’s judgment.

The strategy succeeded. Ruling that the case was now moot, the Supreme Court declined to hear Padilla’s appeal, which left the Fourth Circuit’s judgment approving the government’s “enemy combatant” theory intact.

“Well, how come they’re not arresting, torturing, and executing lots of Americans then?” Because every government, even totalitarian ones, must pay attention to public opinion, and federal officials know that, under current circumstances, Americans might not countenance the arbitrary arrests, torture, and executions of large numbers of Americans.

But what every federal official, especially those in the military, knows is that they now wield one of the most powerful standby military powers in history: the omnipotent power to arbitrarily arrest, torture, and execute American citizens simply by labeling them “enemy combatants.” All that’s needed is the right “emergency” or “crisis” and this standby power can be unleashed on the American people — in the course of protecting them from the terrorists, of course.

It’s true that Americans still retain habeas corpus, given that the recently enacted Military Commissions Act canceled that centuries-old remedy for foreigners only. (The D.C. federal Court of Appeals recently upheld the constitutionality of the Act.) Americans would be unwise to rely on habeas corpus, however, to provide them any safety or security with respect to being labeled an “enemy combatant” and treated accordingly. As soon as an American “enemy combatant” files a petition for writ of habeas corpus, the government will quickly file its response showing that the prisoner is being held as an “enemy combatant” in time of “war,” citing the Fourth Circuit’s decision in the Padilla case upholding the “enemy combatant” designation as part of the ongoing “war on terrorism.” Given the long-established tradition of federal courts not to second-guess the president’s war-making decisions, it is a virtual certainty that no federal court will second-guess the president’s and the Pentagon’s “enemy combatant” determinations. The courts will very likely swiftly dismiss habeas corpus petitions brought by Americans who have been labeled “enemy combatants.”

While there is still a possibility that the Supreme Court will ultimately reject the reasoning and holding of the Fourth Circuit, Americans would be unwise to depend on any such hope. For

one thing, it would take at least a year or two for any case to reach the Supreme Court and be decided, and lots of Americans could be arrested, incarcerated, tortured, and executed within that time, especially if the right “emergency” or “crisis” were to send everyone into emotional hyperdrive. Equally important, given the increasingly conservative ideology of Supreme Court justices, there is a growing likelihood that a majority of the Court will side with the government anyway.

As an integral part of the federal government’s “war on terror,” which itself is an inexorable part of the government’s pro-empire, pro-intervention foreign policy, the U.S. military’s power to arrest, torture, and execute Americans is now reality. It is impossible to reconcile such power with the principles of a free society. As long as it exists, even if only as a standby power in the event of a “crisis” or “emergency, ” Americans cannot be considered a free people. It is the ultimate power that any government can wield over its citizens and, in fact, is a power wielded by such tyrannical regimes as those in Burma, Pakistan, China, North Korea, and Cuba. A necessary prerequisite for the restoration of a free society is its removal from the arsenal of federal powers.

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