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How U.S. Officials Circumvented the Bill of Rights

by Jacob G. Hornberger

In another embrace of President Bush's war-on-terrorism policies, President Obama has announced that he might retain the Pentagon's military-commission system to try people accused of terrorism. Apparently, the president, like the U.S. military, lacks confidence in the federal judicial system established by the Framers to handle criminal cases involving terrorism.

For those who still doubt whether terrorism is a crime, their doubts have been laid to rest by several U.S. federal judges, most recently in the Jose Padilla case. Padilla, who is an American citizen, started his long journey as a criminal defendant in U.S. federal court. On the eve of trial, the government transferred him to the control of the Pentagon, converting his status to that of "enemy combatant" in the war on terrorism. For five years, he was tortured and denied a trial, before U.S. officials suddenly transferred him back to the status of a criminal defendant, securing a federal grand-jury indictment against him for violating federal criminal statutes relating to terrorism.

Padilla recently pled guilty to terrorism in U.S. district court. A federal judge accepted his plea of guilty to that criminal offense. Would a federal judge accept a plea of guilty to a federal crime that wasn't really a crime? Not likely, especially when the crime is written in the federal statute books, having been duly enacted into law by the U.S. Congress.

The federal judge in the Padilla case isn't the only one who has acknowledged that terrorism is a crime. In the case of Zacarias Moussaoui, a foreigner who was charged with conspiracy to commit terrorism, the federal judge accepted Moussaoui's plea of guilty to a federal crime, to wit, terrorism.

Moreover, there are federal judges around the United States who have sentenced people to terms in the federal penitentiary after they have been found guilty of the federal crime of terrorism. These include Ramzi Yousef, one of the terrorists who attacked the World Trade Center in 1993.

In fact, to belabor the obvious, the U.S. Justice Department itself has implicitly acknowledged that terrorism is a crime, for it is the Justice Department that has secured grand-jury indictments and prosecuted many defendants for the criminal offense of terrorism.

I repeat: terrorism is a crime. No one can deny that, especially given the federal proceedings involving Padilla, Moussaoui, and many others who have been tried for terrorism.

So why is there a class of people who are accused of terrorism who are being treated differently than Padilla, Moussaoui, and others who have been prosecuted for terrorism in U.S. district courts? That is, under what justification are some accused terrorists provided one route — i.e., the federal court route — for determining their guilt and their punishment while others are subjected to another route — i.e., the military-commission route?

The answer to that question involves an examination of one of the cleverest and most devious processes ever devised by the lovers of power, one that has enabled U.S. officials to circumvent the procedural protections outlined in the Bill of Rights, the very thing that the Framers and our American ancestors tried to prevent.

Let's first refresh our recollections as to the purpose of the Constitution and the Bill of Rights. The Constitution called into existence the federal government. But our American ancestors understood that that federal government might well prove to be the greatest danger to their freedom and well-being. That's in fact why so many of our American ancestors opposed even establishing a federal government.

Thus, the Framers used the Constitution to ensure that the federal government they were establishing would always remain weak and divided. That was the idea behind setting forth enumerated powers and division of powers.

That wasn't good enough for the American people, however. They still didn't like the idea of establishing a federal government, but they went along with the deal on one condition: that immediately after ratification, the Constitution would be amended with a Bill of Rights, which is what happened.

The Bill of Rights contains restrictions on federal power relating to the arrest, prosecution, and punishment of people accused of violating federal criminal laws. These include provisions relating to search and seizure, indictment, a person's right to remain silent, the right to an attorney, the right to trial by jury, the right to confront witnesses, and the right to be free of cruel and unusual punishments.

Why did our American ancestors insist on the inclusion of those express guarantees in criminal cases? Because they believed that without them, the federal government would simply arrest people, especially people they didn't like, and inflict harm on them. To ensure that that would not happen, our American ancestors declared, "We're reluctantly going to permit a federal government to come into existence despite our misgivings. But here are the rules under which

you people must operate. If you decide that you want to incarcerate and punish someone, you are required to follow these procedural principles.”

Ever since the inception of the United States, by and large the quest of people who have been attracted to federal power has been to break free of constitutional constraints, oftentimes with the best of intentions and the greatest zeal. What has prevented them from doing so has been a citizenry that has treasured its freedom and has been knowledgeable about the history and nature of the Constitution as well as a federal judiciary determined to enforce the Bill of Rights.

The terrorist attacks on 9/11, however, provided the opportunity that the lovers of power had long been waiting for — the opportunity to arrest and punish people, including Americans, without the constraints of the Constitution and the Bill of Rights.

How did they accomplish that monumental feat without even the semblance of a constitutional amendment? By simply announcing that a criminal offense — namely, terrorism — would henceforth be treated as an act of war. Since this was war, the argument went, federal officials would no longer be required to comply with procedural requirements outlined in the Bill of Rights when arresting and punishing people, including Americans.

How clever and devious is that? It will undoubtedly go down in U.S. history as the most brilliant — and perhaps the most evil — end-around of the Constitution ever. While there have been, of course, innumerable violations of constitutional provisions in U.S. history, what was revolutionary about the post-9/11 power was that it was intended to become a permanent feature of American life, given the perpetual nature of the war on terrorism.

And, again, what is amazing is how this power grab was accomplished: through the simple act of declaring that a certain federal criminal offense — terrorism — was now being considered by federal officials as an act of war.

Yet, it's not as though they converted terrorism from a crime into an act of war. As previously noted, terrorism *is* a federal criminal offense. It was before 9/11 and it continued to be after 9/11. Again, that's why both Americans and foreigners (e.g., Padilla and Moussaoui) have been prosecuted for terrorism in U.S. district court.

Therefore, after 9/11 U.S. officials did not cancel terrorism as a federal crime. Instead, they simply declared that it could *also* be considered as an act of war, *at their option*. Of course, the power associated with that option gave them almost complete control over the American people, an omnipotence that the Bill of Rights was intended to prevent.

If U.S. officials opted to treat a person as a criminal defendant, they would have to accord him the protections of the Bill of Rights. But if they opted to treat a person as a combatant, they could simply ignore the Bill of Rights. Their omnipotence lies in the power to exercise the option.

Let's keep in mind the reason that the Pentagon established its detention facility in Cuba rather than the United States. It was not to protect the American people from possible prison escapes. After all, convicted terrorists are held in maximum-security prisons around the country

and no one loses any sleep over their possible escape. Moreover, in World War II German prisoners of war were imprisoned here in the United States.

The reason that the Pentagon went to Cuba to establish its prison facility was precisely to avoid the application of the Constitution and the Bill of Rights and any federal-court interference with its operations. At Gitmo, the Pentagon was going to show America and the world what could be accomplished for law and order in a society without a Constitution and a Bill of Rights — a society in which military power is sovereign and supreme.

One of the fascinating aspects of Gitmo is that the Pentagon was determined to set up not only what it considered an ideal prison facility — one that didn't coddle criminals — but also a model judicial system, one that would prove superior to the federal court system that is required to accord people constitutional rights.

In fact, one big difference between the Guantanamo prison and World War II prisons immediately became evident: The prisoners at Gitmo were not treated as prisoners of war but rather as criminal defendants — yes, criminal defendants, charged with the crime of terrorism! The only difference — but a big difference — was that these criminal defendants would be tried under the Pentagon's new judicial system rather than under the judicial system the Pentagon scorned — the one established by the Framers.

So, the fact of the matter is that when it comes to terrorism cases, the United States is now operating under two competing, dual-track federal judicial systems. One system for prosecuting suspected terrorists is being run by the Pentagon at Gitmo. The other system is being run by the federal courts here in the United States under the principles of the Constitution. The government, not the defendant, gets to decide which system the defendant will be tried under.

What are the attributes of the Pentagon's system? In the Pentagon's system, the accused is presumed guilty (unlike the constitutional system, where the person is presumed innocent), the accused can be tortured into incriminating himself, the accused can be punished before determination of guilt, evidence acquired by torture can be used to convict the defendant, hearsay evidence can also be used, the defendant is denied the right to confront witnesses against him, there is no right of trial by jury, and kangaroo military tribunals are employed.

At Gitmo the Pentagon has established a judicial system that is the dream of those who believe that the procedural protections in the Bill of Rights are nothing more than constitutional "technicalities" that let guilty people go free. No more reading people their rights. No more Miranda warnings. No more coddling of criminals. No more exclusionary rule. Defense attorneys under tight control. Secret proceedings.

In other words, The system that law-and-order types have been dreaming of for decades — one freed of the due-process guarantees outlined in the Bill of Rights — has arrived, and it is at Gitmo.

The English jurist William Blackstone (1723-1780) enunciated the underlying principle of English and American criminal jurisprudence: “Better that ten guilty persons escape than that one innocent suffer.”

The Pentagon’s system is different. It is oriented toward one goal: the punishment of people it has determined are terrorists. The Pentagon’s system operates under the dictum “Better that ten innocent persons suffer than that one guilty person escape.”

Every American should realize what 9/11 enabled federal officials to accomplish — it gave them the ability to do things to both Americans and foreigners that our ancestors feared they would in the absence of a Constitution and a Bill of Rights, the ability to take people into custody and punish them, without having to concern themselves with procedural due process. By wielding the option to treat people accused of terrorism as either criminal defendants or as combatants — an option which, by the way, violates the principles of equal treatment under law and the rule of law — the federal government and its military have upended their relationship with the citizenry, enabling the former to gain supremacy and control over the latter.

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