



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

[fff@fff.org](mailto:fff@fff.org) [www.fff.org](http://www.fff.org)

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## **The Bill of Rights: Due Process of Law**

**by Jacob G. Hornberger**

One of the most deeply rooted principles in American jurisprudence is the concept of due process of law, which is enshrined in the Fifth Amendment to the U.S. Constitution: “No person shall . . . be deprived of life, liberty, or property, without due process of law.”

Due process of law actually stretches back to the year 1215, when the great barons of England extracted an admission from their king that his powers over the citizenry were not unlimited but instead were limited by fundamental principles of fairness and justice. Included among the restrictions on power to which King John acceded in the Magna Carta — the Great Charter — was a prohibition against the exercise of arbitrary seizure of people or their property by government officials:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.

Over the centuries, that phrase — “the law of the land” — gradually evolved into the phrase “due process of law,” the same phrase our American ancestors insisted be made part of the Constitution through the adoption of the Fifth Amendment.

### **Why government?**

In the Declaration of Independence, Thomas Jefferson set forth the rationale for the establishment of government in a society: to secure the fundamental, inherent, and preexisting rights of the people. The idea was that the monopoly force of government was needed to suppress the likes of murderers, rapists, robbers, and other violent criminals. Government’s job would be to bring such malefactors to justice and impose punishment on them.

However, as Englishmen had learned throughout the centuries, both before and after Magna Carta, the matter of criminal justice was not so easy. For history and experience had shown that when government (i.e., the king) was vested with the unlimited power to arrest, incarcerate, and punish violent offenders, always and inevitably such power had been misused against the innocent, especially those who dared to criticize or challenge government policies or practices.

For example, without restrictions on power, the king would simply send his soldiers to the home of a government critic. They would then arrest him, incarcerate him, and punish him.

The idea behind the “law of the land” provision in Magna Carta, which has been described as the cornerstone of English liberties, was to require the king to follow certain procedures as a prerequisite to seizing and punishing a person for a crime he had supposedly committed.

Thus, over the centuries English and American courts gradually defined “due process of law” as a set of *procedural* rights or guarantees to which every person whom the government accused of a crime is entitled.

(Beginning in the late 19th century, the U.S. Supreme Court began developing a *substantive* notion of due process, which blossomed during the Franklin Roosevelt regime but was finally abandoned in the late 1930s. See my series “[Economic Liberties and the Constitution](#)” in the June 2002 – May 2003 issues of *Freedom Daily*.)

### **Notice and hearing**

The core procedural requirements of due process of law were “notice” and “hearing.” An accused had the right, the courts held, to be advised of the nature of the offenses for which he was being charged. That is, the government would be prohibited from simply taking a person into custody on mere suspicion that he was a criminal type or prosecuting him without formally telling him what he was being prosecuted for. Instead, the government would have to formally advise him of the specific charges against him, so that he would then be able to prepare his defense.

That’s the idea behind a grand jury indictment — to formally advise the accused of the exact nature of the offense against him. That’s why our ancestors incorporated that aspect of due process in the Fifth Amendment —

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury

— and the Sixth Amendment —

In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation.

The other essential part of due process was “hearing” — the right of the accused to be heard, which meant, in a criminal case, a trial. Not just any trial, however, because Englishmen had learned hard lessons from, for example, Star Chamber judicial proceedings that involved secret, arbitrary, and unjust verdicts and judgments.

### **Other due-process guarantees**

The English common law gradually developed other aspects of due-process guarantees in criminal cases.

For example, if an accused was forced to defend himself against experienced government lawyers, obviously the trial could easily degenerate into a sham proceeding — that is, one that might have the trappings of a just trial but whose ending would be practically preordained owing to the unlikelihood that a layman in court could successfully defeat experienced prosecutors.

Therefore, to provide the accused with a reasonable chance to challenge the charges against him, procedural due process came to recognize the crucial importance of allowing the accused to retain a lawyer to fight government prosecutors on his behalf. That’s why the right to counsel was enshrined in the Sixth Amendment: “In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence.”

Other due-process protections were included in the Sixth Amendment. For example, the amendment guarantees the right of trial by jury, which protects the right of the accused to be judged by ordinary people in the community rather than by the judge presiding over the case. Also, government witnesses against the accused have to be brought into court to face the accused and subject themselves to cross-examination by the accused or his lawyer. The accused also has the right to use the subpoena power of the court (i.e., “compulsory process”) to force favorable witnesses to come to court to provide evidence on his behalf.

Other procedural protections became an integral part of due process of law even though they were not specifically enumerated in either the Constitution or the Bill of Rights. For example, in every criminal case the government has the burden of proof. What that means is that in the United States, unlike many other countries around the world, the accused is not required to prove his innocence; instead the government is required to prove his guilt by furnishing sufficient, competent, and credible evidence under oath that the accused actually did commit the offense.

How much evidence is the government required to furnish to substantiate a finding of guilt? Unlike civil cases, where the burden of proof on the claimant is a “preponderance of the evidence,” criminal cases require the government to prove a person’s guilt “beyond a reasonable

doubt.” Thus, at the conclusion of the trial, it is entirely possible that a jury could find a criminal defendant not guilty even if he had not introduced any evidence of his innocence whatsoever. The reason might be that the jury, after hearing and considering all the government’s evidence, might still not be convinced “beyond a reasonable doubt” of the defendant’s guilt.

A correlative due process right involves the “presumption of innocence,” which means that at the beginning of every criminal trial the accused is considered to be fully and totally innocent — and remains so until the government succeeds in convincing the jury of his guilt beyond a reasonable doubt.

A related due-process protection included in the Fifth Amendment is the right of every person to remain silent in the face of a government accusation. That was to ensure that government officials would have to build their case against a person with independent evidence — that is, evidence that was not extracted from the accused, especially through force (e.g., torture).

What’s important to recognize is the underlying rationale behind due process of law — that is, why this principle was so important to Englishmen as well as to our Founding Fathers and the Framers: Given the enormous value they placed on people’s lives and liberty and given their recognition of the enormous power of the government, they wanted to ensure that as few innocent people as possible were executed or otherwise punished, even if that meant lots of guilty people went unpunished.

### **The role of habeas corpus**

How are due-process rights protected? That is, what if government officials proceed to arbitrarily arrest and detain people indefinitely without charges or trial, as U.S. officials today are doing to people in Iraq? What if they attempt to punish, even execute them, in secret sham proceedings involving the denial of counsel or other due-process guarantees, as U.S. officials are today doing at their military installation in Cuba to foreigners accused of terrorism?

Our English and American ancestors understood that the only effective way to secure the release of people who were wrongfully detained was through a legal process known as habeas corpus, which stretches back to 1679, when Parliament enacted the Habeas Corpus Act and which the Framers later enshrined in the limitation on the powers of Congress in Article 1, Section 9 of the U.S. 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.

Habeas corpus is a process that entitles a person held in custody to file a petition in court formally requesting the court to summon the accused and his custodian to court where the

custodian will be required to show the reason he is detaining the petitioner. If the court issues a “writ of habeas corpus,” a law-enforcement officer serves the writ (i.e., a formal court order) on the custodian, ordering him to bring the detainee to court and to “show cause” why he is being detained. If the custodian refuses, he is subject to a contempt citation, which means that the judge will order his arrest and detention until he complies with the order of the court. As a practical matter, the writ of habeas corpus forces government officials either to formally charge a prisoner or to release him.

### **Due process today**

Given the government’s conduct in Iraq and Cuba, where criminal suspects have been arbitrarily arrested and detained indefinitely without charges; where detainees have been tortured, raped, sexually abused, and even murdered; and where U.S. officials have steadfastly resisted any attempt to observe the protections of due process of law in the criminal-justice process in those two countries; and given the increasingly secretive nature of judicial proceedings in the United States in the name of “national security”; and given the Pentagon’s attempt to arrest and indefinitely detain and punish American citizens accused of “terrorism,” every American should be enormously grateful that our ancestors enshrined due process of law in the Bill of Rights.

*Jacob Hornberger is founder and president of The Future of Freedom Foundation.*

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