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The Bill of Rights: Bail, Fines, and Cruel and Unusual Punishments by **Jacob G. Hornberger**

Like the Sixth Amendment, the Eighth Amendment deals with the administration of criminal justice. The Eighth Amendment reads as follows:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This is how bail works: When federal officials arrest someone suspected of having committed a crime, they are required to take him promptly to a federal magistrate whose job includes the setting of bail. The bail must be “reasonable” in amount, which obviously depends on many factors, such as the seriousness of the crime, the defendant’s ties to the community, and the defendant’s financial condition. The magistrate’s decision is obviously a discretionary one but it can be appealed to the federal court of appeals.

If the defendant posts the bail, he promises to appear at trial. If he fails to do so, he forfeits the bail and is then subject to a new criminal charge for having jumped bail.

What is the rationale behind this constitutional protection? To preclude the government from jailing innocent people and also to ensure that people are not denied the ability to adequately prepare their defense. Thus, the right to bail should be read in conjunction with the Sixth Amendment’s right to counsel. As the U.S. Supreme Court put it in *Stack v. Boyle* (1951),

This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.

As FindLaw points out in its section on the Eighth Amendment, the right to bail arose in response to the practice of English kings of jailing people indefinitely without ever bringing them to trial. In 1628, the English Parliament responded by enacting the famous Petition of Right,

which included a right to bail. When the king's magistrates began setting bail unreasonably high, Parliament responded in 1689 by adding a provision to the English Bill of Rights stating that "excessive bail ought not to be required." That was the language that effectively was incorporated into the Eighth Amendment.

The Eighth Amendment also prohibits the imposition of excessive fines on people who have been convicted of a crime, but the term "excessive" has never been defined with any exactitude by the Supreme Court. The Court has held that the clause can be applied in civil cases involving asset forfeiture, a practice by which the federal government seizes property of people who have not yet been convicted of a crime; asset forfeiture has become a core element in the war on drugs.

Federal torture of prisoners

Until recently, the last clause of the Eighth Amendment — the part that prohibits "cruel and unusual punishments" — was rather noncontroversial except with respect to the imposition of the death penalty. For all practical purposes, the clause had become as irrelevant as the Third Amendment's prohibition against the quartering of troops in people's homes.

Not anymore. In fact, ever since 9/11 the right to bail and the "cruel and unusual" clause of the Eighth Amendment have become vitally important, given the federal government's policies regarding indefinite detention and torture.

In an early case addressing this clause, *Wilkinson v. Utah* (1878), the Supreme Court stated,

Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture [such as drawing and quartering, embowelling alive, beheading, public dissecting, and burning alive] and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.

The reason that the Court referred to those particular acts of torture was that the English government had employed them against its own people.

The "war on terrorism"

In a genuine war, prisoners of war are required to be treated according to the principles of the Geneva Convention, which prohibits such things as rape, pillage, and torture of prisoners. Even in the absence of a Geneva Convention, however, many people would argue that a civilized country should prohibit such misconduct on the part of its military forces, even when fighting a barbarian who is engaging in such misconduct.

The Eighth Amendment addresses situations where the federal government is accusing a person of committing a crime, not committing an act of war.

While acknowledging that terrorism is a federal crime, the federal government has nonetheless assumed the power to detain and punish accused terrorists outside the normal judicial process. U.S. officials justify this position by saying that their “war on terrorism” is akin to a real war, such as World War II or the Vietnam War. Therefore, the argument goes, the Bill of Rights doesn’t apply to people suspected of violating federal criminal laws against terrorism.

Since the enemy in the “war on terrorism” is an illegal combatant (i.e., he doesn’t wear a military uniform), they claim, he is not entitled to the protections of the Geneva Convention. Therefore, they say, the government can do whatever it wants to these prisoners, including detaining them indefinitely (or until the war on terrorism is finally “won”) and denying them bail, counsel, habeas corpus, trial by jury, and a speedy trial.

One major problem with the government’s position, of course, is that terrorism is, in fact, a criminal offense, not an act of war, which is confirmed by the federal government’s own criminal indictments of Zacarias Moussaoui (the so-called 20th hijacker on 9/11) and other accused terrorists whose cases are being tried in federal courts across the land, and correctly so. Those defendants are, of course, entitled to all the protections of the Bill of Rights.

Yet, operating solely on an ad hoc, discretionary basis, the federal government is treating other suspected terrorists as “enemy combatants” in the “war on terrorism” and denying them the protections of the Bill of Rights.

Consider an analogy involving the federal government’s 30-year metaphorical “war on drugs.” Suppose DEA agents began dividing drug suspects into two categories — those charged in federal court with violating drug laws and others treated as “enemy combatants” in the “war on drugs” whom they begin transporting to the Pentagon’s base at Guantanamo Bay for punishment.

Applying the government’s reasoning in the “war on terrorism” to its “war on drugs,” the suspected drug-law violators in the first group would be entitled to the protections of the Bill of Rights, while those in the second group would be entitled neither to the protections of the Bill of Rights nor to those of the Geneva Convention (they don’t wear uniforms). Those in the second group could be detained until the “war on drugs” was finally won (i.e., never).

But aren’t the feds doing all this only to foreigners? Why should this concern Americans?

Well, carefully read the Eighth Amendment and, for that matter, the Sixth Amendment. You’ll notice something important — these procedural guarantees apply not just to U.S. citizens accused of a federal crime but rather to all people, citizens and foreigners alike, who are accused of a federal crime. It is this universal applicability of criminal-justice rights that has always distinguished the American system of criminal justice from most others around the world.

The Padilla doctrine

Moreover, those who are tempted to think, “Oh, well, it’s only happening to foreigners,” should think again, because it’s also happening to Americans. For almost three years, the Pentagon has held an American, Jose Padilla, in a military brig in South Carolina. They’re accusing Padilla of conspiracy to commit terrorism but they have never formally charged him with a crime. They arrested him in Chicago but there has never been a grand jury indictment. During most of the time that Padilla has been held in military custody, he has been denied the right to speak with his family or with an attorney.

Now you might be tempted to think, “Hey, Padilla is just some poor Hispanic guy who got himself into trouble. So what? Why should I care?”

You should care because the Padilla doctrine constitutes a watershed event in American constitutional history and arguably the gravest threat to our way of life in the history of our nation. It effectively washes away centuries of constitutional protections with respect to the administration of criminal justice, including the presumption of innocence, habeas corpus, right to bail, right to counsel, and right to trial by jury.

What everyone also needs to recognize is that the Pentagon’s position is that it has the legitimate power to do this not only to Jose Padilla but also to every single American.

If the Padilla doctrine is upheld by the U.S. Supreme Court, military officials will then possess the power to arrest any American, including newspaper editors, dissidents, and any critics of the government, and jail them indefinitely or, even worse, transport them to Cuba or elsewhere for torture or killing.

Equally important, no one should operate under the misconception that the torture, sex abuse, rape, and murder of prisoners which have been committed by both the military and the CIA, have been committed by a few “bad apples.” As the evidence has surfaced, the “environment” and “culture” permitting and encouraging torture and sex abuse stretch all the way up to the highest reaches of executive power.

Moreover, no one should forget that the infamous School of the Americas, which has been run by the Pentagon for decades, was teaching torture and assassination techniques for years to Latin American military regimes, which then employed them against their own people. Equally important to keep in mind is the CIA’s policy of “rendition,” by which CIA officials send terrorism suspects to brutal authoritarian regimes that are friendly to the U.S. government for the express purpose of the suspects’ being tortured.

By jailing Padilla, an American citizen, Pentagon officials crossed the Rubicon. Yes, he’s only one person but make no mistake about it: he is simply the test case. If the U.S. Supreme Court ultimately upholds this assumption of military power on the part of the Pentagon, the number of American detainees, the number of Americans tortured, and the number of Americans “rendered” to foreign countries for the purpose of being tortured will quickly escalate, just as the

numbers escalated in Chile, Argentina, Paraguay, Uruguay, and Bolivia during their infamous “wars on terrorism.”

(On February 28, 2004, a U.S. district court in South Carolina ruled in favor of Padilla and ordered the government to charge him or release him. The government is appealing the decision.)

Do you remember when some people used to scoff that the Constitution is an outmoded document suited only to the 19th-century’s “horse and buggy” era? Do you see now how wrong those people were?

The Framers and those who brought us the Bill of Rights had a remarkable insight into human nature and the nature of government. They knew that those with power could never be trusted with it, especially in the administration of criminal justice, and that the greatest threat to people’s liberty was their own government.

That’s why we have the Sixth and Eighth Amendments and the entire Bill of Rights and the Constitution. We owe it to our ancestors, to ourselves, and to our progeny to ensure that U.S. officials are not permitted to wash them down a drainpipe of history.

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