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Tyranny and the Military Commissions Act **by Jacob G. Hornberger**

In *Star Wars, Episode 3*, in response to the Senate's grant of sweeping powers to Chancellor Palpatine, Padme declares, "So this is how liberty dies: with thunderous applause."

The same may be said about the Military Commissions Act (MCA) that was recently enacted by Congress — that this is how freedom ends, with or without the applause.

Despite the fact that the MCA has received just a modicum of publicity from the mainstream press, it is undoubtedly the most ominous and dangerous piece of legislation in our lifetime. By suspending habeas corpus for foreigners, by adopting the executive branch's "enemy combatant" designation for both Americans and foreigners, and by establishing military tribunals for foreigners, the law not only entails a fundamental reordering of our criminal justice system but also effectively places the U.S. military in control of the American people.

Habeas corpus

Of all the rights and freedoms mentioned and enumerated in the Constitution and the Bill of Rights, the writ of habeas corpus is arguably the most important safeguard of individual freedom. Without the "Great Writ," none of the other rights and liberties has much value.

To illustrate why this is so, let us assume that we live in a society in which everyone has the right of freedom of speech, including the right to criticize government programs. One day, someone criticizes some government policy. That day, a federal SWAT team conducts a no-knock raid and arrests the critic. The next day, several people protest the arrest, arguing that the prisoner has the right to criticize the government under principles of free speech. That afternoon, federal agents arrest and incarcerate some of the critics.

What could be done to get the prisoners released from incarceration? The answer is: Nothing, unless the society recognizes the writ of habeas corpus.

With habeas corpus, the prisoner files a petition with the judicial branch of government, asking a judge to order his custodian to appear before the judge to justify his incarceration of the prisoner. If the custodian refuses to comply, the judge issues an arrest warrant for him, which is

enforced at the federal level by deputy marshals. Or let's assume that the custodian shows up and says, "Your honor, the reason we're holding him in custody is that he criticized the government." In that case, the judge can order his immediate release, holding that criticizing the government is not a crime. Or if the judge incorrectly upholds the detention, the prisoner can file an immediate appeal to the appellate courts, which ordinarily give priority to habeas corpus proceedings.

Without habeas corpus, there is no way for a person who is being wrongfully detained to challenge his detention, even if the detention has gone on for years. In the absence of habeas corpus, he must continue to languish in prison until the authorities, out of the kindness of their hearts, decide to release him. That's in fact the way things work in communist China and communist Cuba, where everyone is guaranteed freedom of speech but has no way to secure his release from prison after exercising it.

Habeas corpus, a judicial remedy that stretches back centuries into English jurisprudence, is the linchpin of a free society. Emphasizing its importance, the Chinese philosopher Lin Yutang put it like this: "*Personally, I think that one writ of habeas corpus is worth more than all the Confucian philosophy ever written.*" That's why the Framers expressly included the protection of habeas corpus in the Constitution.

The Military Commissions Act cancels habeas corpus for foreigners accused of terrorism. In one fell swoop, the Congress, at the behest of President Bush, nullified centuries of habeas corpus protection.

It might be tempting for some Americans to say, "No big deal, because foreigners don't count." But that is a grave error because history has shown that when citizens permit their government to deprive one class of people of critically important rights, it's only a matter of time before the government will do the same to other groups.

Ever since the inception of our nation, Americans have been able justly to take pride in the fact that their rules of criminal justice applied to everyone equally, across the board. Rich or poor, powerful or weak, everyone who was detained by the federal government on criminal charges has been entitled to the Great Writ, along with such important procedural rights as due process of law, right to counsel, trial by jury, and the right to cross-examine adverse witnesses.

Will the federal courts overturn the MCA's cancellation of habeas corpus for foreigners, given that under the Constitution Congress can suspend the writ only in times of invasion or rebellion? Ordinarily, the answer would be yes, because under our system of government neither the Congress nor the president has the authority to amend the Constitution by enacting a law that nullifies its provisions.

With the MCA, however, the Congress and the president pulled a neat little constitutional trick. The Constitution permits the Congress to determine what cases the federal courts will have jurisdiction to hear, and Congress used the MCA law to deprive the federal courts of jurisdiction to hear habeas corpus cases brought by foreigners.

Time will tell whether the courts uphold such obvious trickery. But if they do, Americans may well rue the day because if the feds can cancel habeas corpus for foreigners and deprive the courts of the power to do anything about it, they will be able to do the same thing to Americans, not only with respect to habeas corpus but also with respect to other rights and guarantees in the Constitution and the Bill of Rights.

Enemy combatants

Does the fact that habeas corpus was canceled only for foreigners mean that Americans are immunized from the arbitrary arrests, torture, and indefinite detentions to which foreigners will be subjected under the MCA? No, because slipped into the law was the president's and the Pentagon's post-9/11 concept of "enemy combatants" in the war on terrorism. That concept applies not only to foreigners but also to Americans.

What does it mean to be designated an "enemy combatant" in the war on terrorism? Just ask Jose Padilla, an American citizen who was designated an enemy combatant. The Pentagon took Padilla into custody some three years ago and for two years held him incommunicado in a navy dungeon. Even worse, the Pentagon employed the psychological techniques of torture against him that the North Korean communists had employed against American GIs during the Korean War. Padilla was locked up in solitary confinement and denied any contact with the outside world, with the apparent aim of driving him out of his mind as a result of what psychiatrists call "sensory deprivation." According to Padilla's lawyers and psychiatrist, the mental torture has been successful, leaving Padilla with a disturbed state of mind that prevents him from assisting with his own defense.

The Pentagon takes the position that ever since 9/11, the U.S. military has wielded the power to treat any American just as it has treated Jose Padilla.

Padilla, through his lawyer, filed a petition for writ of habeas corpus, challenging his detention by the military. When the case was about to reach the U.S. Supreme Court, the government switched gears and announced suddenly that they were indicting him for the criminal offense of terrorism and transferring him to federal court jurisdiction.

The clever legal move deprived the Supreme Court of jurisdiction to hear Padilla's case (because the issue of military detention had become moot) but, equally important, it left intact the federal court of appeals decision upholding the government's "enemy combatant" concept.

Why is that important? For the simple reason that it has given the U.S. military omnipotent control over the American citizenry. With the president's use of the "enemy combatant" designation, which has now been formally enacted into law by the MCA, the U.S. military now wields the power to send troops across America and take Americans into custody and punish them through torture and deny them due process of law, trial by jury, and other procedural rights whose roots stretch back centuries in American and British law.

Don't Americans accused of terrorism, though, still have the right of habeas corpus? Yes, but all that habeas corpus does is require the government to show that it is justified in holding the prisoner. If there is no legal justification — such as holding someone because he criticized the government — the judge will order his release. But if the Supreme Court upholds the “enemy combatant” concept, as the federal court of appeals did, then all that the government has to do at the habeas corpus hearing is show some evidence that the accused had indeed been designated an “enemy combatant” in the war on terrorism. Once the government does that, the judge will dismiss the petition for habeas corpus relief and leave the prisoner at the indefinite mercy of his custodians.

What about the validity of the “enemy combatant” concept? It is political and legal chicanery that effectively gives the U.S. military standby control over the American people. All that the military has to do is fill out a form with a person's name on it — or with lots of people's names on it — and have the commander in chief (whether Bush, Hillary Clinton, or anyone else who happens to be president) sign it. At that point, military units can sweep into neighborhoods and effect the arrests and incarcerations of American citizens.

At the risk of belaboring the obvious, that's not what America is supposed to be all about. That's what the Soviet Union was, and China, North Korea, and Cuba are all about. Terrorism is a crime, not an act of war. That's why it's defined as a crime in the federal statute books. That's why it's prosecuted as a crime, both here and in Europe. That's in fact why federal prosecutors have prosecuted such terrorists as Zacarias Moussaoui (one of the 9/11 terrorists), Ramzi Yousef (one of the 1993 WTC terrorists), Timothy McVeigh (the Oklahoma City terrorist), and many others accused of terrorism. After all, let's not forget that Jose Padilla himself is now being prosecuted for terrorism in federal district court rather than being held as an “enemy combatant.”

Targeting the unpopular

The beauty is how U.S. officials have accomplished this standby hijacking of America's criminal justice system. They have targeted foreigners or unsavory Americans such as Padilla to get their doctrines established, knowing that most Americans would never come to their defense and knowing that most Americans would never suspect that a government victory in those cases might well end up applying to ordinary Americans as well.

So, under the current state of the law, thanks to Congress, the president, and the MCA, Americans can be incarcerated and tortured by the military for the rest of their lives. No due process and no jury trials. In fact, arguably foreigners accused of terrorism have it “better” under the MCA because they do get a trial — trial by military tribunal — while American “enemy combatants” get no trial at all. The reason I put the word “better” in quotation marks is that military tribunals, unlike jury trials in federal court, will be nothing but kangaroo proceedings

where the outcome (guilt and death) will not be in doubt and where the proceeding is actually just a show trial for the benefit of the American people.

There are, of course, those who say, “We don’t need to be concerned. Our government officials love us and will employ these powers only against foreigners.” The big problem with that way of thinking is that once the roundups begin amidst a big crisis environment, where everyone is stricken with fear, it will be too late to complain. Just ask German Jews or, for that matter, Americans of Japanese descent.

The time to protest is now. The time to fight for the Constitution and Bill of Rights is now. The time to restore habeas corpus is now. The time to repeal the MCA is now. The time to rein in the federal government is now.

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This article was originally published in the February 2007 edition of *Freedom Daily*.