



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

fff@fff.org www.fff.org

Bush's Tyranny Thwarted — For Now

by Sheldon Richman

The news media seemed too preoccupied with Paris Hilton's detention to notice, but a U.S. appeals court in June struck a major blow for liberty. A three-judge panel of the U.S. Fourth Circuit Court of Appeals ruled that the Bush administration may not declare a U.S. resident — whether a citizen or not — an “enemy combatant,” throw him in a military prison, and hold him without charge indefinitely — all without judicial review. Try him in the civilian courts or let him go, the judges said.

This double affirmation of habeas corpus and defendants' rights is a stunning setback for President Bush's attempt to assert autocratic powers under cover of his “war on terror.”

The government alleges that Ali Saleh Kahlal al-Marri, a married student at Bradley University in Peoria, Illinois, and a citizen of Qatar (a country with which the administration is not at war), is an al-Qaeda “sleeper agent” who volunteered for a “martyr mission” in the United States. He was initially charged with criminal possession of credit-card numbers and making false statements to the FBI and on bank forms. But when he asked the court to suppress evidence on grounds he was tortured, the administration moved to dismiss the charges, declared him an “enemy combatant,” and put him in a naval brig.

“Even assuming the truth of the Government's allegations, the President lacks power to order the military to seize and indefinitely detain al-Marri,” Judge Diana Gribbon Motz wrote in the 2-1 majority opinion. “If the Government accurately describes al-Marri's conduct, he has committed grave crimes. But we have found no authority for holding that the evidence offered by the Government affords a basis for treating al-Marri as an enemy combatant, or as anything other than a civilian.”

The decision is important because the Military Commissions Act, passed last year, purported to abolish habeas corpus for “aliens.” The court said, however, that that provision applies not to civilians living in the United States, but only to detainees at Guantanamo Bay, Cuba, who were apprehended in Afghanistan and other foreign locations. Thus, unfortunately, the

status of those who are merely *suspects* at Guantanamo was left unchanged. But the ruling is important nonetheless.

“Congress,” the court said, “sought ... to preserve the rights of aliens like al-Marri, lawfully residing within the country with substantial, voluntary connections to the United States, for whom Congress recognized that the Constitution protected the writ of habeas corpus.” The administration

does not assert that al-Marri: (1) is a citizen, or affiliate of the armed forces, of any nation at war with the United States; (2) was seized on or near a battlefield on which the armed forces of the United States or its allies were engaged in combat; (3) was ever in Afghanistan during the armed conflict between the United States and the Taliban there; or (4) directly participated in any hostilities against United States or allied armed forces.

Thus al-Marri can't be an enemy combatant, and the Bush administration has no constitutional or statutory power to declare him one. That is no small matter.

As the court stated,

For in the United States, the military cannot seize and imprison civilians — let alone imprison them indefinitely.... To sanction such presidential authority to order the military to seize and indefinitely detain civilians, even if the president calls them “enemy combatants,” would have disastrous consequences for the Constitution — and the country.

Habeas corpus and Magna Carta

The importance of the centuries-old, hard-won principle of habeas corpus as a bulwark against tyranny cannot be exaggerated — for what good is a bill of rights if those whom the government imprisons may not publicly contest their detention? Isn't the absence of habeas corpus a defining characteristic of despotism?

By coincidence, the court ruling came down the very week of the 792nd anniversary of Magna Carta, one of the first legal documents in the Western legal tradition. On June 15, 1215, at Runnymede on the River Thames in England, English barons forced King John at sword's edge to sign a charter of freedoms. Most fundamentally, it established that the power of the crown could be limited by law.

In *The Enterprise of Law: Justice without the State*, Bruce L. Benson writes,

The king's drive for revenues and power caused considerable discontent, particularly during John's reign. In 1215, powerful barons renounced their homage to the king and revolted, demanding a

document that would specify the laws and customs that would govern them. On June [15], 1215, John put his seal on the Magna Carta, which is widely perceived as a significant foundation of Anglo-American constitutional government.

As Benson notes, the barons were not trying to establish rights for all people. “In fact,” he writes,

the charter reflected an effort by barons and other powerful groups (e.g., the English Church) to regain their power and privilege that kings subsequent to Henry I had been eroding.

But actions often have large unintended consequences. What the barons established for themselves undoubtedly planted thoughts in others and took on a life of their own. If barons have rights against the king, why not other people?

Among the rights enumerated in Magna Carta was this:

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.

This has been regarded as the germ of habeas corpus, although writs that amounted to the same thing date back to the 12th century. In the 17th century the issuing of writs of habeas corpus was formalized by Parliament.

The U.S. Constitution acknowledges habeas corpus in Article 1, Section 9:

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.

Article 1, of course, is where the powers of *Congress* are enumerated. The president has no power to suspend the writ. Nevertheless, in 1861 Abraham Lincoln did so to quell anti-war and anti-Union activity. The U.S. Circuit Court in Maryland, a border state that had threatened to secede, ruled against Lincoln in the case of the imprisonment of John Merryman, a Maryland cavalry officer. U.S. Chief Justice Roger B. Taney, sitting as a circuit-court judge at the time, wrote the ruling. He said,

These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of habeas corpus, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the constitution has confided to

the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.

But Taney had no one to enforce his writ. The army backed Lincoln, and the commander at Fort McHenry refused to release the prisoner, who spent seven weeks in Fort McHenry before being set free. Two years later Congress effectively ratified Lincoln's action. Jefferson Davis also suspended habeas corpus in the Confederate States.

The al-Marri case is far from over. The Bush administration has asked the full appeals court to hear the case, and whatever happens there, it will most likely go to the U.S. Supreme Court, where anything is possible. We can only hope the government's appeal will fail.

Meanwhile the U.S. Supreme Court has changed its mind and decided to hear a challenge by the Guantanamo detainees, who have been denied access to the courts by the Military Commissions Act. This could mean another pro-freedom ruling is in the offing. But let's not count our chickens.

Some find it tempting to relax the traditional protections of the accused in "exceptional" cases. But it's worth reminding ourselves that preventing tyranny requires us to resist that temptation — *especially* in such cases.

*Sheldon Richman is senior fellow at The Future of Freedom Foundation, author of **Tethered Citizens: Time to Repeal the Welfare State**, and editor of [The Freeman](#) magazine.*

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