

THE FREEMAN

IDEAS ON LIBERTY

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Perspective

We Win One (So Far)

May the government declare a U.S. resident an “enemy combatant,” throw him in a military prison indefinitely, and never charge him with a crime—all without judicial review?

The Bush administration says yes. But in a key ruling in June, the same week as the 792nd anniversary of Magna Carta, a three-judge panel of the U.S. Fourth Circuit Court of Appeals resoundingly said no. If it withstands further appeal, the decision will be a timely affirmation of the limits of executive power and the constitutional priority of civilian over military rule.

The government alleges that Ali Saleh Kahlal al-Marri, a married graduate student at Bradley University in Peoria, Ill., 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 in South Carolina.

That, the appeals court says, is illegal and unconstitutional. “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*” (emphasis added). Judge Motz cites precedents dating back to the nineteenth century affirming that all U.S. residents, citizens and noncitizens, have rights, especially due-process rights, recognized by the Constitution.

The decision is important because the Military Commissions Act, passed last year, purported to abolish habeas corpus for “aliens.” The court said, however, that this 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. The court said, “Congress 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.” As the court noted, the “enemy combatant” declaration “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.

“This does not mean that al-Marri must be set free,” Judge Motz continued. “Like others accused of terrorist activity in this country, from the Oklahoma City bombers to the surviving conspirator of the September 11th attacks, al-Marri can be returned to civilian prosecutors, tried on criminal charges, and, if convicted, punished severely.

“But the Government cannot subject al-Marri to indefinite military detention. 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.”

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?

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.

A top American pastime is bemoaning the price of medical care and insurance. (Michael Moore now has joined in with *Sicko*.) Maybe they would be cheaper if we didn't have to buy coverage we don't want for things we won't need. John Seiler sheds light on the mandated-coverage scandal.

Is buying a hybrid car economical? If you don't understand the price system, you might think so. Paul Cwik has the lowdown.

In some states city governments have the legal power to annex your property beyond city limits and make you a taxpayer—without your consent! Can this really happen in America? Barbara Hunter says it can and does.

The late Milton Friedman (along with his coauthor Anna Schwartz) did something remarkable in his long career as an empirical investigator: he turned the economics profession upside down with his explanation of what caused the Great Depression. Ivan Pongracic, Jr. explains this phenomenal achievement.

If you think “political correctness” in education has been a problem, you haven't seen anything yet. Introducing: cultural competence. Wendy McElroy has the harrowing details.

Early American history is filled with colorful characters, some of whom forgot what America was supposed to be about. Becky Akers has the story of one: Henry “Light-Horse Harry” Lee.

In this month's columns, Richard Ebeling compares the Inca welfare state to our own. Donald Boudreaux explodes a false analogy regarding immigration. Stephen Davies ponders political labels. David Henderson looks at today's living standards. And Jude Blanchette, seeing a *New York Times* columnist claim that the market can't produce enough “human capital,” objects, “It Just Ain't So!”

Our reviewers have been poring over books about Stalin's prison camps, welfare, ethics, and organized labor's racial record.

—Sheldon Richman
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