

HABEAS CORPUS - ALREADY GONE (DO THE EYES HAVE IT?)

by Bruce Leichty, 9/12/07

In a case that is currently pending before the Supreme Court, In re Boumediene, no less than 17 different non-governmental organizations last month submitted a friend of the court brief in support of Lakhdar Boumediene and other "Guantanamo detainees," urging the Court to overturn the judgment of the D.C. Court of Appeals ruling that federal courts are without jurisdiction under the Military Commissions Act ("MCA") to hear habeas corpus petitions filed by foreign citizens confined at the U.S. Naval Base at Guantanamo Bay.

One can almost picture those organizations waiting with bated breath to see if a second miracle occurs--if the Supreme Court, after astonishingly reversing itself to grant the petitioners' request for review, now goes a nautical second mile to rule that the MCA effectuates an unconstitutional suspension of the right to petition for a writ of habeas corpus.

The NGO brief features a Statement urging restoration of habeas rights signed by 47 law professors and leaders from all over the political spectrum under the aegis of The Constitution Project. Shortly after that Statement was signed, the Washington Post ran an editorial opinion authored by two of the signers, titled "Extend Legal Rights to Guantanamo."

With so many prominent organizations, academics and media lined up behind the detainees, you might think there is still a fighting chance for the survival of habeas corpus rights of all aliens held by the United States on turf controlled by the United States, which is a principle as old as In re Yamashita, a Supreme Court case decided in 1946.

You might think our collective freedom-loving backs are covered by these zealous lawyers who have pointed out that the Constitution "ensures that neither Congress nor the Executive can create 'law-free' zones within the exclusive jurisdiction of the United States where the Judiciary cannot independently inquire into the legality of Executive detention...."

In that case you would be wrong, not knowing--or not caring?--that the Bush administration and another compliant court of appeals have already taken away by sleight of hand what these ardent constitutionalists are still trying to defend, in the case of a friendless alien possibly even more reviled than a Guantanamo detainee--so-called Holocaust denier Ernst Zundel.

In the words of the rock group The Eagles, singing about less critical themes in a more carefree age, habeas corpus is "already gone."

And just like those who have never heard of that band evoking the most American of all symbols, most of us don't even know what we missed.

As the federal court appellate attorney for Zundel, I occupy the uneasy vantage point of being one of the few lawyers who does know. Zundel did not have the cachet to land a more prominent lawyer for his counsel, or any human rights organizations for his friends. It has not made any difference to any court so far that my law

degree is from Boalt Hall at Berkeley, or that I am a former editor for an international church-affiliated NGO. I haven't succeeded in recruiting 17 organizations and 47 signers, so let me give you the bad news straight.

Zundel was taken into custody in February 2003 near Knoxville, Tennessee, wrested away from his U.S. citizen wife Ingrid, because he had supposedly abandoned his application for permanent residence through Ingrid and because he had allegedly last entered the United States under the Visa Waiver Pilot Program, by which entrants from a few privileged countries such as Germany (Zundel's native land) waived certain remedies in exchange for a hassle-free entry.

The arrest came as a surprise to the artist and pacifist Zundel, who had recently been cleared of any wrongdoing by the FBI. He was doing chores at his home when armed agents showed up at his door. As far as he knew he was waiting for notice of his adjustment interview. He had never committed any crime. He had received employment authorization and permission to depart and return to the U.S. He was on the verge of opening his art gallery, which he had named Soaring Eagles (probably without knowing about the band). What he also couldn't know on that fateful February day was that the INS claimed that his attorney's duly-requested postponement of his interview was nowhere to be found in the INS file, and that the INS had "deemed" his application abandoned over a year before his arrest, without him ever being notified.

Zundel was packed off to county jail where he was--strangely enough--brutalized by slavering dogs and their black-clad handlers, eventually to be shipped to Canada, from where he had last entered the U.S. in 2001. More important for our purposes, however, before he was whisked over the border he found a local lawyer to file a petition for habeas corpus for him in Knoxville federal court. He never got a habeas hearing before being removed to Canada.

Let's jump ahead in our story just for a minute: in Canada, where he had been repeatedly hounded in the courts and where his house had been firebombed and where a pipe bomb known to Canadian intelligence had once been delivered to him, he was held for two years in solitary confinement and declared a risk to the national security of that country for his allegedly racist views and associations. He was prosecuted and declared culpable under laws that permitted the government to use secret evidence--since overturned by Canada's high court in another man's case, but not Ernst Zundel's. Zundel was ultimately deported to Germany where he was then convicted of the speech crime of "inciting racial hatred" for his views on the Holocaust, and it is in Mannheim, Germany where he languishes now.

Set aside the "ad hominem" impulses for the moment, please, and concentrate on the legal substance.

Back in Cincinnati, the Sixth Circuit recognized the error of the Knoxville federal judge who had summarily rejected Zundel's habeas petition, and sent his case back to the same judge, based on the acknowledgement that habeas corpus rights can still survive for an alien who is deported where there are collateral consequences of his removal--in this case being barred from the U.S. (and from his wife) for 20 years. But the result wasn't any better for Zundel the second time around. Knoxville's folksy Judge Jarvis (now deceased) held that his court had no jurisdiction over Zundel's claim for habeas corpus for several reasons, chief among them being that Zundel had signed away his constitutional habeas rights when he entered under the Visa Waiver Pilot Program ("VWPP").

Here is where the academics are supposed to rally, right? Can you really waive your constitutional habeas corpus rights? What's more, Zundel claimed that he had not actually last entered the U.S. under the VWPP, indeed that the VWPP had sunset April 30, 2000, weeks before his May 2000 entry. Congress eventually made this pilot program permanent, but that was not until October 2000 when Zundel was already married and settled in Tennessee, where he remained until his February 2003 arrest.

Zundel claimed that if given the chance he could prove that then-Attorney General Reno was not in fact admitting anyone to the United States under the VWPP in May 2000--that accommodations had been made to instead permit these business visitors to enter as "parolees." As such, even if Zundel had somehow missed an interview, he was owed at least a hearing before an immigration judge, who had the right to adjudicate applications for marriage-based permanent residence.

Didn't Zundel have the constitutional right to muster his proof and have a federal court habeas hearing on that very issue--i.e. whether he had indeed entered the U.S. under the VWPP? The legality of his detention hinged on that issue. In the Boumediene amicus brief, the friends of the court state emphatically, "Under the historic writ of habeas corpus, a petitioner is entitled to a full opportunity for presentation of the relevant facts related to his detention" (quotes and cites omitted).

And so Zundel argued to the Sixth Circuit. In the meantime Congress had passed the REAL ID Act of 2005 which purported to strip deported aliens of their right to petition for habeas corpus in federal district courts, but instead channeled them only to courts of appeal. Zundel argued that if the Court followed the apparent intent of the REAL ID and converted his appeal into a "petition for review" by the appeals court (effectively nullifying the District Court proceedings), Zundel would be denied the fact-finding habeas forum--or any other meaningful alternative--to which he was entitled. The Boumediene amici write: "Congress's preclusion of the writ [of habeas corpus] can only be sustained if it has provided an adequate and effective substitute" (citation omitted).

But a different panel of the Sixth Circuit heard Zundel's appeal this time, led by George Bush appointee Debra Cook, who had been forced to admit just a month earlier that she had made prohibited campaign contributions to an Ohio Bush crony during

the 2004 elections. The three-judge panel in February 2007 said that Zundel's appeal would be treated as a petition for review and that the petition would be denied. The panel addressed Zundel's extensive argument about the expiration of the Visa Waiver Pilot Program in a terse footnote; and never addressed at all his contention that, as applied, the REAL ID had to be unconstitutional since habeas corpus had been suspended for at least one man.

Based on that pedigree, do you think Ernst Zundel will have a chance of getting his own petition for certiorari heard by the Supreme Court? I'm guessing that even the signers of the Constitution Project who are betting men would not be risking any money on that prospect.

The Bush administration may want us to believe that the right to petition for habeas corpus is as "dated" as this old Eagles fan editorializer, but now you can see why I say that the right of habeas corpus is "already gone." And of course then there is another song the Eagles sing that the Bush administration might want to apply both to Ernst Zundel and the Guantanamo detainees. It is called "Desperado," and the band sings, "you better come to your senses."

But you'll also have to understand why I am partial to another Eagles track when I think of the Sixth Circuit's sparse opinion, "not for publication," and of the would-be Tennessee artist locked up in Mannheim for his unpopular opinions, and of all the academics and human rights organizations who did not bother to respond to my entreaties as I was trying to defend the dike with one finger, while the seas of perceived national security interests and venomous political correctness and indifference threatened to and did engulf habeas corpus.

"You can't hide your lyin' eyes."

Not. Those eyes were in fact hidden, of course, and they remain averted--at least until the legal community responds with the same kind of focused intensity to a surreptitious denial of one individual's habeas rights as it has responded to the nationally-protected denials for the Guantanamo detainees.

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