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Only The Guilty Go Quietly To The Gallows.

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THE NATURE OF DUE PROCESS

by Dave Harrison

Few citizens realize the true nature of the United States Constitution's Due Process Clause of the Fifth Amendment. Indeed, as was exposed in my treatise on the First Amendment (Free Speech Extends Only As Far As The Government Allows It), there is a sinister difference between the ideal and the reality.

Ask most citizens to explain the principles of due process of law, and you will hear answers dancing around the notion of a just and correct outcome. For example, that the government cannot take property from its rightful owner, or how the Fifth Amendment is violated whenever a person suffers conviction for a crime that he/she is innocent of. Those are idealistic answers that sound good to the speaker, but they are not the reality. The Fifth Amendment holds that: "No person shall ... be deprived of life, liberty, or property, without due process of law . . ." But what protections are actually provided by the Due Process Clause? For one, it has been suggested that the Due Process Clause "was intended to secure the individual from the arbitrary exercise of the powers of government". *Hurtado v. California*, 110 U.S. 516, 527 . . . (1884) (quoting *Bank of Columbia v. Okely*, 4 Wheat 235, 244 . . . (1819)). See also *Wolff v. McDonnell*, 418 U.S. 539, 558 . . . (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 U.S. 114, 123 . . . (1889)) . . ." See, *DANIELS v. WILLIAMS*, 474 U.S. 327, 331 (1986). Somewhat of the ideal. In reality, however, it is only the appearance of due process that is necessary to legitimize the arbitrary exercise of the powers of the government.

In the real world, the Due Process Clause does not concern itself with the end result, only the means. In other words, due process of law is only an appearance of process; a grossly flawed, error-prone and mechanically excused process completely untroubled and unashamed by the outcome it renders. This is so even where property is forcibly confiscated from its rightful owner, persons are unjustly dropped into the oubliette, even where the breath of life is snuffed from the innocent. The Supreme Court hinted at the reality in *CAREY v. PIPHUS*, 435 U.S. 247, 259 (1978): "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property." Whether mistaken or unjustified, deprivations and unjust outcomes occur with alarming frequency, yet in and of themselves do not violate the Fifth Amendment. Nowhere is this arbitrary exercise of the powers of government more repugnant than in the Supreme Court's holding in *HERRERA v. COLLINS*, 506 U.S. 390, (1993). In *HERRERA*, the justices opined that a factually and morally innocent person could be executed by the government, and such killing would not offend the Constitution, where that person had received due process of law and was legally guilty. Essentially, the judges of the Supreme Court held, that regardless of your innocence -- indeed, your innocence concerns them not a whit -- as long as you were provided the appearance of due process of law, then the taking of your life offends no part of the Fifth Amendment. The means justifies the ends, even where the ends are factually and morally wrong. Let's look at some other examples.

Not only is the outcome of no import, but in any given situation it is the whims of the government that dictate the degree of process, if any, that may be due. Nearly one-hundred years ago the Supreme Court opined that "due process of law depends on the circumstances. It varies with the subject-matter and the necessities of the situation." See, *MOYER v. PEABODY* 212 U.S. 78, 84 (1909). Not surprisingly, the same government that is unconcerned with executing innocent citizens also decides the necessities of the situation. So, first the government determines the nature of the circumstances, and having done that, then decides what degree, if any, of due process is required to assuage the

necessities of the situation; much like establishing the rules to suit yourself, arranging the game-pieces to your advantage, and forcing others to play the game to a predetermined outcome. It is what the government deems is good for the community, or itself, that controls."The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to ones own will...." See, JACOBSON v. MASSACHUSETTS, 197 U.S. 11, 26-27 (1905), quoting Crowley v. Christensen, 137 U.S. 86, 89 (1890). In JACOBSON, the Supreme Court upheld the authority of the government to subject the citizenry to compulsory vaccinations. In 1948 the Supreme Court decided that individuals could be detained on the mere suspicion of being an enemy alien. LUDECKE v. WATKINS, 335 U.S. 160-173 (1948) (unreviewable powers to detain individuals suspected of being enemy aliens in time of war). Our present government enjoys a similar arbitrary exercise of powers to detain individuals -- without any due process of law -- that the government labels as enemy combatants. See, e.g., the Authorization For Use Of Military Force resolution empowering the President to "use all necessary and appropriate force" against "nations, organizations, or persons" that he determines "planned, authorized, committed, or aided" in the September 11, 2001, al Qaeda terrorist attacks. There's more bad news. The good of the community has long been the reasoning to institutionalize persons deemed by the government to be mentally unstable or who present a supposed threat to the public. ADDINGTON v. TEXAS, 441 U.S. 418-433 (1979); JACKSON v. INDIANA, 406 U.S. 715-741 (1972); GREENWOOD v. UNITED STATES, 350 U.S. 366-376 (1956). Mere suspicion of aberrant behavior is enough, and no due process required, to jail any individual. GERSTEIN v. PUSH, 420 U.S. 103, 111-114 (1975).

Moreover, due process is satisfied in incarcerating a suspect without bail if he is designated by the government as a flight risk; a designation satisfied by little more than a zealous government agent informing a dutiful judge that the defendant has two feet and is refusing to play the game. See, e.g., BELL v. WOLFISH, 441 U.S. 520, 534 (1979); see also, UNITED STATES v. SALERNO, 481 U.S. 739-755 (1987) (Bail Reform Act of 1984 does not infringe on Due Process Clause, even where bail is denied.). Where the necessity of the circumstances is determined by the government to be for the good of the community, or itself, then the outcome is irrelevant, because the Due Process Clause does not guarantee that governmental edicts will be fair, courteous or correct, only that the necessities of any given situation are satisfied. In such instances, not even the appearance of due process is necessary.

The justices of the Supreme Court drove the last nail into the coffin containing the Due Process Clause by its unabashed decision in HERRERA. It is unlikely that you attended the funeral. Indeed, you might not have even been aware of its passing, for the Due Process Clause had been gravely ill for so many years. The Fifth Amendment, ratified on 15 December, 1791, was created by our Founding Fathers to assure that the process would always be fair and just. But common sense tells us that our Founding Fathers had more in mind than the mere appearance of process. Due process of law encompasses the outcome of the proceedings as well. A corrupt end cannot be justified by any appearance of a fair process. In examining the Due Process Clause of the Fifth Amendment we find there can be no fair process, no just end, regardless of appearance, where the outcome is the arbitrary exercise of government powers, whether by the heavy-handed taking of property or the executing of an innocent citizen.

To this writer, the Due Process Clause of the Fifth Amendment stands for the principle that it is always a violation of the Constitution when an innocent person is deprived of life, liberty or property. Anything less results, as it did in HERRERA, in the arbitrary exercise of the powers of the government. An incorrect outcome always violates the Due Process Clause of the Fifth Amendment to the United States Constitution, and must be corrected. No circumstances, trumped-up designation, or mere suspicions can excuse the execution, nor even the detention, of an innocent citizen. Notwithstanding the appearance of due process of law, the means can never excuse an unjust end.

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