THE THIRTY-SECOND KENNETH J. HODSON LECTURE ON CRIMINAL LAW*

WHERE MOUSSAOUI MEETS HAMDI[1]

FRANK W. DUNHAM, JR.[2]

Martin Niemoeller, a World War I German U-Boat captain and then a Lutheran pastor and philosopher, when asked by a student referring to the Holocaust, "How could it happen?" responded:

> First they came for the Communists, but I was not a Communist so I did not speak out. Then they came for the Socialists and the trade unionists, but I was neither, so I did not speak out. Then they came for the Jews, but I was not a Jew so I did not speak out. And when they came for me, there was no one left to speak out for me.[3]

Niemoeller forcefully points out our human inclination, no matter our sense of justice in ordinary times, to rationalize injustice to others situated differently from us as beyond our control, or worse, deserved, and to sit silently in the face of it only to later have it visit our own

---

* Established at The Judge Advocate General's School on 24 June 1971, the Kenneth J. Hodson Chair of Criminal Law was named after Major General Hodson who served as The Judge Advocate General, U.S. Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and he was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

[1] This lecture is a reconstruction from rough notes used in remarks made on 19 May 2004, by Frank W. Dunham, Jr., to members of the staff and faculty, distinguished guests, and officers attending the 52d Graduate Course at the Army's Judge Advocate General's Legal Center and School, Charlottesville, Virginia. Assistant Federal Public Defender Geremy C. Kamens is acknowledged for his significant contributions to the content of the original notes and their narrative presentation here. Citations to authorities have been added, and the paper has been updated to include recent developments.

[2] Mr. Dunham is the Federal Public Defender for the Eastern District of Virginia. He was appointed in March 2001 after twenty-three years in private practice and seven years as an Assistant United States Attorney.

[3] The Jewish Virtual Library, Martin Niemoller, *at* http://www.jewishvirtuallibrary.org/jsource/Holocaust/Niemoller_quote.html (last visited Mar. 28, 2005).

doorstep. The phenomenon of rationalization is more prevalent in times of stress. Humankind, often prompted to act selflessly and with great courage on such occasions, such as the New York City fire and police personnel following 9/11, have also been known to act selfishly and hysterically when personal security is threatened.

This combination of human tendencies, rationalizing injustice and acting hysterically when personal security is threatened, is, not surprisingly, manifested when we act as a group through government. After all, our democratic government is nothing other than a reflection and extension of the will and mood of the people. Throughout our history, reacting to the stress from fear for our national security and personal safety, our government has taken actions which are unjust and irrational—actions the majority may have accepted at the time, but which we came later to decry in retrospect when the exigency had passed. For those concerned about incursions upon our civil liberties by governmental actions in the wake of 9/11, they should understand that the current reaction to the perceived crisis is nothing novel. They should be encouraged by the fact that historically there has been a self-corrective process when the crises passed. They should also be cautioned by the fact that the current crisis may never end and that things could get a lot worse instead of being self-corrected.

Very early in our history, and closely following the passage of the Bill of Rights, our second President, John Adams, sided with the English in a war against France. It is important to note that at that time, there were no immigration laws, and therefore no such things as "illegal aliens." We had living among us many folks who still considered themselves citizens of France.

Fearing pro-French sentiment in the Republican northeast where the population consisted of many French nationals, the federalists in Congress enacted the Alien and Sedition Acts of 1798.[4] The Alien Friends Act allowed the detention and deportation of any alien deemed dangerous to the country without due process of law, that is, without notice of charges, presentation of evidence, a right to be heard, or

---

[4] *See An Act Concerning Aliens*, ANNALS OF CONGRESS, 5th Cong., 2d Sess., *in* THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA 570-72 (Boston: Little Brown, 1845); *An Act for the Punishment of Certain Crimes Against the United States*, 5th Cong., 2d Sess., *id.* at 596-97.

judicial review.[5] Congress did this notwithstanding the Fifth Amendment to our Constitution, which states that "[n]o person shall . . . be deprived of . . . liberty . . . without due process of law."[6]

The Sedition Acts prohibited criticism of the President and the government, notwithstanding the First Amendment to our Constitution which states, "Congress shall make no law . . . abridging the freedom of speech."[7] The Acts were vigorously enforced against the Republican opposition and vocal critics of the Adams administration. These Acts expired by their own terms on the last day of Adams administration and were not renewed.[8]

Self-correction arrived when the new president, Thomas Jefferson, recognizing the insanity of it all and the conflict with American core principles, pardoned all those convicted under the Acts, and Congress later repaid all the fines imposed.[9] The Alien and Sedition Acts were never reviewed by a court, but the Supreme Court has said several times that these Acts have been deemed unconstitutional in the court of history.

But Jefferson was by no means perfect when it came to civil liberties. In this nation's most famous treason case brought by the Jefferson administration against Aaron Burr, Chief Justice John Marshall rejected President Jefferson's claims of national security.[10] The government accused Burr of conspiring to start a war and sought the death penalty.[11] In Burr's defense, he sought letters in Jefferson's possession.[12] Jefferson refused a Court order to produce the letter, claiming "state secrets" privilege.[13] Marshall would not allow Jefferson

---

[5] Act of July 6, 1798, 1 Stat. 577, R.S. 4067 (as amended 40 Stat. 531, 50 U.S.C. § 21).
[6] U.S. CONST. amend V.
[7] *Id.* amend. I.
[8] *See* New York Times v. Sullivan, 376 U.S. 254, 276 n.16 (1964); *see also* PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 298 (1999) (noting that the Acts expired in 1801).
[9] *See Sullivan*, 376 U.S. at 276; *see also* WILLARD STERNE RANDALL, THOMAS JEFFERSON: A LIFE 532-33 (1993).
[10] United States v. Burr, 25 F. Cas. 30 (C.C.D.Va. 1807) (No. 14692D) (Burr I); United States v. Burr, 25 F. Cas. 187 (C.C.D.Va. 1807) (No. 14694) (Burr II).
[11] *See* RANDALL, *supra* note 9, at 576.
[12] *See Burr II*, 25 F. Cas. at 190; *see also* RANDALL, *supra* note 9, at 577.
[13] *See* JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 284 (1996) (noting that Jefferson "was so eager to see Burr convicted of treason that he was willing to violate basic constitutional principles").

to hang Burr while withholding information material to his defense, stating that "[i]f the President refuses to disclose [information material to the defense], the courts have no choice but to halt the prosecution."[14]

During the Civil War, President Abraham Lincoln engaged in probably the greatest civil liberty infringements in our history. He suspended the writ of habeas corpus eight times in various locations within the United States and twice throughout the whole country. The privilege to petition a court for a writ of habeas corpus to seek relief from illegal executive detention is at the heart of a case I will be discussing with you and is perhaps our most important freedom.

The modern writ of habeas corpus is traced back to England and a case arising in 1627, called Darnell's Case, or the case of the five knights.[15] The King of England at the time, Charles I, had detained five noblemen, throwing them into the castle's dungeon deep, for failing to support England's war against France and Spain. The men filed suit, asking to be brought to court for an explanation from the King for the detentions. The King refused, saying that the men were detained by the King's command—national security, so to speak, in jolly old England. The court denied relief, stating that it had no power to require the King to explain the basis for the detention.[16] It must have been good to be King. The decision provoked widespread outrage, and the following year the Parliament responded by enacting the petition of right, often referred to as "the Great Writ," basically prohibiting imprisonment without formal charges.

The Great Writ was codified in the first Habeas Corpus Act of 1641, which required an explanation from the king for detentions.[17] These rights were expanded by the Habeas Corpus Act of 1679, which required charges to be brought within a specific time period for anyone detained

---

[14] Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 98 (1974) (citing *Burr II*, 25 F. Cas. at 191-92); *see also* RANDALL, *supra* note 9, at 577 (describing how, after twenty-five minutes, the jury found Burr "not proved to be guilty under this indictment by any evidence submitted to us" (internal citation omitted)).

[15] *See* Darnell's Case, 3 Cobbett's St. Tr. 1 (1627), 9 Holdsworth 114.

[16] *See Developments in the Law—Federal Habeas Corpus*, HARV. L. REV. 1 nn.11-13 (Mar. 1970) [hereinafter *Developments in the Law*].

[17] *Id.* at 1 n.14; *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 460 (Jan. 1966).

for criminal acts.[18] This tradition was incorporated into the U.S. Constitution, in Article I, Section 9, often referred to as the suspension clause, because it permits suspension of the right to petition for a writ of habeas corpus only in times of invasion or rebellion.[19]

Alexander Hamilton viewed the right to petition for a writ of habeas corpus as the bulwark of all freedoms because it required that all detentions be supported by law.[20] Indeed, many felt that there was no need for a Bill of Rights, because the right to the Great Writ would protect all other rights from any tyrant who would seek to violate them.

So it was this most fundamental of all rights that Lincoln took it upon himself to suspend. Among the approximately 38,000 civilians who were arrested and held by the military without trial and without judicial review during the war were newspaper editors critical of Lincoln.[21]

That is not to say that there was no opposition to Lincoln's detentions. He acknowledged this criticism in his famous address to Congress on July 4, 1861,[22] when, referring to his suspension of habeas corpus, he argued, "are all the laws *but one* to go unexecuted, and the Government itself to go to pieces, lest that one be violated?"[23] Lincoln's case in point was *Ex Parte Merryman.*[24] In that 1861 case, Chief Justice Roger Taney, sitting as a circuit court judge, questioned the President's assertion of executive power to suspend the writ of habeas corpus.[25] A southern sympathizer, Merryman was, however, also a civilian, a citizen,

---

[18] *Developments in the Law*, *supra* note 17, at 1 n.19.

[19] U.S. CONST. art. I, § 9, cl. 2.

[20] *See* RON CHERNOW, ALEXANDER HAMILTON 260 (2004) (noting that Hamilton felt the Constitution guaranteed the right to habeas corpus).

[21] *See* DANIEL FARBER, LINCOLN'S CONSTITUTION 170 (2003); MARK G. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 104 (1991); Steven R. Shapiro, *Defending Civil Liberty in the War on Terror, The Role of the Courts in the War Against Terrorism*, *in* 29 FLETCHER FORUM OF WORLD AFFAIRS 103 (Winter 2005).

[22] ABRAHAM LINCOLN, ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 594 (Roy P. Basler ed., Da Capo Press 1990) (1946).

[23] *Id.* at 601; *see also* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 38 (2000). Chief Justice Rehnquist chronicles many of the events set forth in this article, making the point that courts, during wartime, have historically tightened their approach to civil liberties, only to loosen the reigns when the war concluded.

[24] 17 F. Cas. 144 (1861).

[25] *Id.* at 148.

and a resident of Maryland which had not seceded.[26] The courts were open. Lincoln suspected Merryman of plotting to blow up the rail line between Baltimore and Washington, D.C. at a time when it was the only means of moving troops from the north to defend Washington.[27] Situated in Virginia, just across the Potomac River, the Army of the Potomac threatened the capitol city. Lincoln had the military arrest and detain Merryman.[28] He maintained that the suspension clause, which allows suspension only "when in Cases of Rebellion or Invasion the public Safety require it,"[29] permitted him to suspend the writ, which Merryman attempted to use to gain his freedom. Certainly, a rebellion was at hand. But Chief Justice Taney held that since the suspension clause rests in Article I, the President's Article II powers did not include the power to suspend the writ.[30] Taney concluded that only Congress, whose powers are enumerated in Article I, had that power.[31]

Rather than adhere to the ruling, Lincoln appealed it to the full Supreme Court. Before the Court could consider the matter, the issue became moot when Congress ratified Lincoln's action by authorizing suspension of the writ.[32] Thus, debate over whether the President has the power to suspend the writ without the support of the Congress has never been answered by the Court. It is noteworthy that immediately after the Civil War, when that great conflict was still fresh in the national mind, but when its exigencies had passed, Congress passed the current habeas statute which sets forth the procedures for habeas proceedings that we still follow, or are supposed to follow, today.[33] Because the habeas statute does not contain the Constitution's caveat for suspension of the privilege in times of rebellion or invasion, many believe its passage settled the issue of whether the President, on his own, can suspend the writ and that suspension can only occur by act of Congress.

Also, just as President Jefferson acted to reverse actions taken by the Adams administration when the war between Britain and France

---

[26] *Id.* at 147.
[27] REHNQUIST, *supra* note 23, at 26.
[28] DAVID HERBERT DONALD, LINCOLN 299 (1995).
[29] U.S. CONST. art. I, § 9, cl. 2.
[30] *Merryman*, 17 F. Cas. at 148-49.
[31] *Id.*
[32] Act of Mar. 3, 1863, 12 Stat. 755.
[33] *See* 18 U.S.C. § 2241 (2000) (providing the circumstances under which the writ of habeas corpus shall extend to those in custody).

concluded and tensions from threats to our interests relaxed, the Supreme Court waited until after the Civil War to issue its only serious rebuke to assertions of executive power over citizens during that conflict. In *Ex Parte Milligan*,[34] the petitioner, like Merryman, was a civilian.[35] Milligan was a citizen of Indiana, a northern state where the courts were open.[36] Just before the end of the war, the government arrested and detained Milligan as a prisoner of war.[37] The government accused Milligan of violating the laws of war by plotting the escape of confederate soldiers held prisoner in Indiana.[38] A military tribunal convicted Milligan and sentenced him to death.[39]

Lincoln had not suspended the writ of habeas corpus in Indiana. The Supreme Court, in ruling on Milligan's habeas petition, handed down a decision, which Chief Justice Rehnquist has said "is justly celebrated for its rejection of the government's position that the Bill of Rights has no application in wartime."[40] The Supreme Court contradicted the military's judgment that Milligan was a prisoner of war. Further, it held that there could be no military trial of a civilian when the courts were open and operating.[41] It is important to note that this landmark decision reinforcing our basic rights came after the war was over.

Moving out of sequence for a moment, *Milligan* is tough to square with the Court's later decision in *Ex Parte Quirin*.[42] *Quirin* involved German saboteurs who entered this country from a submarine offshore during World War II.[43] Some of them were U.S. citizens.[44] Captured during this nefarious mission by the FBI, they were later turned over to the military for trial.[45] In *Quirin*, the Supreme Court ratified their trial and pending execution by the military at a time when civilian courts were

---

[34] 71 U.S. 2 (1866).
[35] *Id.* at 4.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 4-5.
[39] *Id.* at 5.
[40] REHNQUIST, *supra* note 23, at 137.
[41] *Milligan*, 71 U.S. at 3.
[42] 317 U.S. 1 (1942).
[43] *Id.* at 20-21.
[44] *Id.* at 20 (noting that at least one of the alleged saboteurs was a naturalized U.S. citizen).
[45] *Id.* at 21-23.

open.[46] Indeed, the Court ratified the action of the military tribunals without an opinion, stating that an opinion would follow. The saboteurs were executed before the opinion was written.

Some say that *Milligan* and *Quirin* can only be distinguished by the fact that the national crisis was perceived to have passed when the Court decided *Milligan*, but that it was going full bore when *Quirin* was decided.[47] Others say *Milligan* and *Quirin* can be distinguished, because at the time of the civil war, Congress had not authorized military proceedings against civilian citizens such as Milligan,[48] whereas by the time of *Quirin*, it had done so.[49] Still others say the cases can be reconciled only because Milligan disputed the military's classification of him as a prisoner of war,[50] while the saboteurs in *Quirin* purportedly "conceded" that they were a part of the armed forces of Nazi Germany.[51]

The government again attempted to crack down on civil liberties during World War I. There was widespread opposition to the war, and President Woodrow Wilson moved aggressively to stifle criticism. Shortly after America's entry into the war, Congress passed the Espionage Act of 1917, which was used to prohibit what was perceived as seditious speech by criminalizing any speech which might disrupt the government's efforts at conscription.[52] The government interpreted and enforced the statute broadly and prosecuted more than 2,000 dissenters for expressing opposition to the war. Many received sentences of ten to twenty years in prison. Then, in 1918, Congress passed the Sedition Act, which made it unlawful to publish language intended to cause contempt or scorn for our form of government, the constitution, or the flag.[53]

---

[46] *Id.*

[47] *See, e.g.*, John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1125 (2002) (asserting that "the formal declaration of war by President Roosevelt on the Axis powers, mak[es *Quirin*] distinguishable from" *Milligan*).

[48] *Milligan*, 71 U.S. at 12.

[49] *Quirin*, 317 U.S. at 8.

[50] *Milligan*, 71 U.S. at 51.

[51] *Quirin*, 317 U.S. at 15.

[52] Espionage Act, ch. 30, § 3, 40 Stat. 217, 219 (1917), *amended by* Act of May 16, 1918, ch. 75, 40 Stat. 553 (1918).

[53] Sedition Act of 1918, ch. 75, 40 Stat. 553 (1918), *repealed by* Act of 1921, ch. 136, 41 Stat. 1359, 1360 (1921).

In a series of decisions, the Supreme Court upheld convictions of people who had opposed the war.[54] In one such case, Charles Schenck, a socialist, was convicted of violating the espionage act by passing out antiwar leaflets and encouraging resistance to the draft.[55] Justice Holmes wrote: "[W]hen a nation is at war, many things that might be said in time of peace are such hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."[56]

Self-correction soon followed. By December 1920, Congress had repealed the Sedition Act, and between 1919 and 1923, all who had been convicted were released. During the 1930s, President Franklin Roosevelt granted amnesty and restored the rights of all who had been convicted.[57] Finally, the Supreme Court later overruled all of its precedent from that era.[58] This enlightenment following the end of World War I did not, however, prevent massive arrests in the wake of the Russian Revolution. From November 1919 to January 1920, a police unit called the General Intelligence Division, created by Attorney General A. Mitchell Palmer and led by J. Edgar Hoover, arrested 5,000 people suspected of communist sympathies.[59] More than 1,000 were summarily deported to Russia without due process.[60] This ended by 1924 when Attorney General Harlan Fisk Stone called Palmer's General Intelligence Division a secret police that was a menace to free government and free institutions.[61]

In World War II, non-criminal executive detentions re-appeared in the form of the shameful internment of Japanese Americans. Pearl Harbor was attacked in December 1941. By February 1942, President Roosevelt had authorized the military to designate military areas from

---

[54] *See* Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919).
[55] *See Schenck*, 249 U.S. at 48-49.
[56] *Id.* at 51.
[57] GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 232 (2004).
[58] Brandenberg v. Ohio, 395 U.S. 444 (1969) (repudiating the "clear and present danger" test used by the Court in *Schenck*, *Debs*, and *Abrams*).
[59] CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 73, 75-84 (1991).
[60] *See id.* at 85-86 (providing details of the deportations of some citizens to Russia).
[61] *See id.* at 123 (listing Mitchell as a lead critic of the "Palmer Raids").

which anyone could be excluded.[62] This measure was plainly aimed at Japanese Americans. John L. DeWitt, commander of the U.S. Army on the west coast, called the Japanese "an enemy race," stating that the country could not trust "[e]ven second and third-generation Japanese Americans," because, he said, "the racial strains were undiluted."[63] He issued an order excluding them from the entire west coast.[64] Then-California Attorney General Earl Warren, later confirmed as Chief Justice of the Supreme Court, supported DeWitt.[65] Warren said that anyone who didn't expect "a wave of sabotage is simply to live in a fool's paradise."[66] The Supreme Court ratified the exclusion of Fred Korematsu, a young Japanese American who was convicted for failing to leave his west coast home when ordered.[67] Korematsu was among over 100,000 people of Japanese descent who were forced to leave their west coast homes for confinement in desert camps for the duration of the war as a result of DeWitt's order.[68]

The overreaction to the fear of disloyalty by Japanese citizens followed a familiar corrective pattern, this time decades after the perceived threat had passed. In 1976, President Ford stated that the internment of Japanese Americans was wrong.[69] In 1983, a congressional commission stated that there had been no threat and that prejudice, war hysteria, and a failure of leadership contributed to create the policy of internment.[70] In 1988, President Reagan made a formal apology, and offered reparations.[71] Finally, the Supreme Court's decision in *Korematsu* is roundly considered one of the worst decisions

---

[62] *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942); *see also* Geoffrey R. Stone, *Civil Liberties at Risk Again: A U.S. Tradition*, CHI. TRIB., Feb. 16, 2003, at C1.

[63] Alan Brinkley, *A Familiar Story: Lessons from Past Assaults on Freedoms*, *in* THE CENTURY FOUNDATION, THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 40 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] Korematsu v. United States, 323 U.S. 214 (1944).

[68] *See* Stone, *supra* note 62, at C1.

[69] LAST WITNESS: REFLECTIONS ON THE WARTIME INTERNMENT OF JAPANESE AMERICANS 5 (Erica Harth ed., 2001).

[70] REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 5, 8 (1983).

[71] *See* Civil Liberties Act of 1988, 50 U.S.C. app. 1989b-4 (1988); *see also* Stone, *supra* note 62, at C1.

of all time, in a league with *Dred Scott*[72] and *Plessy v. Ferguson*.[73] The Court has never cited *Korematsu* with approval.

The late Justice Brennan, reviewing this history at the Law School of Hebrew University in Jerusalem, warned of exaggerated claims of national security, stating that "[t]he perceived threats to national security [that] have motivated the sacrifice of civil liberties during times of crisis are often overblown and factually unfounded."[74] Summarizing many of the events at issue, he stated:

> The rumors of French Intrigue during the late 1790s, the claims that civilian courts were unable to adjudicate the allegedly treasonous actions of Northerners during the Civil War, the hysterical belief that criticism of conscription and the war effort might lead droves of soldiers to desert the Army or resist the draft during World War I, the wild assertions of sabotage and espionage by Japanese Americans during World War II . . . were all so baseless that they would be comical were it not for the serious hardship that they caused during times of crisis.[75]

Then, during the Cold War, the country faced another time of great national hysteria. Senator Joe McCarthy alleged that communists had infiltrated every vestige of American society with the goal of taking over our government from within through subversion. He used the bully pulpit of televised congressional hearings to publicly accuse citizens of disloyalty, a forum in which the accused citizen could really offer no defense.[76] Congress also passed the Emergency Detention Act of 1950.[77] As a part of that Act, Congress authorized the creation of detention camps modeled after those used to intern Fred Korematsu during World

---

[72] Scott v. Sanford, 60 U.S. 393 (1857).
[73] Plessy v. Ferguson, 163 U.S. 537 (1896).
[74] Anthony Lewis, *Security and Liberty: Preserving the Values of Freedom*, *in* WAR ON OUR FREEDOMS, *supra* note 63, at 71.
[75] *Id.*
[76] *See* ARTHUR HERMAN, JOSEPH MCCARTHY: REEXAMINING THE LIFE AND LEGACY OF AMERICA'S MOST HATED SENATOR 160 (2000).
[77] Pub. L. No. 81-831, ch. 1024, 64 Stat. 987, 1019-31 (1950) (codified as amended in 50 U.S.C. §§ 811-826) (repealed).

War II.[78] These camps were intended for detention by the executive of persons he deemed subversive, but the power was never exercised.

There was also an assault on free speech. In *Dennis v. United States*,[79] the Supreme Court held that communist party leaders could be punished for their speech under the "clear and present danger" standard, even though their speech presented neither.[80] Later, when the threat of a takeover of our government from within by a communist conspiracy was no longer feared, the Court reversed *Dennis*.[81] However, the Emergency Detention Act was not repealed until 1971.[82] At that time, we were in the midst of a widely unpopular war, and there was no doubt that Congress feared use of executive detentions to stifle dissent. As a part of the legislation repealing the Emergency Detention Act, Congress passed 18 U.S.C. § 4001(a), which prohibits detention of citizens unless authorized by an act of Congress.[83]

Of course, the Vietnam War era was not without its own civil liberties abuses. However, due to the huge unpopularity of that war, civil rights abuses during that time never enjoyed popular support, occurred largely in secret, and were subsequently punished. The White House created its own "plumbers' unit" to spy on dissenters critical of the war in the name of plugging governmental leaks.[84] This ultimately led to the downfall of Richard Nixon's presidency. The CIA and the FBI conducted illegal break-ins and spied on domestic political dissenters. When these civil liberties abuses came to light, they led to, among other reforms, the creation of an informational sharing wall between and within those organizations. This "wall," which was recently criticized by the 9/11 Commission,[85] was essentially torn down as a so-called "reform" after 9/11 to more effectively combat terrorism.[86] Government

---

[78] *Id.*
[79] 341 U.S. 494 (1951).
[80] *See id.* at 503-04.
[81] Brandenberg v. Ohio, 395 U.S. 444 (1969); Yates v. United States, 354 U.S. 298 (1957).
[82] Sept. 25, 1971, Pub. L. No. 92-128, §§ 1(a), (b), 85 Stat. 347.
[83] 18 U.S.C. § 4001(a) (2000).
[84] ANTHONY SUMMERS, THE ARROGANCE OF POWER: THE SECRET WORLD OF RICHARD NIXON 389 (2000) (providing the origin of the term as those individuals who were "to plug the leaks that infuriated the president").
[85] THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 78-80 (2004).
[86] *Id.* at 328.

spying on its citizens is again in vogue and as a result of the attacks on 9/11. We are once again confronted with actions by our government in the name of protecting us that infringe on civil liberties.

We read of allegations of detainees being tortured during interrogations, some rendered to other countries for that purpose,[87] misuse of material witness warrants to detain for lengthy periods hundreds of citizens accused of nothing other than being Muslim, secret deportation proceedings in the name of national security,[88] and what some refer to as kangaroo courts dressed up as military tribunals to try detainees for alleged war crimes.[89] Special kudos are due to JAG Corps' defense counsel for denouncing these tribunals as unfair and taking every legal step, even some outside the military tribunal regime, to defend them.[90]

It is against this history that I discuss the two cases in which I have been involved. For the most part, lawyers who undertake causes for unpopular defendants litigate the cases vigorously. They do this not out of any sense of agreement with the cause or actions of the client but, as Niemoeller so poignantly makes clear, out of recognition that when you defend the rights of the least among us, you are actually defending the rights of all. The two cases in which I have been involved are *United States v. Zacarias Moussaoui*, pending in the U.S. District Court for the Eastern District of Virginia in its Alexandria Division[91] and *Yaser Hamdi v. Donald Rumsfeld*,[92] which was pending in the Norfolk division of that same court, but which has now concluded. Both involve positions taken by the government, which to me are as frightening as any of the

---

87 *See, e.g.*, Christopher Bollyn, *The Pentagon's Ghost Planes and Enforced Disappearances*, Jan. 17, 2005 (on file with author); Neil Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo*, Jan. 1, 2005 (on file with author).

88 Barry Tarlow, *RICO Report; Terrorism Prosecution Implodes: The Detroit 'Sleeper Cell' Case*, CHAMPION 61, Jan./Feb. 2005.

89 Swift as Next Friend for Salim Hamdan v. Rumsfeld, CV04-0777L (W.D. Wash. 2004), *Petition for Writ of Mandamus or in the Alternative, Writ of Habeas Corpus*, at 20 n.4.

90 Neil A. Lewis, *Military's Lawyers for Detainees Put Tribunals on Trial*, N.Y. TIMES, May 4, 2004, at A1.

91 United States v. Zacarias Moussaoui, Cr. No. 01-455-A, E.D. Va. While many of the proceedings and related pleadings in the district court are either under seal or are classified, many are *available at* http://notablecases.vaed.uscourts.gov/notablecases/Index.html.

92 Hamdi v. Rumsfeld, 124 S. Ct. 2633, *on remand at* 378 F.3d 426 (4th Cir. 2004).

historical abuses I have already discussed. In the first of these cases, the government contends that it can put a man to death based on a trial in which he is denied the right to call witnesses to testify in his favor. The second involved a government contention that it could hold a citizen indefinitely, *incommunicado*, without counsel, in solitary confinement, without any charge, trial, or proceeding in which the citizen could challenge the basis for his detention.

Moussaoui is accused of being a participant in the 9/11 plot. Hamdi was alleged to be an "enemy combatant," because he was captured on a battlefield in Afghanistan. On the surface, the two cases seem entirely different. The government made no claim that Hamdi was a terrorist. Accused of no crime, Hamdi's case was civil in nature, a petition for a writ of habeas corpus challenging his detention by the military. Moussaoui's case, on the other hand, not only is a criminal case, it is a death penalty case. He is an alleged terrorist charged with being a participant in what many consider the worst crime in U.S. history, the attacks on 9/11. Yet, there are similarities.

The inability of counsel to communicate with either client was the first of these similarities. Because the government would not allow access to him for almost two years, Hamdi could not talk to us. The government did not relent on this until his case reached the Supreme Court and this restriction became an embarrassment. Similarly, although the government imposed no barrier, after initial meetings with Moussaoui, there came a point where he would not talk to us. So, Hamdi couldn't, Moussaoui wouldn't; the effect was the same. We had to proceed almost as if the cases were hypothetical because we had no clients with whom we could consult. Second, both clients were Muslims. Although Hamdi was born in the United States, neither was raised here. Thus, the detainees had distinct cultural differences from counsel and the courts hearing their respective cases. These did not turn out to be a problem in dealing with Hamdi, but they are a continuing problem in the defense of Moussaoui which exacerbate other problems in that case. Finally, and perhaps most significantly from a legal standpoint, there was the government's invocation of separation of powers in an effort to limit the power of Article III courts to enforce constitutional rights. While there are many other significant legal issues in both cases, I limit my focus here to this one.

In *Moussaoui*, the government contends that, because of separation of powers, the Sixth Amendment's compulsory process clause does not

apply. This is because, it says, to permit Moussaoui to exercise this right would interfere with the President's Article II war powers.[93] Accordingly, the government has refused to comply with court orders to produce persons it has designated as enemy combatants,[94] but who are also favorable defense witnesses "with material testimony that is essential to Moussaoui's defense"[95] and within the reach of the district court's compulsory process power.[96]

In *Hamdi*, the government contends that separation of powers precludes affording Hamdi his Fifth Amendment due process rights in the adjudication of his petition for a writ of habeas corpus. To do so, said the government, would necessarily empower Article III courts to second-guess battlefield judgments made in the exercise of Article II war powers.[97]

Since the *Hamdi* case is now concluded, we address it first. The most often asked question is how does a federal public defender, whose responsibility is to represent indigent criminal defendants in federal court, end up representing a habeas petitioner neither accused nor convicted of a crime? The fact of the matter is that when we began the representation we assumed it would be a criminal case like that of John Walker Lindh.[98] The U.S. military apprehended Lindh in Afghanistan for allegedly fighting for the Taliban.[99] As a U.S. citizen, federal agents brought him back to the United States, indeed to the Eastern District of Virginia, my district, to stand trial on various charges arising from the notion that he had taken up arms against his own countrymen.[100] Lindh retained private counsel,[101] but I was familiar with his case, and it was built almost exclusively on statements Lindh made while in U.S. government custody. When we learned that another U.S. citizen, Yaser

---

[93] United States v. Moussaoui, 382 F.3d 453, 466 (4th Cir. 2004).
[94] *Id.* at 459, 464.
[95] *Id.* at 476.
[96] *Id.* at 463-66.
[97] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2645-50 (2004) (noting that the government's position turns separation of powers "on its head").
[98] *See* United States v. Lindh, 227 F. Supp. 2d 565 (E.D. Va. 2002); United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002).
[99] *See* Brooke A. Masters & Patricia Davis, *Walker's Long Trip Ends at Alexandria Jail; Federal Court Hearing Today for American Accused of Fighting with Taliban*, WASH. POST, Jan. 24, 2002, at A13.
[100] *See id.*
[101] *See id.*

Hamdi, had been apprehended in Afghanistan under those same alleged circumstances, and had been returned to the Eastern District of Virginia as well, we assumed another prosecution was soon to follow.

In order to advise Hamdi of his rights, particularly of his right to remain silent, we attempted to meet with him by endeavoring to contact the commanding officer of the Navy Brig in Norfolk, Virginia, where the government was holding Hamdi.[102] When we received no response to our inquiries, we filed a petition for writ of habeas corpus in the U.S. District Court in Norfolk. Federal Magistrate Judge Thomas Miller appointed the federal public defender's office to represent Hamdi.[103] At the time we were appointed to undertake the representation of Hamdi, not only did we still believe a criminal case against him was right around the corner, but we believed that Judge Miller thought so, too.

It was not until after the magistrate judge ordered a response to the habeas petition that we began to wonder what was going on. First, we could not get a clear answer from the U.S. Attorney, Paul McNulty, as to whether Hamdi would be prosecuted. We did not believe McNulty was playing games; he has never been one to do that. Instead, the picture perceived was that the Department of Justice honestly did not know whether or not there would be a prosecution. The only thing that was clear was that there were no plans to release Hamdi any time soon. The question, then, was if he was not to be charged criminally, on what theory could the government continue to indefinitely detain a citizen? The answer to that question came soon enough. We learned that the government contended it could hold Hamdi indefinitely, in solitary confinement, *incommunicado*, without access to counsel and without charge or hearing of any kind as an "enemy combatant."[104]

Both the federal magistrate judge and U.S. district court judge disagreed with the government's notion that Hamdi could have a habeas petition pending before the court and yet be denied access to his counsel. Both ordered the government to make arrangements for counsel's

---

[102] Cato Institute, News Release, *Supreme Court to Hear 'Enemy Combatant' Cases Tomorrow* (Apr. 27, 2004), *available at* www.cato.org/new/04-04/04-27-04r.html [hereinafter Cato Institute News Release].

[103] Hamdi v. Rumsfeld, Order of May 14, 2002, No. 2:02CV-348 (Dkt. No. 5) (E.D. Va. 2002).

[104] *Id.*, Tr. of May 20, 2002 Hr'g, at 6.

access.[105] But before that could happen, the government moved to dismiss the case on grounds that the federal public defender was not a proper "next friend." You see, a federal habeas petitioner must ordinarily sign his own petition.[106] But because we could not get to Hamdi, we had signed for him as the statute allows a person acting for the petitioner to do.[107] This process is referred to as acting as the petitioner's "next friend." After the district court ruled that the Federal Public Defender acted properly by signing the petition in a next friend capacity,[108] but before we were allowed to see Hamdi, the government appealed. This was the first in a series of three appeals in this case to the U.S. Court of Appeals for the Fourth Circuit.

The three judge panel of the Fourth Circuit that heard this first appeal made it obvious that they did not believe a federal public defender, acknowledging he had never met the client, could act as a "next friend." Our argument that the concept was "next friend," not "best friend" fell on deaf ears. The panel's opinion directing that the petition be dismissed made that clear.[109] However, before the mandate of the court of appeals directing the district court to dismiss Hamdi's petition reached that court, we located Hamdi's father in Saudi Arabia. We had him sign a new habeas petition as "next friend." Judge Doumar consolidated the original petition with the new petition signed by Hamdi's father and again ordered that the government grant the Federal Public Defender access to his client.[110]

The government again appealed, essentially arguing that the district court's order that a lawyer should be able to see his client about a pending case was unprecedented and that the republic would fall were that to occur. The court of appeals again agreed with the government. It held that Judge Doumar's order that the petitioner be allowed to meet with his counsel was premature and that the district court judge should proceed more cautiously and with a view towards seeing if the case could

---

[105] *Id.*, Order of May 20, 2002 (Dkt. No. 11); Order of May 29, 2002 (Dkt. No. 19).
[106] 28 U.S.C. § 2242 (2000).
[107] *Id.*
[108] Hamdi v. Rumsfeld, Order of May 29, 2002, No. 2:02CV-348 (Dkt. No. 19) (E.D. Va. 2002).
[109] Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002).
[110] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2636 (2004).

be resolved before taking the drastic step of actually ordering the government to let the detainee see his lawyer.[111]

This led to the third and final appeal. Directed to proceed cautiously and to exhaust all other avenues before taking the drastic step of allowing petitioner to see his counsel, the district court judge examined a declaration from a Pentagon bureaucrat by the name of Michael Mobbs. The government argued that the declaration, which was based on Mobbs' review of the file (Mobbs had no firsthand knowledge of anything), was factually dispositive as to whether Hamdi had been properly classified as an enemy combatant. We argued that nothing was dispositive factually until there was an opportunity for Hamdi to present his side of the story. The district judge, trying to remain faithful to the direction of the court of appeals to open up access to the petitioner only as a last resort, but also concluding that the Mobbs Declaration raised more factual questions about Hamdi's status then it answered, ordered discovery of the documents on which the Mobbs Declaration was based. The government again appealed, arguing that the Mobbs Declaration was more than adequate to dispose of the petition on the merits and that the case should be dismissed.

The court of appeals again reversed the district court and directed that Hamdi's petition be dismissed.[112] It did so over our arguments that due process generally, and the habeas statute specifically, gave Hamdi the right to respond,[113] with the assistance of counsel, to the government's factual justification for holding him set forth in the Mobbs Declaration and to have a district court resolve any factual disputes.[114] We also argued that the anti-detention act[115] precluded executive detention of Hamdi because Congress had not authorized the detention of citizens without charge or trial.

The Fourth Circuit held that separation of powers precluded a proceeding in accordance with the habeas statute where Hamdi would

---

[111] Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002); *Hamdi*, Order of June 11, 2002, No. 2:02CV-439 (Dkt. No. 2) (E.D. Va. 2002).

[112] Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004).

[113] 28 U.S.C. § 2243 (2000).

[114] *Id.*

[115] 18 U.S.C. § 4001(a) (2000).

have an opportunity to present his side of the case.[116] The court of appeals reasoned that to grant him that opportunity would necessarily put Article III courts in the position of second guessing quintessential military judgments made as part of Article II commander-in-chief powers, such as deciding who to hold as prisoner on the battlefield.[117] Moreover, the court of appeals, while doubtful that § 4001(a) applied in this circumstance, concluded that congressional authorization for Hamdi's detention was found in the very general language of the Authorization for Use of Military Force (AUMF) passed by Congress shortly after 9/11.[118]

Significantly, at the time that Hamdi's case was pending before the Fourth Circuit for the third time, the government arrested another citizen, Jose Padilla, holding him without charge and detaining him at the same facility to which it had by then moved Hamdi.[119] Unlike Hamdi, who had been captured abroad, FBI agents took Padilla into custody at O'Hare International Airport on a material witness warrant.[120] Agents transported Padilla to New York and held him in the Metropolitan Detention Center (MDC), ostensibly waiting to testify before a grand jury.[121] Counsel was appointed. Before any further proceedings, and without advising the district court or Padilla's counsel, the military took Padilla from the MDC to a Navy brig in Charleston, South Carolina, to detain him there as an enemy combatant.[122] Appointed counsel, Donna Newman, was told that she could not have access to him.[123] The material witness warrant was dismissed.[124]

Padilla's counsel then filed a habeas petition in the U.S. District Court in New York. The issues raised were almost identical to those we

---

116 *Hamdi*, 316 F.3d at 474-76.
117 *Id.* at 465-66.
118 *Id.* at 467.
119 Cato Institute News Release, *supra* note 102.
120 *See* Paula Span, *Enemy Combatant Vanishes Into a 'Legal Black Hole,'* WASH. POST, July 30, 2003, at A1.
121 *See id.*
122 *See* Michael Kilian & Lisa Anderson, *U.S. to Let Padilla See Lawyer; Held 20 Months in 'Dirty Bomb' Case*, CHI. TRIB., Feb. 12, 2004, at C1.
123 *See id.*
124 *See generally* John Riley, *Held Without* Charge*; Material Witness Law Puts Detainees in Legal Limbo*, NEWSDAY (N.Y.), Sept. 18, 2002, at A6 (listing Padilla among numerous individuals the government detained on material witness warrants in the months after the 9/11 attacks).

had been raising on Hamdi's behalf with one significant difference. The government claimed that the military captured Hamdi on a foreign battlefield after engaging in combat against U.S. allies, whereas the military snatched Padilla on U.S. soil from a U.S. civilian jail.

In denying Hamdi's petition for rehearing and ordering that his habeas petition be dismissed, the Fourth Circuit noted that Hamdi's case, a battlefield detention, was "apples and oranges" when compared to Padilla's, who was on U.S. soil and was nowhere near a battlefield when detained.[125] Similarly, in ordering that Padilla's petition be granted, the Second Circuit in discussing the holding of the Fourth Circuit in *Hamdi*, suggested there was no circuit conflict, because the *Padilla* and *Hamdi* cases were, given where the individuals were when initially detained by the military, like "apples and oranges."[126] It seemed clear that both circuits would approve the military detention of Hamdi, but not of Padilla.

Ultimately, the Supreme Court granted certiorari in a trilogy of enemy combatant cases, *Hamdi*, *Padilla*, and a third case, *Rasul v. Bush*.[127] *Rasul* was a habeas corpus case filed in the District of Columbia on behalf of alien enemy combatant detainees held at Guantanamo.[128] What all three of these cases had in common was an executive assertion that the petitioners could be held indefinitely, in solitary confinement, *incommunicado*, without access to counsel, and without any recourse to the courts for the aliens held at Guantanamo, and only limited access for the citizens, Hamdi and Padilla, who were by then both held in a Navy brig in Charleston, South Carolina. With regard to the latter two, the government contended that it needed to do no more than state why they were being held and that the detainee could not contest the factual basis for that status determination. The Supreme Court, by granting *cert* in all three cases, apparently concluded that it might need to address all of them to clarify the law.

During the briefing process after *cert* was granted, we were finally allowed access to Hamdi. The government said it relented and granted

---

[125] Hamdi v. Rumsfeld, 337 F.3d 335, 344 (4th Cir. 2003).
[126] Padilla v. Rumsfeld, 352 F.3d 695, 721 n.29 (2d Cir. 2003), *cert. granted*, 540 U.S. 1173 (2004).
[127] Rasul v. Bush, 321 F.3d 1134 (D.C. Cir.), *cert. granted*, 540 U.S. 1003 (2003).
[128] *See id.* at 1135.

access, because its interrogation of Hamdi had concluded and his value as a source of intelligence exhausted. We concluded that the real reason was the embarrassment it wanted to avoid trying to defend its denial of access to counsel to the Court. Whatever the reason, being able to put a face on the client provided significant inspiration as we continued with the case. We will never forget the moment when we met Hamdi for the first time and said, "Hi. We are your lawyers and you have a case in the United States Supreme Court." Unlike some we represent in our role as federal public defenders, Hamdi was actually a very likable young man who was very appreciative of everything we did for him.

We argued the case before the Supreme Court on April 28, 2004. Padilla's case was argued that same day. During the arguments, questions were asked in both cases about whether there were any limits on the Executive's power over enemy combatants, including whether they could be tortured.[129] Paul Clement, the Deputy Solicitor General, assured the Court that the United States does not engage in torture.[130] That night, the events at Abu Ghraib prison hit the news for the first time.[131] One can only guess at the impact this breaking news might have had on justices who had just been told that separation of powers precluded Article III courts from having any role in connection with the detention of enemy combatants and not to worry, just "trust us," about torture.

On June 30, the Court released its opinions. In *Hamdi*, there was a split opinion, 4 – 2, 2 – 1. Overall, and for various reasons and in varying degrees, the Court ruled 8-1 that indefinitely detaining Hamdi while denying him judicial review and due process was a violation of his rights. A plurality of the Court, Justices O'Connor, Breyer, Kennedy, and Rehnquist, found that Congress, in the AUMF, had authorized the detention of enemy combatants, both citizens and non-citizens alike, when authorizing the use of military force against the perpetrators of 9/11. Therefore, the military was authorized to deal with enemy belligerents according to the treaties and customs known as the laws of war. But this plurality also held that this authorization was not a "blank

---

[129] Oral Argument, Rumsfeld v. Padilla, No. 03-1027, Tr. at 22-24, Apr. 28, 2004; Oral Argument, Hamdi v. Rumsfeld, No. 03-6696, Tr. at 49-50, Apr. 28, 2004.

[130] *Id.*

[131] *See* James Risen, *G.I.'s Are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A1.

check" and was subject to judicial review and procedural due process. As Justice O'Connor explained in quite stirring language:

> Striking the proper constitutional balance here is of great importance to the nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.[132]

Justice O'Connor rejected the Fourth Circuit's holding that separation of powers precluded an Article III court from giving Hamdi due process in adjudicating his habeas petition:

> [T]he position that the Courts must forego any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers . . . . [I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to his detention . . . .[133]

Justices Souter and Ginsburg went even farther, concluding that Congress did not authorize the detention of citizens at all by the very general language of the AUMF, especially in light of the very specific prohibition in § 4001(a), the non-detention act passed in 1971.[134] Justices Scalia and Stevens went still further, concluding that the Constitution precludes detention of citizens as enemy combatants in the absence of suspension of the writ of habeas corpus.[135] They said the government's only option, if it wanted to detain Hamdi, was to proceed by grand jury indictment and provide him all of the protections the

---

[132] 124 S. Ct. 2633, 2648 (2004).
[133] *Id.* at 2650.
[134] *Id.* at 2652-660.
[135] *Id.* at 2660-674.

Constitution guarantees an accused before liberty may be deprived. Finally, Justice Thomas agreed with the government that federal courts are ill-equipped to review the executive's enemy combatant determinations, and agreed with the plurality that Congress had authorized such detentions with the AUMF.[136]

The Guantanamo detainees, whose cases had been argued a week before Padilla's and Hamdi's, also gained access to the courts to have their habeas petitions heard. While the procedures that would govern such proceedings, since they were aliens and not citizens, were not spelled out in the Court's opinion, many believe the *Hamdi* opinion's plurality will be instructive to the lower courts. On the surface, it appears Padilla was the loser in this round. Even though the circuit courts seemed to recognize that he had a much stronger claim for due process protection than either Hamdi or the petitioners from Guantanamo, he remains locked up in a Navy Brig in Charleston at this writing, because the Supreme Court ruled that his habeas petition had been filed in the wrong venue and therefore ordered it dismissed without prejudice.[137] However, when you read the opinion in *Hamdi* together with Justice Stevens' dissent in *Padilla*, and then count the noses, it seems clear that Padilla has five votes for the proposition that he must be charged with a crime in an Article III court or released.[138] So far, the government has ignored the fact that a clear majority of the Court has disapproved of Padilla's continued detention as an enemy combatant not charged with any crime.

Following the Court's opinion in *Hamdi*, the government chose to negotiate Hamdi's release and return him to his home in Saudi Arabia rather than face the due process hearing in front of Judge Doumar to which the Court said he was entitled. We do not know whether the government's decision was dictated by the weakness of its case or its ultimate assessment that Hamdi indeed posed no threat to this country, but I suspect it was a little bit of both.

---

[136] *Id.* at 2674.

[137] *Id.* at 2735 n.8.

[138] When you add the four dissenters in *Hamdi* (Justices Souter, Ginsburg, Scalia and Stevens) to Justice Breyer's joining Justice Stevens' dissent which supported Padilla's release unless he was charged with a crime (*see* 124 S. Ct. at 2735 n.8), it is clear that there are five votes on the Court for Padilla's position that unless a grand jury indicts him, he must be freed.

Let me switch gears now and move to where Moussaoui meets Hamdi. Of course, because it is still an ongoing case wrapped in national security information and under seal proceedings, we are necessarily constrained in what we can say.

In *Hamdi*, our client was the one detained as an enemy combatant. In *Moussaoui*, it is the defense witnesses who are detained as such. However, the government's argument is not swayed by this difference. It maintains that separation of powers precludes an Article III court from exercising any jurisdiction over enemy combatants, be they the petitioner in a habeas proceeding or material witnesses in a capital case. Thus it maintains that such favorable defense witnesses are not reachable by the Sixth Amendment's compulsory process clause.

Moussaoui demonstrated, in accordance with balancing procedures set forth in *Valenzuela-Bernal*,[139] that there is substantial likelihood that the enemy combatant witnesses would provide testimony in his favor.[140] One circuit court judge believes the testimony from these witnesses could help him escape a sentence of death.[141] *Moussaoui* also has established that the witnesses are within reach of the court's process[142] and that neither the separation of powers nor national security concerns can justify denying him access to the witnesses.[143] However, the U.S. Court of Appeals for the Fourth Circuit concluded that despite all of this, Moussaoui's case could proceed in the face of refusal by the government to produce the witnesses for testimony because Moussaoui would not be "materially disadvantaged" by "substitutes."[144] The substitutes are to be based upon "summaries of classified documents containing information from unnamed, unsworn government agents purporting to report unsworn, incomplete, non-verbatim accounts of what government agents say the defense witnesses have said."[145] Counsel will never talk to these witnesses, and the jury will never hear from them.

---

[139] United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).
[140] United States v. Moussaoui, 382 F.3d 453, 469-76 (4th Cir. 2004).
[141] *Id.* at 483-89.
[142] *Id.* at 463-66.
[143] *Id.* at 466-69, 474-76.
[144] *Id.* at 477.
[145] Moussaoui v. United States, No. 04-8385, *petition for cert. filed, available at* http://www.nacdl.org/public.nsf/newsissues/ffefba52d750149885256f73005e2c94/$FILE/Moussaoui_cert.pdf (last visited Mar. 31, 2005).

The Fourth Circuit's opinion circuitously denies embracing the very result that it decrees. In essence, by requiring Moussaoui to proceed to trial without the right the Sixth Amendment guarantees, that is, "in *all* criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .,"[146] the Fourth Circuit has held that the right to compulsory process need not be enforced when a court determines in advance of trial that the accused will not be materially disadvantaged by a denial of that right.

Because, among other things, we disagree with the notions that the explicit language of the Sixth Amendment has room for exception, that a court in advance of trial and without any access to what witnesses have actually said can conclude there will be no material disadvantage to proceeding without them, and that there is no material disadvantage to Moussaoui from having to proceed on the basis of the substitutes proposed here, we have petitioned the Supreme Court for a writ of certiorari.[147] In opposition to our petition, the government continues to argue that separation of powers places the enemy combatant witnesses outside the reach of an Article III court's compulsory process power, an argument it lost in the Fourth Circuit.[148] We say the ultimate answer to that question lies in the plurality opinion of Justice O'Connor in *Hamdi*.

---

[146] U.S. CONST. amend. VI (emphasis added).

[147] *Moussaoui*, No. 04-8385, Petition for Writ of Certiorari; *see* Brief for the United States in Opposition, at 26-30.

[148] *Moussaoui*, 382 F.3d at 471-76.