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The Moussaoui Case: The Mess from Minnesota

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THE MOUSSAOUI CASE: THE MESS FROM MINNESOTA

A. John Radsan[†]

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I. INTRODUCTION

The United States should drop all criminal charges against Zacarias Moussaoui,¹ not because he is innocent, but because he is a foreign citizen who is (or was) a terrorist bent on killing innocent

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1. Zacarias Moussaoui, the infamous “20th Hijacker,” was arrested in Minnesota in August 2001. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 247 (2004) [hereinafter 9/11 REPORT], available at <http://www.9-11commission.gov/report/911Report.pdf>. He is currently the only defendant facing trial for the September 11 terrorist attacks.

Americans, destroying American property, and disrupting American society.² For less than a nanosecond, Moussaoui should be a free man again. Once the federal criminal charges against him are dropped, Moussaoui's publicly paid lawyers, including the Federal Defenders of the Eastern District of Virginia, should be released from their services. Those who are broad-minded might thank the defense lawyers for doing their best—despite Moussaoui's antics—to defend him. Those who offer such thanks do so based on a presumption of innocence, and on a criminal process that strives to give a fair trial to even those accused of the most despicable crimes.³ But these presumptions and assumptions are the faith of the criminal realm. To apply them to the military or intelligence realm may be heresy, folly, madness, or worse.

Before the nanosecond of Moussaoui's freedom ends, he should be transferred to the custody of the United States Department of Defense.⁴ After that, based on recommendations coordinated by the National Security Council (NSC) for the President, the Executive Branch should implement a well-conceived decision about Moussaoui's next address. The NSC, rather than a particular United States agency, such as the Justice Department or the Defense Department, is the appropriate forum to vet such policies because they transcend the boundaries between domestic and international spheres, going beyond law enforcement and military issues. The NSC, which sits above the various agencies in a coordinating role, was, after all, created in 1947 "to advise the President with respect to the integration of domestic, foreign, and

2. The most recent charges against Moussaoui, through superseding indictment, are: (1) conspiracy to commit acts of terrorism transcending national boundaries, (2) conspiracy to commit aircraft piracy, (3) conspiracy to destroy an aircraft, (4) conspiracy to use weapons of mass destruction, (5) conspiracy to murder United States employees, and (6) conspiracy to destroy property. See Second Superseding Indictment at 1, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. filed July 2002) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/66826/0.pdf>.

3. I am sure that many defense lawyers model themselves after Gregory Peck's moving portrayal of Atticus Finch in *To Kill a Mockingbird*. See generally *TO KILL A MOCKINGBIRD* (Universal Studios 1962).

4. For a model of transferring a prisoner from one realm to another, consider Jose Padilla's transfer from custody under a material witness warrant to the custody of U.S. military authorities. See *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2716 (2004) (noting that Padilla was taken into custody by Department of Defense officials and transported to a Naval Brig in Charleston, South Carolina, where he has been held ever since).

military policies relating to the national security.”⁵ The President, in making this decision on Moussaoui’s next address, should consider our relations with foreign countries and the safety of our homeland.⁶ But whatever happens to Moussaoui, he did not—and does not—belong in criminal custody. That is the straightforward thesis of this article.

The Bush Administration, in many public statements, has said that September 11 changed everything about U.S. counter-terrorism policy.⁷ To the dismay of critics, many of them in the legal academy, the Bush Administration has described this policy as a “war” against terrorism.⁸ Whether we call it a policy or a war, dealing with individuals and organizations that seek our destruction is serious business.⁹ Prior generations won the Cold War to protect us. It is up to this generation, and perhaps future generations, to succeed in a new struggle to preserve our nation

5. National Security Act of 1947, ch. 343, tit. I, § 101, 61 Stat. 496.

6. One possible option would be a transfer to foreign authorities, with France, the country of Moussaoui’s citizenship, being an obvious example. Other options include a military facility within the United States (e.g., the brig in Norfolk, Virginia), a military facility within U.S. territory (e.g., Guam), a military facility in a place whose jurisdictional status is not completely clear as a result of recent Supreme Court precedent (e.g., Guantanamo Bay, Cuba), or a facility on a mobile platform (e.g., an aircraft carrier that stays out to sea).

7. *See, e.g.*, President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (describing the United States’ concerted and protracted effort against terrorism); President George W. Bush, Radio Address of the President to the Nation (Sept. 15, 2001), at <http://www.whitehouse.gov/news/releases/2001/09/20010915.html> (describing the United States’ concerted and protracted effort against terrorism); Press Release, President George W. Bush, At O’Hare, President Says “Get on Board,” Remarks by the President to Airline Employees (Sept. 27, 2001), at <http://www.whitehouse.gov/news/releases/2001/09/20010927-1.html> (stating that America is fighting a “new type of war”).

8. PHILIP B. HEYMANN, *TERRORISM, FREEDOM, & SECURITY: WINNING WITHOUT WAR* 19-33 (BCSIA Studies in International Security ed., 2003) (arguing, inter alia, that intelligence and international law should be used to construct our nation’s counter-terrorism framework and that a military-based “war” on terrorism runs counter to traditional American policies).

9. For the consensus of a bipartisan panel of experts, *see, e.g.*, 9/11 REPORT, *supra* note 1, at 363–64.

[To] [c]all[] this struggle a war accurately describes the use of American and allied armed forces to find and destroy terrorist groups and their allies in the field But long-term success demands the use of all elements of national power: diplomacy, intelligence, covert action, law enforcement, economic policy, foreign aid, public diplomacy, and homeland defense.

Id.

and our values. For this reason, the Moussaoui case, which has languished in our courts for over three years, is a sad relic of the past, a modern version of *Bleak House*,¹⁰ a bitter reminder of a time when we naively believed that terrorism was more a law enforcement problem than a national security problem.¹¹ Now that the Bush Administration has settled into a second term, it should be less concerned about the political fallout from controversial decisions and more intent on trying to do what is right.¹² The time, if ever, for empty posturing is over. Transferring Moussaoui to military custody would thus be a sign of strength, serving as a first step in a more reasoned and strategic policy for dealing with terrorists.¹³

This article, after giving a brief history of the Moussaoui case,¹⁴ identifies the main paradoxes or problems of continuing to deal with him in the criminal system.¹⁵ By no stretch of the imagination does this article provide an exhaustive or comprehensive treatment of the Moussaoui case. Each problem, by itself, could be the subject of a separate law review article. This article suggests that Moussaoui, rather than Yaser Esam Hamdi, or Jose Padilla, or the detainees in Guantanamo Bay, could have served as the true test for determining the minimum process that the American Constitutional system owes to an individual whose goal is our

10. CHARLES DICKENS, *BLEAK HOUSE* 50 (Norman Page ed., Penguin Books 1971) (1853). In this Dickens novel, it was the Jardyce case that seemingly dragged on forever.

11. In this regard, my criticism goes beyond political orientations. As many have noted and admitted, neither the Clinton Administration nor the Bush Administration got “it”—“it” referring to the gravity of the danger from Islamic extremists. For a view that the Clinton Administration got “it” more than the Bush Administration, see Richard Clarke’s polemical book, *Against All Enemies: Inside America’s War on Terror*. RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR* (Free Press 2004) [hereinafter *AGAINST ALL ENEMIES*]. For a view that the threat was out there for us to see as long ago as the Iranian Revolution in the late 1970s, see *id.* at 36–37 (stating that the Iranian Revolution “drew America further into the realm of Islam”).

12. In this regard, after John Kerry’s defeat, President Bush’s statement that he “earned [political] capital in the campaign, and now . . . intend[s] to spend it on . . . winning the war on terror,” can be seen as a positive. Press Release, President George W. Bush, President Holds Press Conference (Nov. 4, 2004), at <http://www.whitehouse.gov/news/releases/2004/11/20041104-5.html>.

13. To show this strength, it makes most sense to transfer Moussaoui at a time in the case, whether in district court or in the Fourth Circuit, when the public does not perceive that the legal rulings are going against the government.

14. See *infra* Part II.

15. See *infra* Part III.

annihilation.¹⁶ The distinction between the Moussaoui case and the Hamdi/Padilla cases is that Moussaoui is not a U.S. citizen. The distinction between the Moussaoui case and the Hamdi/Padilla/Guantanamo cases is that the Bush Administration has offered more convincing evidence in public filings that Moussaoui was a major player connected to a major terrorist plot. The premise of this article is that we should respect our rule of law but that we should not treat terrorists any more decently than required.¹⁷ To do more than the law requires, in an age of weapons of mass destruction, is more folly than an act of humanity.¹⁸ Although this article does not address the case of a non-U.S. citizen who is a major player arrested outside the United States, it follows that someone like Khaled Sheik Mohammed (KSM), the alleged

16. See *Moussaoui Uncooperative in Court* (CBS television broadcast, Apr. 22, 2002), at <http://www.cbsnews.com/stories/2002/04/25/attack/main507248.shtml> (Moussaoui frequently quoted the *Koran* and prayed to Allah for the destruction of the United States). For a flavor of the rants and ramblings that led Judge Brinkema to revoke Moussaoui's right of self-representation, see, e.g., Defendant's Motion for Access to Tape at 2, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. filed Oct. 31, 2003) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/69361/1.pdf> (stating that prosecutor David Novak is conducting a national therapy session disguised as a trial and that "[a]s for America [sic] [p]ost [t]raumatic [d]isorder the [u]nique [b]est [l]awyer [Moussaoui] is [g]lad to [p]rovide a [w]ar [t]herapy [c]ompany to [t]reat [m]ass [c]asualty of [d]eranged Americans"); Attachment to Defendant's Motion at 2, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. filed Oct. 31, 2003) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/69364/1.pdf> (asserting that American taxpayers paying for the Moussaoui trial are being robbed by al Qaeda); Attachment to Defendant's Motion at 1, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. filed Oct. 31, 2003) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/69367/1.pdf> (stating that he, the infamous twentieth hijacker, is the "little bitch of Leonie Brinkema"); Defendant's Motion to Stipulate Rights & Duties at 1, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. filed July 15, 2002) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/66846/0.pdf> (motioning to stipulate his right and duty to live a long and happy life on this earth with four wives and to stop Judge Brinkema from misrepresenting his fight for life).

17. I have not yet joined the cottage industry of offering comprehensive advice on counter-terrorism strategy. Those who do often draw on comparative experiences—for example, the Israeli experience with Palestinian terrorism or the British experience with IRA terrorism. See, e.g., MICHAEL IGNATIEFF, *THE LESSER EVIL* (Princeton University Press 2004).

18. My fear is that historians of future generations will view the United States the way we view the British troops who fought against America's Founding Fathers—as old-fashioned types who marched in file in red uniforms, failing to adjust to new methods and rules of war.

mastermind of the 9/11 plot, should not be treated any better than Moussaoui.¹⁹ This article's conclusion is that the Moussaoui case is better resolved through a military proceeding.²⁰

II. THE HISTORY OF THE MOUSSAOUI CASE

The Moussaoui case is back where it started in the Eastern District of Virginia. Judge Brinkema, the presiding judge over the prosecution, will set a trial date now that the Supreme Court decided not to grant the writ of certiorari filed by the Moussaoui defense team concerning how much access they should have to three Al Qaeda members—potential witnesses—who are in detention.²¹ The Moussaoui defense team alleged that these detainees tend to exculpate Moussaoui from the criminal charges, supporting his claim that he was not part of the September 11 plot, and tended to mitigate his culpability if the case reaches the death penalty stage.²² Unsatisfied with the Fourth Circuit's most recent en banc ruling on these topics, the Moussaoui defense team took their case to the highest level in our judicial system.²³ As a result, Judge Brinkema had kept the case off the court's trial calendar while the Supreme Court decided what to do.²⁴

Moussaoui was detained weeks before September 11, 2001, during the period when the default mode for dealing with

19. Accordingly, KSM is being held indefinitely for interrogation in an undisclosed location. Human Rights Watch, *The U.S.'s "Disappeared": the CIA's Long-Term "Ghost Detainees,"* HUMAN RIGHTS WATCH BRIEFING PAPER, at 37 (Oct. 2004), available at <http://www.hrw.org/backgrounders/usa/us1004/us1004.pdf>.

20. See *infra* Part VII.

21. *Moussaoui v. United States*, 383 F.3d 453 (4th Cir. 2004), *cert. denied*, 2005 WL 218482 (denied without comment).

22. See Government's Motion at 1, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. filed Dec. 2, 2002) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/70316/0.pdf> (ordering that "[u]ntil the Supreme Court has ruled on the petition, and on [Moussaoui's] appeal if the petition is granted, this case will remain stayed to conserve limited resources of the judiciary and to minimize disclosure of classified information").

23. See Defendant's Response to Government's Motion to set a Trial Date at 1, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. filed Nov. 8, 2004) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/70295/0.pdf>.

24. See Order at 2, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. filed Dec. 2, 2004) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/70316/0.pdf> (refusing to set a trial date).

terrorists was through law enforcement.²⁵ In response to tips from a flight school in Minnesota about a suspicious flight student—who, with scant flying knowledge, desired training as an “ego boosting thing” and wanted to “take off and land” a Boeing 747—special agents from the Minneapolis field office of the Federal Bureau of Investigation (FBI) began an investigation into Moussaoui’s strange practices.²⁶ Moussaoui was first held, not on terrorism charges, but on immigration violations.²⁷ As the public has learned from former FBI supervisor Coleen Rowley and others, the special agents pleaded with bureaucrats at FBI headquarters to authorize a warrant to search Moussaoui’s computer under the Federal Intelligence Surveillance Act (FISA).²⁸ Yet, FBI headquarters, as publicized by hearings before the Joint Inquiry Staff and the 9/11 Commission, did not believe they had sufficient evidence connecting Moussaoui to a foreign power for purposes of FISA.²⁹

25. The first attack on the World Trade Center in 1993 resulted in convictions against Mohammad Salameh, Nidal A. Ayyad, Mahmud Abouhalima, Ahmad Ajajfour, Ramzi Yousef, and Eyad Ismoil. William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U.L. REV. 1, 98–99 (2000). The attacks on U.S. embassies in Tanzania and Kenya in 1998 resulted in convictions against Mohamed Rashed Daoud al-Owhali, Khalfan Khamis Mohamed, Mohamed Sadeek Odeh, and Wadih el Hage. Phil Hirschhorn, *Four Guilty in Embassy Bombings Trial* (May 30, 2001), available at <http://edition.cnn.com/2001/LAW/05/29/embassy.bombings.03/>.

26. The pre-September 11 period to the Moussaoui case is summarized in the 9/11 Report. 9/11 REPORT, *supra* note 1, at 273–76.

27. *Id.* at 247.

28. *Id.* at 273–74.

29. See *The FBI’s Handling of the Phoenix Electronic Communication & Investigation of Zacarias Moussaoui Prior to Sept. 11, 2001: Hearings Before the Select Committee on Intelligence, U.S. Senate & the Permanent Select Committee on Intelligence House of Rep.*, 107th Cong. 19–20 (2002), available at <http://www.intelligence.senate.gov/0209hr/020924/hill.pdf> (prepared statement of Eleanor Hill, Staff Director, Joint Inquiry Staff noting that a misunderstanding between FBI headquarters and Minneapolis led to the conclusion that there was insufficient information to show that Moussaoui was an agent of a foreign power under FISA); see also 9/11 REPORT, *supra* note 1, at 274. To obtain a warrant under the Foreign Intelligence Surveillance Act (FISA), the Justice Department needs to show, inter alia, that the search or the electronic surveillance relates to a “foreign power” or “an agent of a foreign power.” 50 U.S.C. § 1805(a)(3)(A) (2002). FISA—only applicable within the United States—is Congress’s arrangement, in response to the landmark “Keith” decision, *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297 (1972), to regulate electronic surveillance and searches for national security purposes within the United States. FISA has withstood all general attacks on its constitutionality. See, e.g., *In re Sealed Case*, 310 F.3d 717, 746 (2002) (holding that the government may, without contravening the Fourth Amendment to the United States Constitution, conduct surveillance of an agent of a foreign power if the “significant purpose” of such surveillance is foreign intelligence).

So, in an attempt to gather additional evidence, the FBI special agents initiated requests—what they call leads—for assistance from foreign authorities, including France and Britain.³⁰ Disappointed that FBI headquarters was not giving Moussaoui the attention the special agents believed he deserved, they opened a back channel to the Central Intelligence Agency (CIA).³¹ From the CIA, they sought information and assistance. Part of the assistance they sought was in dealing with their own bureaucracy.³² It was in this way that senior officials at the CIA received more comprehensive briefings about Moussaoui than did the upper echelons of the FBI.³³

The U.S. authorities, operating under the old paradigm, were not sure they had the grounds for a FISA warrant, a regular search warrant, or an arrest warrant in the Moussaoui case.³⁴ Accordingly, rather than think beyond the law enforcement paradigm, they searched for another justification for Moussaoui's detention within the existing paradigm.³⁵ Accordingly, on August 15, 2001, a material witness warrant was issued against Moussaoui.³⁶

Three weeks later, on that fateful September day, while the FBI was still waiting for some responses from foreign authorities, nineteen hijackers boarded four commercial planes.³⁷ Meanwhile, Moussaoui, the evidence related to him, and possible connections between him and other terrorists remained on hold while two planes crashed into the twin towers of the World Trade Center, a third plane took out a chunk of the Pentagon, and a fourth plane, thanks to the heroics of the passengers who learned that their hijackers intended to use their plane as a missile, crashed into a field in Pennsylvania, killing everyone on board. That is perhaps

30. See 9/11 REPORT, *supra* note 1, at 274.

31. See *id.*

32. See *id.* at 275–76.

33. See *id.* at 275 (stating that neither of the FBI's top two officials were briefed about Moussaoui prior to September 11, 2001, but the Director of Central Intelligence was briefed on Moussaoui on August 23, 2001).

34. *Id.* at 274–76.

35. It is not clear why the authorities did not continue to hold Moussaoui for immigration violations. Perhaps U.S. authorities, fearful of letting a big fish get away, had no intention of deporting him.

36. Under the federal material witness statute, “[i]f it appears . . . that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person.” 18 U.S.C. § 3144 (2001).

37. See 9/11 REPORT, *supra* note 1, at 274.

the tragedy within the tragedy—the lingering thoughts that the catastrophe could have been averted if our officials had better performed their jobs and if the legal structures had not gotten in their way.³⁸ The dire predictions from FBI special agents about Moussaoui and other suspicious individuals came true. Later, while the World Trade Center was smoldering in ruins, after investigators and prosecutors had gathered enough evidence to convince a grand jury that there was probable cause that Moussaoui had committed a crime, he was arraigned on federal charges and held without bail in the Alexandria Detention Center.³⁹

Other than the initial inquiries the FBI made of Moussaoui while he was in flight school and before his arrest, it does not appear from the public record that U.S. authorities have been able to interrogate Moussaoui. Worse, honoring the rights of a criminal defendant who claimed to be indigent, the United States has provided Moussaoui with legal counsel, and the taxpayers have

38. Ahmed Ressay, once bent on blowing up the Los Angeles airport as a part of the Millennium Plot, was cooperating with U.S. authorities before September 11. It has been reported that Ressay later tied evidence from Moussaoui to the Hamburg cell that played a leading role in executing the September 11 plot. *See* 9/11 REPORT, *supra* note 1, at 275–76 (noting that Ressay’s cooperation with investigators helped to link Moussaoui to Afghan terrorist camps); *see also* Michael Isikoff & Mark Hosenball, *What the PDB Didn’t Say: Perhaps George Bush Would Have Paid More Attention to the August Memo if it had Contained Some of What was Already Known About Al Qaeda’s Activities*, NEWSWEEK, Apr. 14, 2004, available at <http://64.233.167.104/search?q=cache:OGkHHI06NkoJ:editor.msn.com/id/4741570/> (stating that Ressay told American officials that he recognized Moussaoui as an Afghan training camp student who was tied to the Hamburg-based terrorist cell). Therefore, this is one of those “what if” scenarios that analysts and many other citizens will ponder for years. Could the plot have been unraveled if these connections were allowed to be made before September 11? It has also been reported that Khalid Sheikh Mohammed, the “mastermind” behind the September 11 plot, would have called off the operation if he had believed that there was a significant possibility that Moussaoui, in detention, was giving information to U.S. authorities. *See* 9/11 REPORT, *supra* note 1, at 276. The interrogation of Ramzi Binalshibh also revealed that Khalid Sheikh Mohammed would have called off the 9/11 attacks had he been cognizant of Moussaoui’s arrest. *Id.* at 541 n.107 (citing INTELLIGENCE REPORT, *Interrogation of Ramzi Binalshibh*, Feb. 14, 2003). “Intelligence Reports,” cited in the 9/11 Report, are actually identical to what the CIA refers to as “cables.” Cables are simply (1) communications between operatives and CIA headquarters or (2) communications between operatives themselves.

39. Larry Margasak, *Citing Need to Resolve Motions, Judge Won’t Set Moussaoui Trial*, CHI. TRIB., Dec. 4, 2004, at 26, available at 2004 WL 100743817 (noting that Moussaoui is being held in the Washington suburbs at Alexandria’s detention center).

gotten the bill.⁴⁰ Defense counsel, at their first meeting with Moussaoui, almost surely advised him not to volunteer any statements to the authorities or to other prisoners. This is standard practice. Even when Moussaoui was representing himself, having relegated his counsel to standby status, he sometimes seemed shrewd enough not to make any obvious admissions to the charges.⁴¹ In any event, at no time did American officials have the opportunity to interrogate Moussaoui in the aggressive fashion that is being used on KSM and other Al Qaeda cohorts whom we treat as terrorists rather than criminals.⁴² These other terrorists are

40. Indeed, Moussaoui relishes in the fact that American taxpayers are footing the bill for his legal representation. See Defendant's Motion at 1, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. filed Oct. 31, 2003) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/69364/1.pdf> (stating that "[Judge Brinkema] must release \$260,000 of American Taxpayer money to pay for al Qaeda pro se suicide legal operation . . . [and] . . . God willing the 12 American Taxpayer[s] [sic] will enjoy the \$260,000 show . . . what about the \$260,000 day light robbery by al Qaeda").

41. See Transcript of Plea Hearing at 43, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. filed July 25, 2002) (Criminal No. 01-455-A), available at <http://www.washingtonpost.com/wp-srv/nation/transcripts/moussaoui072502.htm> (speaking only in hypothetical terms). At one point, while Moussaoui was discussing the possibility of pleading guilty to charges, he admitted to Judge Brinkema that he is a "member of al Qaeda . . . [and] pledge[s] bayat [allegiance] to Osama bin Ladin." Transcript of Arraignment & Motions Hearing at 26-27, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. filed July 18, 2002) (Criminal No. 01-455-A), available at <http://web.elastic.org/~fche/mirrors/cryptome.org/usa-v-zm-071082.htm>. These are damning admissions in the face of conspiracy charges. But Moussaoui has consistently denied that he had any role in the September 11 plot. Transcript of Plea Hearing at 43, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. filed July 25, 2002) (Criminal No. 01-455-A), available at <http://www.washingtonpost.com/wp-srv/nation/transcripts/moussaoui072502.htm> (stating "I did not know about September 11.").

42. See Jonathan F. Lenzner, *From a Pakistani Stationhouse to the Federal Courthouse: A Confession's Uncertain Journey in the U.S.-Led War on Terror*, 12 CARDOZO J. INT'L & COMP. LAW 297, 299-300 n.13 (2004) (noting that "[b]efore [Khalid Sheikh] Mohammed's capture, U.S. officials decided that they would not to [sic] bring him to the United States to stand trial. Officials reasoned that obtaining intelligence from the September 11 mastermind superseded the competing interest in bringing him to justice in U.S. courts") (citation omitted)). At least one commentator argues that the use of overly aggressive interrogation tactics on suspected terrorists (e.g., Khalid Sheikh Mohammed and John Walker Lindh) has undermined the United States' efforts to prosecute them in the United States due to legal restraints and political hurdles. *Id.* at 299-300. See also Human Rights Watch, *The U.S.'s "Disappeared": the CIA's Long-Term "Ghost Detainees,"* HUMAN RIGHTS WATCH BRIEFING PAPER, at 37-38 (Oct. 2004), available at <http://www.hrw.org/backgrounders/usa/us1004/us1004.pdf> (noting that CIA torture techniques patently prohibited in criminal cases—such as water submersion—are so severe that FBI officials have ordered its agents to preclude

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correctly being treated under what could be described as a new intelligence paradigm.

III. PROBLEMS WITH THE CRIMINAL SYSTEM

A. *A Boomerang to the Federal Rules of Criminal Procedure*

In a twist on how Al Qaeda used commercial aircraft against us as missiles, this terrorist group could use our own rules concerning criminal discovery. In particular, senior managers in Al Qaeda could instruct their troops that in the event the foot soldiers are captured and detained, they should weave false information into their tales. They might do their best to exculpate Moussaoui and other Al Qaeda members who are held in the U.S. criminal system. That way, they could turn defeats into victories. Although Al Qaeda might not train operatives in exclusive missions of disinformation, it is not out of the question. If this network can convince operatives to conduct suicide missions, its leaders probably can convince their operatives to allow themselves to be detained for the exclusive purpose of helping out a person whom the leaders would describe as “brother Moussaoui.” From Al Qaeda’s perspective, they can get more bang for their buck on pure operations of destruction. More likely, as fallbacks to failed missions, operatives might be instructed and trained in planting false exculpatory information, and to do so in a subtle way to maximize the chances that their captors believe the lies.⁴³

According to American experts, Al Qaeda’s tradecraft is good, already including counter-surveillance and counter-interrogation tactics.⁴⁴ Therefore, false exculpation would be a dangerous

themselves from taking part in high-level detainee interrogations so that the officials would not be compromised in future criminal cases).

43. By contrast, I doubt that the allegiances are so strong in organized crime groups or narcotics trafficking organizations that members would risk additional perjury charges to exculpate other members. See 18 U.S.C. §§ 1621, 1622, 1623 (2001) (providing five-year felonies relating respectively to perjury, suborning perjury, and making false declarations before a grand jury or court); see also 18 U.S.C. § 1001 (2001) (applying broadly to all individuals who make false statements “in any matter” before any of the three branches of government). Unlike the situation with detainees held by intelligence agencies, in the situation with mobsters and traffickers, law enforcement officials would be in a position to assess and challenge the potential for false exculpatory information.

44. See, e.g., Arthur H. Garrison, *The War on Terrorism on the Judicial Front, Part II: The Courts Strike Back*, 27 AM. J. TRIAL ADVOC. 473, 513 (2004) (discussing the Al

addition to their repertoire. Such disinformation missions are more effective within the legal process when the United States Government treats Al Qaeda members as law enforcement problems rather than military problems.

We know that some detainees have passed on disinformation.⁴⁵ What is not clear, especially for those of us in the unclassified sector, is whether these detainees have passed on disinformation in Moussaoui's case.

This disinformation possibility, of course, comes from *Brady v. Maryland*⁴⁶ and from Rule 16 of the Federal Rules of Criminal Procedure,⁴⁷ which require prosecutors to provide exculpatory and other discovery to criminal defendants. Even so, why Justice Department prosecutors must turn over information from the files of intelligence agencies is not obvious on the face of the rules. The answer comes from the Justice Department's broad view of which

Al Qaeda training manual, *Military Studies in the Jihad Against the Tyrants*, which provides instructions on collecting intelligence, counter-interrogation techniques, and means of communication during detention); John T. Nason, *Conducting Surveillance Operations*, F.B.I. LAW ENFORCEMENT BULL., May 1, 2004, vol. 73, iss. 5, at 5, available at 2004 WL 69837618 (noting that "as part of Al-Qaeda specialized training, operatives are instructed to follow meticulous operational security. Tactics include conducting dry runs prior to becoming operational, using secondary roads and public transportation to flush out surveillance, and employing prearranged signals to communicate the absence or presence of surveillance to other Al-Qaeda members"); Press Briefing, Judge Albert Gonzales et al., White House Counsel (June 22, 2004), available at www.whitehouse.gov/news/releases/2004/06/print/20040622-14.html (stating that many of the detainees have been trained in counter-interrogation techniques).

45. See, e.g., 9/11 REPORT, *supra* note 1, at 146 ("[a]ssessing the truth of statements by these witnesses—sworn enemies of the United States—is challenging"); see also *id.* at 488 n.4 (calling claims made by Khalid Sheikh Mohammed that he contemplated assassinating Rabbi Meir Kahane when Kahane lectured in Greensboro, North Carolina, "uncorroborated" and "mere bravado") (citing INTELLIGENCE REPORT, *Interrogation of KSM*, July 12, 2003); *National Commission on Terrorist Attacks Upon the U.S., 12th Public Hearing*, (June 16, 2004), available at http://www.9-11commission.gov/archive/hearing12/9-11Commission_Hearing_2004-06-16.htm (commenting that Khalid Sheikh Mohammed, providing many of the details described in the 9/11 Report, may be a source of disinformation).

46. 373 U.S. 83, 87 (1963) (holding that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

47. FED. R. CRIM. P. 16(a) (prescribing what the government must disclose to a defendant, such as the defendant's own statement if the statement is in "the government's possession, custody, or control," as well as photographs, documents or books if they are "within the government's possession, custody, or control").

agencies fall within the definition of “government.”⁴⁸ The criminal discovery rules require compliance from the government, not the Justice Department.⁴⁹ On some cases, the Justice Department has determined that other agencies, such as the Central Intelligence Agency or the National Security Agency, are so “aligned” with the prosecution through the sharing of information and personnel that prosecutors have a duty to search the files of those other agencies, in addition to searching their own files, for information that is responsive to defense requests and defense rights.⁵⁰ The classic example for alignment is an espionage prosecution, say, of Aldrich Ames.⁵¹ Yet the Justice Department has also seen alignments in narcotics cases (e.g., the prosecution of the former Panamanian leader, Manuel Noriega) and in most terrorism cases from the “shoe bomber” Richard Reid to John Walker Lindh.⁵²

Al Qaeda scours our media for clues about refining their tradecraft. Indeed it is reported that Osama Bin Laden stopped using his cell phones after a newspaper article appeared in which someone was too open about the United States Government’s ability to monitor Bin Laden’s conversations.⁵³ An organization

48. See *id.* (using the phrase “the *government* must disclose”) (emphasis added).

49. *Id.*

50. For a discussion of alignment, see, e.g., Jonathan M. Fredman, *Intelligence Agencies, Law Enforcement, and the Prosecution Team*, 16 YALE L. & POL’Y REV. 331, 347–49 (1998) (asserting that although alignment issues commonly arise in the area of international terrorism—where intelligence and law enforcement overlap—neither Congress nor the courts have yet to describe precise boundaries of disclosure obligations under *Brady*, the Jencks Act (18 U.S.C. § 3500 (2001)), and Rule 16). Within the Justice Department, the Counter-Espionage Section, formerly called the Internal Security Section, is viewed as the one of the chief purveyors of a broad view of alignment.

51. For further discussion of Aldrich Ames see PETE EARLEY, *CONFESSIONS OF A SPY: THE REAL STORY OF ALDRICH AMES* 332 (1997).

52. See *United States v. Noriega*, 117 F.3d 1206, 1210 (11th Cir. 1997) (General Manuel Noriega was convicted in a jury trial and sentenced to consecutive imprisonment terms of twenty, fifteen, and five years); see *United States v. Lindh*, 227 F. Supp. 2d 565, 566 (E.D. Va. Oct. 4, 2002) (John Walker Lindh pled guilty to supplying services to the Taliban and carrying an explosive during the commission of a felony. Lindh was sentenced to 20 years in prison); see *United States v. Reid*, 369 F.3d 619, 620 (1st Cir. 2004) (Richard Reid pled guilty to eight terrorism-related offenses and was sentenced to life in prison).

53. See, e.g., Paul Haven, *And He Never Comes Up for Air. Osama Bin Laden Has Adopted a Low-Tech Approach, Using Pen and Ink Instead of Cell-Phones and Satellites, Making Him Just about Impossible to Trace*, ST. PAUL PIONEER PRESS, Aug. 15, 2004, at 4A (noting that Bin Laden has resorted to conveying messages via letter to remain undetectable by the intelligence community); Michael Hirsh & John Barry, *The*

that is crafty and evil enough to turn our planes back on us would only have to surf the Internet for a few minutes to come up with some of the ideas outlined in this article. Further, if Al Qaeda wanted to bury the United States Government in paper they might file a series of Freedom of Information Act (FOIA)⁵⁴ requests through front persons and front organizations for access to official documents.

Almost surely, there is nothing in place in the discovery process that allows prosecutors to ferret out false information from detainees. Neither the prosecutors nor the court has had direct access to the unnamed detainees.⁵⁵ The prosecutors and the court may have been told the names of the detainees in confidence, but

Hunt Heats Up; the Man in Charge of Catching Osama Bin Laden 'Can Drive a Knife through your Ribs in a Nanosecond.' *Inside the Search*, NEWSWEEK, Mar. 15, 2004, at 46, available at 2004 WL 62584640 (reporting that Bin Laden no longer uses electronic means of communication).

54. By my reading, FOIA puts very few limits on who can make requests for official information. See 5 U.S.C. § 552 (2001). For discussion of FOIA, see, e.g., Themes Karalis, *Foreign Policy and Separation of Powers Jurisprudence: Executive Orders Regarding Export Administration Act Extension in Times of Lapse as a Political Question*, 12 CARDOZO J. INT'L & COMP. L. 109, 110–21 (2004) (noting the historical development, purposes, and exemptions of FOIA); Keith Anderson, Note, *Is There Still a "Sound Legal Basis?": The Freedom of Information Act in the Post-9/11 World*, 64 OHIO ST. L. J. 1605, 1605 (2003) (arguing that "courts should defer to the decisions of law enforcement agencies to withhold information requests under FOIA to promote greater homeland protection").

55. Judge Brinkema denied Moussaoui's motions for pretrial access and the trial appearance of unnamed detainees and ordered that the "United States make [undisclosed persons] available for trial testimony in the form of a videotaped deposition pursuant to Fed. R. Crim. P. 15 under [undisclosed] conditions." See Order, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. filed Jan. 31, 2002) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/68180/1.pdf>. However, the prosecution refused to comply with the court order and offered to provide Moussaoui with mere written summations of statements made by the detainees to government interrogators. *United States v. Moussaoui*, No. CR. 01-455-A, 2003 WL 21277161, at *1 (E.D. Va. May 15, 2003). As a result of this blatant refusal to comply, Judge Brinkema sanctioned the prosecution by precluding it from seeking the death penalty or "making any argument, or offering any evidence, suggesting that [Moussaoui] had any involvement in, or knowledge of, the September 11 attacks." *United States v. Moussaoui*, 282 F. Supp. 2d 480, 487 (E.D. Va. 2003). On appeal, the Fourth Circuit vacated the sanctions imposed on the government and further held that although the government's currently proposed substitutions for detainees' deposition were inadequate, some form of redacted written summaries of detainees' testimony would be sufficient—thereby evading the manifest security risk posed by direct and/or videotaped deposition testimony without contravening the Sixth Amendment. *United States v. Moussaoui*, 382 F.3d 453, 479, 482 (4th Cir. 2004).

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not where they were being held.⁵⁶ The prosecutors and the court seem to be relying on cables or summaries of the interrogations, possibly done by American interrogators from various U.S. agencies, or possibly done with the assistance of foreign officials.⁵⁷ The interrogators of the detainees do not answer to the prosecutors and do not share their training, their outlook, or their mission. As much as it has become fashionable to speak about cooperation between law enforcement and intelligence agencies, about breaking down the stovepipes, about a national intelligence czar, there are still many areas of separation and disconnect. Even the 9/11 Commission, which was able to convince the Government to acknowledge the names of some Al Qaeda detainees, was not allowed direct access to these detainees.⁵⁸ These aggressive interrogations are the keys to the Bush Administration's crown jewels.

In the Moussaoui case, the Justice Department prosecutors, assisted by teams from the Counter-Terrorism Section at the Criminal Division, have spent hundreds of hours reviewing thousands of documents at several U.S. agencies to comply with their view of discovery obligations. Much of the back and forth between Judge Brinkema in the district court and the judges at the Fourth Circuit Court of Appeals has related to defining the

56. In covering hearings in the Moussaoui case, the media have been diligent in determining which high-value detainees Moussaoui wants access to and where they are located. At times, this diligence simply applies to filling in blanks in the redacted filings. See Order, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. Jan. 31, 2003) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/68180/1.pdf> (stating that “defense motions [redacted] are DENIED to the extent that they request pretrial access to [redacted] DENIED to the extent the motions seek to compel the trial appearances of [redacted] and GRANTED to the extent that they seek to compel the trial appearances of [redacted]”).

57. See *United States v. Moussaoui*, 382 F.3d 453, 460–62 n.14 (4th Cir. 2004) (noting that the prosecution team does not receive reports from the intelligence community which are specifically tailored to the Moussaoui prosecution; rather, the reports merely contain information that has general foreign intelligence value).

58. See David Johnston & Don Van Natta Jr., *Threats & Responses: The Interrogations; Account of Plot Sets Off Debate Over Credibility*, N.Y. TIMES, June 17, 2004, at A1 (reporting that the “[9/11] commission staff members . . . did not have direct access to any detainee and had based their account on intelligence reports drawn from the interrogations”); J. Scott Orr, *9/11 Panel Sends Questions to Captured Al Qaeda Terrorists*, STAR-LEDGER (Newark, NJ), May 12, 2004, at 9 (noting that the 9/11 Commission was merely allowed to pose questions to detainees, rather than have direct access).

contours of Moussaoui's right of access to detainees whose names the U.S. Government has not even acknowledged. This access derives from discovery rules, Fifth Amendment due process protections, and Sixth Amendment trial rights. So armed, Moussaoui's lawyers have been somewhat successful in convincing the court that Moussaoui has some right to the classified information in the case.⁵⁹ This right applies to both the guilt and penalty phases of the trial.⁶⁰

In several opinions, Judge Brinkema has noted the acute importance of Moussaoui's right to information from the detainees since the Government has made this a death penalty case.⁶¹ Further, Judge Brinkema has suggested that if the Government would like to protect classified information by cutting corners on legal process, it should do so in a different forum.⁶² Although the judge cannot ensure the integrity of the legal process in all places, namely military tribunals, she can make sure that Article III courts keep to the old standards.⁶³ Even the opinions from the conservative Fourth Circuit have only questioned the scope of

59. In the current posture of the case, Moussaoui is said to have a right to classified summaries of exculpatory information that the detainees have given, but not a right to present questions directly to the detainees themselves. *See* United States v. Moussaoui, 382 F.3d 453, 479 (4th Cir. 2004) (holding that redacted summaries are a sufficient proxy for detainees' deposition testimony).

60. *Id.*

61. *See, e.g.,* United States v. Moussaoui, No. CR. 01-455-A, 2003 WL 21263699, at *5 (E.D. Va. Mar. 10, 2003) (stating that Moussaoui has a compelling right to receive a fair trial); United States v. Moussaoui, 282 F. Supp. 2d 480, 486-87 (E.D. Va. 2003) (noting that Moussaoui's access to detainees is necessary to procure reliable evidence, which is indispensable to the "determination that death is the appropriate punishment") (citation omitted); United States v. Moussaoui, 282 F. Supp. 2d at 482 (stating that "the United States may not maintain this capital prosecution while simultaneously refusing to produce witnesses who could, at minimum, help [Moussaoui] avoid a sentence of death") (citations omitted)).

62. United States v. Moussaoui, No. CR 01-455-A, 2003 WL 21263699, at *6 (E.D. Va. filed Dec. 11, 2001) ("To the extent that the United States seeks a categorical, "wartime" exception to the Sixth Amendment, it should *reconsider* whether the civilian criminal courts are the appropriate forum in which to prosecute alleged terrorists captured in the context of an ongoing war."); *see also* Associated Press, *Judge Jibes Feds in Moussaoui Trial* (Apr. 4, 2003), at <http://www.cbsnews.com/stories/2003/04/24/attack/main550876.shtml> (discussing Judge Brinkema's concern over the extent to which the United States has classified court documents).

63. This notion of keeping the existing constitutional system free from the taints of emergency accommodations has support at more theoretical levels. *See, e.g.,* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1047-49 (2004) (proposing that a special grant of emergency powers to the Executive be subject to increasing super-majorities in the Congress).

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Moussaoui's constitutional rights, not their existence.⁶⁴ In tandem with the district court, the Fourth Circuit's debate has been focused on what form the discovery and the evidence should take, with the Government pushing for watered down versions of detainee statements when it has not been able to convince the Court that Moussaoui has no right to that classified information.

The Justice Department has provided Moussaoui's defense team, but not Moussaoui himself, with classified discovery. These defense lawyers have security clearances that require them to handle the classified information with great care, and these defense lawyers have signed agreements with the United States promising not to share this information with Moussaoui.

The Classified Information Procedures Act (CIPA)⁶⁵ does not solve the problem of greymail that lurks behind the Moussaoui case.⁶⁶ Greymail is the process by which the prosecution is forced to drop charges or to limit charges because of the defendant's use of classified information or the threat of using classified information.⁶⁷ CIPA merely ensures that these problems are dealt with pre-trial rather than in the middle of trial.⁶⁸ Under CIPA, it is very unlikely that the Court would require the Government to turn over raw intelligence cables or raw intercepts.⁶⁹ Under section 3, the prosecutors have had the Court enter protective orders for handling classified information in the Moussaoui case.⁷⁰ Under section 4, concerning classified discovery, and under section 6, concerning the use of classified information at trial, CIPA gives the Government the right to propose summaries and substitutions for the classified information.⁷¹ A common method of substitution,

64. See *United States v. Moussaoui*, 382 F.3d 453, 482 (4th Cir. 2004) ("Because the Government will not allow Moussaoui to have contact with the witnesses, we must provide a remedy adequate to protect Moussaoui's constitutional rights."); see also *Hamdi v. Rumsfeld*, 316 F.3d 450, 464-75 (4th Cir. 2003).

65. 18 U.S.C. app. 3 (2001).

66. See Cameron Stracher, *Eyes Tied Shut: Litigating for Access under CIPA in the Government's "War on Terror,"* 48 N.Y.L. SCH. L. REV. 173 (2004) (containing a discussion of CIPA and graymail in the Moussaoui context).

67. *United States v. Lee*, 90 F. Supp. 2d 1324, 1328 & n. 5 (D.N.M. 2000).

68. *Id.*

69. 18 U.S.C. app. 3 (2001).

70. *Id.*

71. See 18 U.S.C. app. 3 § 4.

The court . . . may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal

familiar to many through documents that are made public in response to FOIA requests or through government declassification programs, is redactions of the original sources. Yet, even after summaries and substitutions, if the U.S. Government cannot bear the pain of having to turn over classified discovery to a terrorist, the only remedy is to dismiss the prosecution.⁷²

At least in the criminal realm, the rights of defendants trump the government's need for secrecy.⁷³ This is the specter that has haunted the Moussaoui prosecutors from the beginning of their case, the leaks and rumors from officials at the White House and the Defense Department who have said that whenever it becomes clear that the price is too high for dealing with Moussaoui in an Article III court, he will be swept over to the military system.⁷⁴ There, a defendant's rights are more limited and the ability to protect classified information more ample.⁷⁵

Although the back and forth between the Rumsfelds and the Ashcrofts is well-suited to Washington parlor games, the thesis of this article is that reasonable people have known all along that Moussaoui belongs in military detention. It is time for those people to come out of their closets. Under a military paradigm, Moussaoui would be interrogated and his computer and belongings searched without any hand-wringing. Wherever Moussaoui is detained, he may not be tortured.⁷⁶ The treatment

Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove.

Id.; see also 18 U.S.C. app. 3 § 6(c)(1)(a)-(b) (“[T]he United States may move that . . . the court order the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove or the substitution for such classified information of a summary of the specific classified information.”).

72. This dismissal requires the Attorney General's approval. See 18 U.S.C. app. 3 § 12.

73. *Lee*, 90 F.Supp at 1328 n.5 (noting that a criminal defendant has a “fundamental right” to cross examine witnesses for the prosecution); see also *United States v. Reynolds*, 345 U.S. 1, 12 (1953) (stating that it is “unconscionable” to invoke a government privilege in order to deprive the accused anything which might be material to his or her defense).

74. CBS, *Military Tribunal for 6 Suspects* (July 3, 2003), at <http://www.cbsnews.com/stories/2003/07/18/attack/main563920.shtml>.

75. See MIL. R. EVID. 505(a) in 2 STEPHEN A. SALTZBURG ET AL., *MILITARY RULES OF EVIDENCE MANUAL* 5-52 (5th ed. 2003) (“Classified information is privileged from disclosure if disclosure would be detrimental to the national security.”).

76. Torture violates domestic law and international law. See *United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or*

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that prisoners received at Abu Gharib prison in Iraq is the work of hoods and hooligans. It is not the work of intelligence professionals who, through skill, patience, and often good luck, pry information out of people to disrupt terrorist plots and to protect the innocent.

B. Faretta Issues

At one stage during the Moussaoui saga, Judge Brinkema allowed Moussaoui to represent himself. She held lengthy hearings on this issue in which she strived to meet the Constitutional standards under *Faretta v. California*.⁷⁷ As Moussaoui learned, however, the right to proceed pro se is not absolute, and, in response to his long pattern of antics and abuse, Judge Brinkema revoked Moussaoui's right to represent himself.⁷⁸

Moussaoui probably does not realize all the opportunities he had to use the criminal system back against our Government. Otherwise, he would have been able to put more pressure on the prosecution by keeping his mouth shut and insisting that the classified discovery be shared directly with him. As much as possible, he would have reduced the role of "cleared" standby counsel as intermediaries and repositories of classified information. The intelligence agencies, more narrow in their view of law enforcement-intelligence alignment, would have been outraged at the possibility of having to share information with someone the Government considers a terrorist.

Punishment, G.A. Res. 39/46, Annex 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), available at <http://www1.umn.edu/humanrts/instree/h2catoc.htm>; see 18 U.S.C. §§ 2340–2340A (2001). This Act went into effect October 26, 2001, and contains prohibitions against torture, as well as setting serious penalties for any violations. *Id.*; see also Memorandum from Daniel Levin, Assistant Attorney General, Department of Justice, Office of Legal Counsel, to James B. Comey, Deputy Attorney General (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/dagmemo.pdf>. This memo, known as the "Torture Memo," contains a lengthy analysis of 18 U.S.C. §§ 2340–2340A, the use of torture, and further clarification and analysis of the phrase "severe pain." *Id.*

77. 422 U.S. 806 (1975). *Faretta* is the leading case for the right to proceed *pro se*.

78. See *id.* at 834 n.46 ("[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."); Order, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. filed Nov. 11, 2003) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/694120/0.pdf> ("[The defendant's] pleadings include contemptuous language that would never be tolerated from an attorney, and will no longer be tolerated from this defendant.").

With American lawyers on Moussaoui's defense team, there is some room for compromises between the Justice Department and the intelligence agencies about what is turned over to the defense. But if Moussaoui were on his own, wearing both the hats of defendant and of defense counsel, the room for compromise would be much smaller. Again, as a part of their tradecraft, Al Qaeda might instruct operatives to maintain their composure and to insist on self-representation if they find themselves as criminal defendants in our courts. Again, such perverse scenarios tend to exist when terrorists are viewed as criminals with broad rights to discovery from the Government, rather than combatants with limited procedural rights before military tribunals.

C. *Death Penalty Complications*

For the Government to seek the death penalty in Moussaoui's case, no matter the forum, creates complications. Yet these complications would not be as great in a military tribunal because a combatant is entitled to fewer procedural rights before a military tribunal.⁷⁹ That is another reason to move Moussaoui to a military tribunal.

Beyond the details of the Moussaoui case, some broad observations about the death penalty in terrorism cases are appropriate. When a statement is repeated enough, whether true or not, it often takes on the appearance of truth. Terrorists, it is said, are not deterred by the prospect of penalties in the criminal system.⁸⁰ Terrorists, who are recruited for suicide missions, it is also said, are not deterred by the prospect of a death penalty.⁸¹ These statements, however, may not shine true on closer examination.

It is quite possible that a terrorist recruit may not flinch at the prospect of death in a successful martyr mission. The terrorist's success will often be consistent with posters and videos and other propaganda that were used to recruit him, with selected quotations from the Koran, and with distorted visions of martyrs who rise to paradise covered in flowers, banners, and praise.⁸² The would-be

79. See *supra* text accompanying note 61.

80. Susan M. McGarvey, *Missed Opportunity? The Affirmation of the Death Penalty in the AEDPA: Extradition Scenario*, 24 J. LEGIS. 99, 105 (1998).

81. Paul Butler, *Forward: Terrorism and Unilateralism: Lessons from and for, Criminal Law*, 93 J. CRIM. L. & CRIMINOLOGY 1, 14 (2002).

82. See Jack Kelley, *The Secret World of Suicide Bombers*, USA TODAY, Jun., 26, 2001, at 01A, available at 2001 WLNR 3776830.

martyr may not be thoroughly consistent or logical, but he is usually not so far gone that he does not recognize that his enemies do not share his values and may punish him if caught. The would-be martyr may hesitate at the thought of languishing in the infidel's prisons or being executed in defeat by the infidel's sword.⁸³ His defeat might then be something to hide or to explain, both to himself and to his community. He may experience shame.

Such observations are not intended to open up a full debate about the propriety of the death penalty.⁸⁴ By putting aside a moral, ethical, and philosophical debate, this article, in an agnostic mode, modestly assumes that if anyone deserves to be executed it is the terrorist who kills or aims to kill innocents. The terrorist's attack is a fundamental attack on civilization, a fundamental breach of our most basic norms.⁸⁵ If Moussaoui, for example, would read his own holy book carefully he would discover a passage that indicates that he who kills one person kills all of humanity.⁸⁶ There is the clear condemnation of his evil thoughts and evil deeds.

Professor Thomas Michael McDonnell, in contrast to this article, argues that the death penalty is counter-productive in combating terrorism because this harsh punishment creates more hatred for the United States and, in turn, more terrorist recruits against us.⁸⁷ Unlike Professor McDonnell, this article is most concerned with the initial ripples from our use of the death penalty in terrorism cases, that is, the effects on Justice Department investigations and prosecutions. Whether the American use of the

83. *See id.*

84. *See* Richard C. Dieter, *International Influence on the Death Penalty in the U.S.*, in 80 FOREIGN SERVICE J. 31 (Steven Alan Honley ed., Oct. 2003), available at <http://www.deathpenaltyinfo.org/article.php?scid=17&did=806>; Norman L. Greene et al., *Capital Punishment in the Age of Terrorism*, 41 CATH. LAW. 187 (2002); Senator Arlen Specter, *The Time Has Come for a Terrorist Death Penalty Law*, 95 DICK. L. REV. 739 (1991).

85. The disease of terrorism was diagnosed at least by the 19th century. For a literary diagnosis of the symptoms and the effects of such nihilism, we can refer to Fyodor Dostoyevsky's works, particularly *Crime and Punishment* and *The Devils*. FYODOR DOSTOYEVSKY, CRIME AND PUNISHMENT (Constance Garnett, trans., P.F. Collier & Son) (1917); FYODOR DOSTOEVSKY, THE DEVILS (Constance Garnett, trans., St. Petersburg) (1873).

86. *The Dinner Table* 5:32 (The Qur'an). By now, it should be clear that I am one of those who believe that Al Qaeda and other Islamic fanatics have hijacked a great religion.

87. *See generally* Thomas Michael McDonnell, *The Death Penalty – An Obstacle to the “War against Terrorism”?*, 37 VAND. J. TRANSNAT'L L. 353, 389–406 (Mar. 2004) (discussing policy considerations and repercussions of executing Al Qaeda members).

death penalty creates more recruits for Al Qaeda or creates more animosity against us in the “Muslim World” is not clear. The analysis of these outer ripples often depends on impressions as much as on data. Further, the notion of a unified Muslim World can easily be deconstructed.⁸⁸ After all, the death penalty is not contrary to Islam; the Muslim World, if one exists, is familiar with the death penalty in countries that have both Islamic and non-Islamic governments.⁸⁹

A full discussion concerning retribution and deterrence, common arguments in favor of the death penalty, is also beyond the scope of this article. To be sure, a terrorist may not be deterred by the death penalty in the same way that murderers, kidnappers, or other potential criminals are. The terrorist has a political and religious aspect to his crime that does not usually exist in other violent criminals.⁹⁰ But these observations are not enough to dismiss any effect from the death penalty on the grounds of retribution and deterrence. To develop the notion of just retribution requires a philosophical analysis that has been left aside. The general deterrence from the death penalty can also be questioned, but the specific deterrence of executing a terrorist rather than incarcerating him is clear: The executed terrorist, who cannot escape from prison, is obviously less of a threat to us than a terrorist who is sentenced to life in prison.

Even so, a more instrumental attack on the death penalty in terrorism cases can be made. The costs of the death penalty, whether implemented by a federal district court or a military tribunal, may not be worth the benefits in counter-terrorism policy.

The Justice Department’s decision to seek the death penalty in the Moussaoui case was political.⁹¹ The American public was

88. In fairness, Professor McDonnell does recognize the limits of the data. In the absence of facts, he adopts the reasonable position of searching for good analogies, for example, the British policies in dealing with terrorism in Northern Ireland. These analogies, of course, only go as far as the factual similarities between the two situations being compared. *See, e.g., id.* at 401–10 (discussing making martyrs out of the executed).

89. Saudi Arabia, a U.S. ally, and Iran, part of President Bush’s “axis of evil,” are examples of Islamic governments with the death penalty. Amnesty International, at <http://web.amnesty.org/pages/deathpenalty-countries-eng> (last visited March 29, 2005). Jordan, a U.S. ally, and Libya, a repentant U.S. foe, are examples of secular governments in the Muslim World with the death penalty. *Id.*

90. *See* Kelley, *supra* note 82.

91. A political decision, per se, is not negative. A political decision is negative to the extent that it does not contribute to good strategy.

outraged after the attacks on our soil. For many, the spirit of the mob was stirred up; they wanted someone to pay for these horrors, and, in Old Testament tradition, they expected blood to be repaid with blood. The families of the victims have been an effective lobby on the Government, pushing for inquiries into the intelligence failures and putting pressure on the Justice Department to exact the ultimate price from the “evildoers.”⁹² Attorney General Ashcroft, already a broad supporter of the death penalty, probably did not need any prodding. As the nation’s symbolic executioner, he was pleased to fulfill these bloody demands.⁹³

In our politics, once a public official promises something, it is difficult for him to back off that promise. The Justice Department seeks Moussaoui’s conviction and execution, and nothing less than that may satisfy many parts of a bloodthirsty American public. The decision to seek the death penalty has come at a cost, not to the Attorney General, but to the line prosecutors that must deliver the conviction and the execution. As the prosecutors know, the death penalty creates its own complications in a criminal case. For this reason, after the Moussaoui case became eligible for the death penalty, another prosecutor, David Novak, was added to the government’s team because of his experience in navigating through the procedural obstacles.⁹⁴ Without the death penalty, one fewer prosecutor would be needed at counsel’s table and many other problems would be avoided.

Part of the reason that Judge Brinkema has been so broad in her definition of what must be turned over to Moussaoui in discovery is the looming threat of the death penalty over him.⁹⁵

92. See David Firestone & James Risen, *Threats and Responses: The Hearing; White House, In Shift, Backs Inquiry on 9/11*, N.Y. TIMES, Sept. 21, 2002, at A1, available at 2002 WLNR 4068133; Christine Haughney, *9/11 Survivors Give Panel a Wish List; Review and Future Remedies Urged*, WASH. POST, Apr. 1, 2003, at A10, available at 2003 WL 17424833; Tasha Robertson, *OK for 9/11 Probe Followed Families’ Steadfast Lobbying*, BOSTON GLOBE, Sept. 27, 2002, at A1, available at 2002 WL 4151231; Pat Wingert, *Bonds of Steel; Keeping Faith: The Families of 9/11 Victims are a Mighty Force. Ask the White House, the Commission – or Anyone Else in Their Way*, NEWSWEEK, Apr. 5, 2004, at 30, available at 2004 WLNR 3639708.

93. Attorney General Transcript, News Conference, *DOJ to Seek Death Penalty Against Moussaoui* (Mar. 28, 2002), at <http://www.usdoj.gov/ag/speeches/2002/032802newsconferenceaginmiamifloridamoussaoui.htm>.

94. This was made clear to me in conversations with both Rob Spencer and David Novak in 2004.

95. Mem. Op., *United States v. Moussaui*, 282 F. Supp. 2d 480 (E.D. Va. filed Mar. 10, 2003) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts/1:01-cr-00455/docs/68354/1.pdf>.

When death is a possibility, the stakes are higher, and the courts err on the side of disclosure.⁹⁶ That is how it should be. The Justice Department accepts this. The American public should know this. If the death penalty is not part of the case, the Justice Department would be in a much better position to convince the courts that the government, for national security reasons, does not have to turn over classified discovery. And even for the classified items that must be turned over, the Justice Department could make stronger arguments for broad redactions and general summaries.

The United States is one of few developed countries that still uses the death penalty.⁹⁷ Most of our allies in Europe have banned this penalty.⁹⁸ In an international struggle against terrorism, the United States needs cooperation from all parts of the globe. This cooperation takes the direct form of contributing troops to campaigns in Afghanistan but also takes the subtle form of passing on leads and intelligence from the law enforcement agencies and intelligence services. For example, in investigating the September 11 attacks, we asked for and received assistance from France, Germany, and Spain, countries that do not permit the death penalty.⁹⁹ In their negotiations with the Justice Department, the French, German, and Spanish governments put conditions on the information they shared with us in the Moussaoui case once they learned that we were seeking his execution.¹⁰⁰ Further, the French, German, and Spanish governments and other governments may self-filter, not even telling us about useful information they have in their files because of their opposition to our use of the death penalty. These are not theoretical possibilities. These are facts that contradict our counter-terrorism policies.

A complication for this analysis is the possibility that our allies are posturing on the death penalty. For their public, they may be

96. *See id.*

97. *The Death Penalty Worldwide*, at <http://www.infoplease.com/ipa/A0777460.html> (last visited Apr. 15, 2005). Some other countries that still use the death penalty are Bahrain, Lebanon, Oman, United Arab Emirates, and Yemen, putting us in strange company. *Id.*

98. *Id.* France, Germany, the United Kingdom, and Spain have all outlawed the death penalty. *Id.*

99. *See* 9/11 REPORT, *supra* note 1, at 274 (French); *see id.* at 494–99 nn.64–132 (German); *see id.* at 530 n.145 (Spanish).

100. *See* Seymour M. Hersh, *The Twentieth Man: Has the Justice Department Mishandled the Case Against Zacarias Moussaoui?*, THE NEW YORKER, Sept. 30, 2002, at 56; Michael Isikoff, et al., *Should This Man Die?*, NEWSWEEK, Apr. 8, 2002, at 30, available at 2002 WLNR 8854294.

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open about their opposition to the death penalty. In their private meetings with U.S. authorities, say with a political officer in the U.S. embassy in Spain or with an FBI legal attaché in Paris, they may be very cooperative and less ideological about the death penalty. For those without access to classified information and for those who once had security clearances but are not allowed to draw on their prior access because of continuing agreements on protecting classified information, the best we can do is guess what lies in the wilderness of mirrors.¹⁰¹ In crass and simple terms, is Franco-American cooperation on counter-terrorism at all affected by the possibility of Moussaoui's execution? Yes, I argue, to a limited extent. But when France, a Western democracy, more secular than the United States, is in the same existential bind as us in a clash of civilizations with Islamic extremists, does the plight of one French citizen of Moroccan descent matter as much to the French Government as the two-way exchanges of information and personnel that are necessary to both American and French security?¹⁰² Effective intelligence services do not function in isolation. Further, our allies' opposition to our use of the death penalty may limit their extraditions of individuals to United States jurisdiction, but may not limit other forms of their cooperation.

101. Because of agreements I made upon entering the Central Intelligence Agency, I submitted this article for "pre-publication review" with so-called classification experts there. Even so, the views in this article are mine, not theirs.

102. Although tempted, I am not saying that the French are more two-faced than Americans. I do note that with a higher percentage of Muslims to their general population than the United States, the French seem more concerned about a Muslim backlash in their country. Between 5 and 10% of the population in France is Muslim, compared to 1% in the United States. CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK*, available at <http://www.cia.gov/cia/publications/factbook/fields/2122.html> (last updated Feb. 10, 2005). In a move that many French citizens supported as a defense of the secular values of the French Republic, the French Government has prohibited the veil and other items of religious clothing in the public schools. This led to demonstrations by Muslims in France and to angry statements from the Islamic Republic of Iran, among other governments in the Muslim World, and to further threats from Usama Bin Laden and other members of Al Qaeda. Caroline Faraj, *Bin Laden Deputy Slams Scarf Ban* (Feb. 24, 2004), at <http://cnn.com/2004/WORLD/meast/02/24/qaeda.headscarves/>; BBC News, *Iran Urges French Scarf Rethink* (Dec. 23, 2003), at http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/3343119.stm; Elaine Sciolino, *French Muslims Protest Rule Against Scarves*, N.Y. TIMES, Jan. 18, 2004, at 110, available at 2004 WLNR 5812462. The ban has also been used as leverage by hostage takers in Iraq. Two journalists held captive urged the French government to repeal the ban in exchange for their lives. Elaine Sciolino, *Hostages Urge France to Repeal its Scarf Ban*, N.Y. TIMES, Aug. 31, 2004, at A8, available at 2004 WLNR 5532754.

This cooperation, in short, is not all or nothing. Finally, it is useful to remember that we did not need French permission to arrest Moussaoui, and the French Government has not been too vocal in its demands that we return him to his French homeland so that French authorities can decide what to do with him.¹⁰³

The death penalty, whether sought in a federal district court or in a military tribunal, is counter-productive when the lost benefits of international cooperation outweigh any deterrence and retribution benefits from seeking the death penalty.¹⁰⁴ That is clear. Rather than play to public perceptions, good leaders would explain these realities to the American public and to the families who lost loved ones in the September 11 attacks.

D. *The Costs of Special Protection*

Wherever Moussaoui is housed, he should be isolated from Al Qaeda members, inside or outside the facility, to prevent his escape and to prevent the free flow of information to and from him. Therefore, another advantage of a military tribunal in Moussaoui's case is that he can be more effectively isolated in a military facility than in criminal detention. Military bases, more so than detention centers and prisons, are designed and managed to combat military threats.¹⁰⁵ "Force protection," in short, is more the military's specialty than law enforcement's.¹⁰⁶

103. By contrast, some Governments have been very vocal about having their citizens released from Guantanamo Bay. See Neil A. Lewis, *Bowing to Ally, Bush to Rethink Tribunals for British Subjects*, N.Y. TIMES, July 19, 2003, at A3, available at 2003 WLNR 5663871 (discussing the reconsideration of cases involving Australian and British detainees); Associated Press, *Saudis Seek Control of Saudi Detainees*, Jan. 29, 2002, at <http://www.dailyherald.com/special/waronterrorism/story.asp?intID=3728559> (discussing the urging by Saudi Arabia that Saudi detainees be turned over for questioning at home).

104. In my calculus, I assume that the philosophical arguments about the death penalty even themselves out so that the calculations can be limited to instrumental effects. I do recognize the inherent limits to these data and calculations, such that I, too, am engaged in impressionism as much as science.

105. See Department of Defense Directive 2310.1, August 18, 1994, available at http://www.dtic.mil/whs/directives/corres/pdf/d23101_081894/d23101p.pdf (persons captured or detained by the U.S. Military "shall normally be handed over for safeguarding to the U.S. Army Police, or to detainee collecting points or other holding facilities operated by U.S. Military police").

106. See Commander Gregory P. Noone, et al., *Prisoners of War in the 21st Century: Issues in Modern Warfare*, 50 NAV. L. REV. 1, 10-11 (2004). Under the Geneva Conventions, enemy prisoners must be removed from the battlefield as soon as possible and protected at all times from physical and mental harm. *Id.* Further, enemy prisoners must be held in a place sufficiently outside the combat

At the Alexandria Detention Center, Moussaoui is subject to Special Administrative Measures (SAMS), which are authorized in the regulations of the Bureau of Prisons.¹⁰⁷ These SAMS, which have also been placed on espionage defendants in the past, severely restrict Moussaoui's interactions with other prisoners, with his defense counsel, and with the rest of the world.¹⁰⁸ In effect, he lives in a bubble within a bubble. The public is not able to determine the specific costs from these extra security measures, but it is safe to say that Moussaoui is costing the taxpayers far more than the typical criminal defendant who is housed in the general population of pre-trial detainees. The restrictions on the flow of documents and visitors are designed, in part, to prevent Moussaoui from leaking any classified information to which he obtains access, properly or improperly, and to prevent messages from being passed to and from other members of his terrorist group.¹⁰⁹

Moussaoui's isolation has taken a toll on him.¹¹⁰ He seems much thinner in court than in the photographs taken close to the time of his arrest. Moussaoui's isolation and his repeated statements that his court-appointed lawyers are part of the government plot against him have affected the quality of his defense.¹¹¹ For a flavor of Moussaoui's mental processes, we can

zone of danger. *Id.*

107. 28 C.F.R. § 501.3(a) (2005).

108. *Id.* Special administrative measures may include, but are not limited to, limiting correspondence, visits, interviews with representatives of the news media, and use of the telephone. *Id.*

109. Under the Bureau of Prisons procedures, the special administrative measures may be renewed annually. 28 C.F.R. § 501.3(c) (2005).

110. Earlier in the process, Judge Brinkema determined that Moussaoui was competent to face trial. *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. filed Dec. 11, 2001) (Criminal No. 01-183), at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/DocketSheet.html>. The standard for competency is low, mainly the ability to assist defense counsel, such that it is possible for Moussaoui to suffer from some mental illness while being competent. *See Dusky v. United States*, 362 U.S. 402, 402 (1960) (describing the test for competency as whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him"); *see also Godinez v. Moran*, 509 U.S. 389, 397-400 (1993) (holding that the standard for pleading guilty or waiving the right to counsel is the same as the standard for competency to stand trial). The definitions of mental illness that mental health experts use are quite broad. *See, e.g.,* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, AMERICAN PSYCHIATRIC ASSOCIATION (4th ed., textual rev. 2000).

111. *See* Sam A. Schmidt & Joshua L. Dratel, *Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism*

consult the numerous filings he made while pro se.¹¹² Many of these filings are handwritten, displaying Moussaoui's bizarre sense of humor and a vitriol for almost everyone connected to the case, including Judge Brinkema, the prosecutors, and his defense lawyers.¹¹³ Isolation in a military facility, of course, would also take

Prosecutions, 48 N.Y.L. SCH. L. REV. 69, 75 (2004). Dratel represented one of the defendants in the trial in the Southern District of New York related to the bombings of the U.S. embassies in Kenya and Tanzania. *Id.* at 69. As further proof of the limited circle of lawyers involved in national security cases, one of the embassy bombing prosecutors, Ken Karas, was added to the Moussaoui prosecution team soon after the indictment.

112. See Defendant's Motion, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. filed Aug. 1, 2002) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/67010/0.pdf> (Moussaoui titled the motion: "Motion for a 1st Class Ticket on 747-400 Out of the United States Now!"); Defendant's Motion, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. filed July 3, 2002) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/66590/0.pdf> (Moussaoui titled the motion: "Motion to Have Independent Electronic Surveillance Forensic Expert to Examine and Test a Square Fan 'Mysteriously' Left on My Car"); Defendant's Motion, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. filed July 1, 2002) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/66489/0.pdf> (Moussaoui titled the motion: "Motion to Stop Leonie Brinkema DJ playing Game with My Life"). The Government obtained the right to review these filings before they were made public to ensure that they did not contain secret messages to other members of Moussaoui's terrorist network.

113. See Defendant's Motion, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. filed July 10, 2002) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/66741/1.pdf> (Moussaoui titled the motion: "Motion to Stop the Cynical Comedy, Parody of Justice Directed by DJ Brinkema"). "DJ" is Moussaoui's abbreviation for "death judge," a title he uses often to refer to Judge Brinkema. Defendant's Motion, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. filed July 1, 2003) (Criminal No. 69065), <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/69065/1.pdf>. For a sample attack on the prosecutors, see Defendant's Motion, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. filed July 11, 2003) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/68933/1.pdf> (Moussaoui titled the motion: "Motion to Emergency Strike by the Natural Born Terrorist, ZM, to Have a Dual [sic] Shoot Out with Chief Liar Ashcroft in Lieonie [sic] Court Yard."). And for an attack on Moussaoui's own lawyers, see Defendant's Motion, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. filed May 12, 2003) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/68749/1.pdf> (Moussaoui titled the motion: "Motion to Counter Dirty Insider Dealing by Fat Megalo Dunham for his Chief Pay Persecution Master Ashcroft (a/k/a United Satan Chief Liar) and To Have Fat Megalo Out of 9/11 Circus Trial"). Dunham is chief defense attorney Frank Dunham, who Moussaoui repeatedly refers to as either "fat" or "blood sucker." United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. filed Aug. 7, 2003) (Criminal No. 68876),

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a toll on Moussaoui. The toll on the taxpayer, however, may not be as severe.

E. Taking Away the Soapbox

Another reason to choose a military tribunal over a federal district court is to deprive Moussaoui, as much as constitutional, of a platform for his propaganda. The conflict against Al Qaeda is as much a battle of ideas as a battle of arms. A military tribunal, with strict limits on public access, would put an appropriate muzzle on Moussaoui without taking away his rights to fair process. Otherwise, even without cameras in the courtroom, a trial in federal district court with film crews on the steps of the courthouse and reporters inside would create a media frenzy in which Moussaoui's words of defiance would be replayed and distorted all over the world. This is a soapbox that should be taken away.

F. Material Witness Statute

Another problem with treating Moussaoui as a law enforcement problem rather a military problem¹¹⁴ was that it placed stress on the tools of criminal law. Square pegs were pounded into round holes. If Moussaoui had been promptly transferred to military custody, it would not have been necessary to test—some would argue abuse—the use of a material witness warrant in his case. The material witness problem, of course, was resolved once Moussaoui was indicted on criminal charges.

In the early days after September 11, the Bush Administration had not tested the full contours of the material witness statute for detaining individuals. Since Moussaoui's arrest, it has become clear that an individual can be detained while a grand jury investigation is pending.¹¹⁵ Based on the witness's possible

<http://notablecases.vaed.uscourts/1:01-cr-00455/doc/68876/1.pdf>. All of the above documents are available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/DocketSheet.html>. Moussaoui's court pleadings were so insulting and inflammatory that at one point, Judge Brinkema ordered them sealed, only to remove the ban thirteen days later. Associated Press, *Moussaoui Judge Bars Release of Insults* (Sept. 6, 2002), at http://courttv.com/trials/moussaoui/090602_ap.html.

114. See discussion *supra* Part II.

115. *United States v. Awadallah*, 349 F.3d 42, 49–51 (2d Cir. 2003). The requirement of promptly taking the witness's deposition so he can be released from custody can also be avoided. See *id.* at 62 (concluding that the deposition mechanism is not automatically available for grand jury witnesses detained under section 3144, and that post-deposition release of witnesses is subject to the court's

connection to a crime or possible assistance in solving a crime, a witness can be detained even if the government does not have probable cause—or any evidence—that the witness, himself or herself, has committed a crime.¹¹⁶ It is in this way, as many commentators have noted, that the presumption of innocence and other constitutional rights have been turned on their heads.¹¹⁷

Material witnesses are mainly at the mercy of prosecutors who are trusted to not abuse their discretion. In short, the criminal system expects a prosecutor to issue subpoenas on the basis of good faith instead of pretexts. With the secrecy that cloaks grand jury proceedings, and with judges that are reluctant to probe behind the reasons for grand jury subpoenas, these expectations are based more on faith than on facts. After all, prosecutors can fall into the possessive and incorrect snare of regarding subpoenas as their own, rather than the grand jury's.¹¹⁸ Be that as it may, if the checks on investigative abuses are to be effective, they should focus on the

discretion).

116. 18 U.S.C. § 3144 (2004). The standard is whether “the testimony of a person is material in a criminal proceeding.” *Id.*

117. Much has been written recently about the alleged abuses of this statute to detain terrorism suspects. See, e.g., David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1778 (2004) (asserting that the material witness statute circumvents restrictions—such as judicial review—prescribed in section 412 of the USA PATRIOT Act); Quinn H. Vandenberg, *How can the United States Rectify Its Post-9/11 Stance on Noncitizens' Rights?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 605, 623–25 (2004) (arguing that the material witness statute is abusive because it is vague and neither limits how long a witness can be detained nor dictates whether the government can compel the witness's testimony). In my experience as a federal prosecutor in the Southern District of California, a core use of this statute was to detain illegal aliens so they could testify against the traffickers that brought them from Mexico into the United States. Without their testimony, the cases against the “coyotes” were weaker. These illegal aliens did not need to be detained too long. With the agreement of defense counsel, their testimony could be preserved for trial through a deposition under Rule 15 of the Federal Rules of Criminal Procedure, and they could then be returned to Mexico. On the other hand, many of those who have been held on material witness warrants in terrorism investigations have been held for months, if not years. See Steve Fainaru, *Suspect Held 8 Months Without Seeing Judge*, WASH. POST, June 12, 2002, at A1 (reporting that a Boston cab driver was held in solitary confinement for more than eight months without seeing a judge or receiving assistance of counsel), available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A34822-2002Jun11¬Found=true>; Adam Liptak, *Threats and Responses: The Detainees; For Post-9/11 Material Witness, It Is a Terror of a Different Kind*, N.Y. TIMES, Aug. 19, 2004, at A1, available at 2004 WLNR 5371092 (describing how a material witness was arrested and held for sixteen months without being charged for a crime or even asked to testify).

118. I know this from first hand experience.

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prosecutor's practices rather than the grand jury's.

IV. THE POLITICS OF MOUSSAOUI

It is easy to wonder why, in the face of all these problems and complications, the Moussaoui case remains in federal district court. The reason Moussaoui is still in the criminal system is more about inertia than strategy. During the dangerous and uncertain days after September 11, our officials could be forgiven for not being able to think through all the implications of our counter-terrorism policies. They were reacting to horrible events. More than three years later, the public should be less forgiving with any Administration that still bumbles about in the dark for a cohesive strategy.¹¹⁹ Bush officials may defend themselves, in a classified cloak, by saying that they are keeping our enemies guessing. But it is neither convincing nor right for them to keep most of the American people guessing. The American public and our allies need to be on board in a struggle that may last as long as the Cold War. Part of getting them on board is being precise about the objectives and the means for attaining them. Part of it is being specific in measuring our progress.

In one area of confusion, it is not clear what principles led to placing Jose Padilla in a military brig as opposed to placing John Walker Lindh before a federal court. Both are U.S. citizens. Walker Lindh, the so-called "American Taliban," was captured on a battlefield in Afghanistan.¹²⁰ Padilla, whom the Bush Administration designated as the "dirty bomber,"¹²¹ was captured at Chicago's O'Hare airport.¹²² Did it make a difference that Padilla is a Latino from mean streets, while Walker Lindh is a privileged Caucasian from Marin County? Let's hope not. Why are some of Moussaoui's cohorts in Guantanamo and secret locations while he continues to reside at a federal detention center, part of the criminal system, in Virginia? The time has come for answers. If there are no answers, the time has come to admit the mistakes, to rectify them, and to move on.

119. This is not the place to replay the criticism of the Bush invasion of Iraq as a diversion from the overall goal of eradicating terrorists. My criticism goes far beyond that conflict.

120. *United States v. Lindh*, 227 F. Supp. 2d 565, 568–69 (E.D. Va. 2002).

121. *See Padilla v. Bush*, 233 F. Supp. 2d 564, 572–73 (S.D.N.Y. 2002).

122. *See* Jared A. Simmons, Note, *In Civilian Dress & With Hostile Purpose*, 37 *IND. L. REV.* 579, 580 (2004).

The Justice Department, for its part, probably wants to show that it can finish what it started, that we can still prosecute terrorists the old-fashioned way. And in a logic that only makes sense in Washington, D.C.—because the Defense Department may still be pushing for Moussaoui’s transfer to military custody—the Justice Department may be reacting with the same force against a sister agency.¹²³ Rather than “lose” to the Defense Department, the Justice Department insists on the status quo.

The Justice Department is now headed by a new Attorney General with less of a stake in the Moussaoui case.¹²⁴ Accordingly, the Bush Administration has another opportunity to do something that makes sense.¹²⁵ Even the chief of the Justice Department’s Criminal Division when Moussaoui was indicted, Michael Chertoff, has expressed some doubts about the wisdom of our policies. When Chertoff, now the head of Homeland Security, was on the bench in the Third Circuit, he floated the idea of enacting a special statute, along the lines of British anti-terrorism laws, to authorize the limited detention and interrogation of terrorism suspects.¹²⁶

123. See Dan Eggen, *FBI Chief Says Tribunal May Try 9/11 Suspects*, Jan. 15, 2004, WASH. POST, at A1; Editorial, *Missing Witnesses*, N.Y. TIMES, Mar. 6, 2004, at A14 (noting that the Bush administration has threatened to try Moussaoui before a military tribunal); Philip Shenon, *White House Called Target of Plane Plot*, N.Y. TIMES, Aug. 8, 2003, at A7 (reporting that Moussaoui would be tried before a military tribunal if civilian courts ordered the government to grant Moussaoui access to detainees).

124. Charles Hurt, *Gonzales Confirmed Attorney General*, WASH. TIMES, (Feb. 4, 2003), available at <http://www.washtimes.com/national/20050204-123544-7508r.htm>.

125. I am a close friend of Robert Spencer, the lead Moussaoui prosecutor. Although I have not discussed the proposal of this article with him, I doubt that it will come as a surprise to him. Outside the moment, we all may agree that our counter-terrorism policy is far more important than the rewards, accomplishments, or satisfactions of any official involved in a particular case.

126. See Michael Chertoff, *Law, Loyalty, & Terror: Our Legal Response to the Post-9/11 World*, THE WEEKLY STANDARD (Dec. 1, 2003), available at https://www.weeklystandard.com/Utilities/printer_preview.asp?idArticle=3419&B=C3BB2 (asserting that “[w]e need to debate a long-term and sustainable architecture for the process of determining when, why, and for how long someone may be detained as an enemy combatant, and what judicial review should be available”). In a forthcoming article, I explore in more detail whether it is possible to pass a sensible and constitutional statute that would allow a prolonged detention, measured in months rather than days, of terrorism suspects for interrogation for intelligence purposes. This statute at a minimum would create a special detention court, parallel to the FISA court, to review applications from the Executive Branch for such detentions.

V. THE SPECIFICS OF A MILITARY TRIBUNAL

There are two components to the military proceedings for Guantanamo detainees, all of whom are said to be other than U.S. citizens. First, all detainees are to appear before the Combatant Status Review Tribunal (CSRT) to determine whether or not they are enemy combatants.¹²⁷ Here, the status must be shown by a preponderance of the evidence to three commissioned military officers.¹²⁸ Under the CSRT, the rules of evidence are relaxed and a non-lawyer represents the detainee.¹²⁹ Once the government makes this showing, it may confine the detainees for the duration of the combat, namely the confrontation with Al Qaeda, provided they still pose a threat.¹³⁰ Second, if the government would like to confine the detainee beyond the duration of the conflict, it may do so through the military commissions that the President has established.¹³¹ Here, with a higher burden, the government must show beyond a reasonable doubt to a tribunal of anywhere from three to seven military officers that the detainee has violated the laws of war.¹³² A two-thirds vote is sufficient for a verdict, and either military or civilian counsel may represent the detainee.¹³³ The hearsay rules are relaxed so that any evidence that has “probative value to a reasonable person” may be admitted.¹³⁴ In Moussaoui’s case, this article assumes that the government could meet the burden of either the CSRT or the military commission, but the

127. Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy (July 7, 2004), *available at* <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

128. Memorandum from Gordon England, Secretary of the Navy (July 29, 2004), *available at* <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

129. *Id.*

130. Memorandum from Gordon England, Secretary of the Navy (Sept. 14, 2004), *available at* <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf> (establishing the annual Administrative Review Procedures for enemy combatants). As of March 1, 2005, the U.S. Military has held 558 CSRT hearings. Defense Department, Combatant Status Review Tribunal Summary, *available at* <http://www.defenselink.mil/news/Mar2005/d20050301csrt.pdf> (last visited April 15, 2005).

131. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

132. Department of Defense Military Commission Order No. 1, §§ 4(A)(2)–(3), 6(F) (Mar. 21, 2002), *available at* <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

133. *Id.* at 4(C) and 6(F).

134. *Id.* at 6(D)(1).

focus is on the military commission.

This article is not intended as a specific analysis of all the procedures of the Bush Administration's military commission. In arguing that Moussaoui should be transferred to military custody, this article can accept the basics of what the Bush Administration has proposed for military commissions. Going a bit further, it seems clear that the procedures need not be as stingy as those that the Bush Administration has proposed. For example, contrary to the Bush Administration order, a unanimous verdict could be called for out of fairness to the accused and out of a concern for the credibility of the military proceedings to our public and to the international community.¹³⁵ The great advantages of a military tribunal for the Moussaoui case are that the use of military personnel increases the chances that the fact-finders can obtain security clearances to hear any classified information necessary to the case and that much of the trial could be closed to the public.¹³⁶

To repeat, the criminal law paradigm in dealing with non-citizens who are parts of plots or organizations intent on killing U.S. citizens and destroying U.S. property does not strike the proper balance between the government's legitimate interest in protecting the secrecy and efficacy of counter-terrorism operations and the defendant's right to a fair trial.¹³⁷ The non-U.S. citizen such as Moussaoui who avoided wearing a military uniform so he could blend into American society to kill American citizens, whether as part of the September 11 plot or some other plot, whether the intended victims were on U.S. soil or elsewhere, is a direct descendent of the *Ex Parte Quirin*¹³⁸ defendants, who were appropriately treated in a military tribunal.

135. See Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57835 (requiring only a two-thirds majority to convict an enemy combatant).

136. See Military Commission Order No. 1 at § 4(C)(3) (stating that the accused may hire civilian counsel if it is determined the attorney is eligible to access "SECRET" level classified information); *id.* at § 6(B)(3) (stating that the proceedings should be open "the maximum extent possible," but some proceedings may be closed to protect classified information, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests).

137. One of the government interests is the interrogation for intelligence purposes of high-value detainees, some of whom Moussaoui would like to access. An obvious method of disrupting terrorist plots is to know about them in their planning stage before they are implemented.

138. 317 U.S. 1, 35 (1942).

Some reasonable arguments have been made for hesitating, for not taking the government on faith, before resorting to military tribunals.¹³⁹ Regardless, the Government's allegations in the Moussaoui indictment, contrary to what Professor Margulies implies, do constitute more than the Executive branch's "mere assertion of exigency."¹⁴⁰ Instead, the detail to the Moussaoui indictment lays out a *prima facie* case that Moussaoui has violated the laws of war.¹⁴¹

The Government is not under the same discovery obligations in a military tribunal as it is in a federal district court. This is one lesson of *Quirin* where fewer constitutional safeguards were required for military tribunals.¹⁴² Further, despite the voices of dissent, there is ample scholarly support for trying individuals who have violated the laws of war in military tribunals.¹⁴³ The Executive Branch now has the discretion, even if it lacks the wisdom, to do what is proposed in this article. If the Bush Administration is serious when it states that we are engaged in a war on terrorism, it logically follows that captured enemies should be dealt with as combatants rather than criminal defendants. Finally, no further Congressional authorization is necessary to transfer Moussaoui from federal district court to a military tribunal.

There are at least four reasons why the President does not need any further Congressional authorization to transfer Moussaoui to a military tribunal. First, the President has ample powers as the Commander in Chief of the military.¹⁴⁴ Second,

139. See Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure after September 11*, 84 B.U. L. REV. 383 (2004). For a harsher attack on military tribunals, see Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002).

140. See Margulies, *supra* note 139 at 440.

141. Second Superceding Indictment, Count Four, United States v. Moussaoui, 282 F. Supp. 480 (E.D. Va. entered Jul. 16, 2002) (Criminal No. 01-455-A), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/66826/0.pdf>.

[D]efendant . . . unlawfully, willfully and knowingly combined, conspired, confederated and agreed to use weapons of mass destruction, namely, airplanes intended for use as missiles, bombs, and similar devices, and other weapons of mass destruction, without lawful authority against persons within the United States . . . with the result that thousands of people died on September 11, 2001.

Id.

142. *Quirin*, 317 U.S. at 39–41.

143. See Margulies, *supra* note 139, at 437 n.263.

144. U.S. CONST. art. II, § 2, cl. 1.

Congress has established a system of military justice and granted the Executive Branch the authority to make rules in this field.¹⁴⁵ This provides general support for treating some individuals outside the criminal system. Third, a week after the September 11 attacks, Congress authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons” behind the September 11 attacks.¹⁴⁶ This provides specific support. Fourth, the “4001(a) statute” that provides that “no citizen shall be . . . detained . . . by the United States except pursuant to an Act of Congress” does not require express authorization to detain illegal combatants.¹⁴⁷ On this last point, Professor Margulies’s analysis is sound that this statute does not preclude implied authorizations for detentions, that this statute is more backward-looking to prevent internments along the lines of the American concentration camps during World War II.¹⁴⁸ Professor Margulies seems off the mark, however, to the extent he seems to suggest that the implied authorization can only reach attacks on U.S. citizens and U.S. property within the United States. The Authorization for Use of Military Force, after all, speaks of preventing “any future acts of international terrorism against the United States.” This addresses an attack on our nation. Accordingly, a broad and—arguably—more correct reading of this Authorization covers illegal combatants that attack U.S. citizens and U.S. property anywhere in the world.

Hardly anyone can doubt that our counter-terrorism efforts are global; it follows that in a global war we may find and capture illegal combatants inside and outside the United States. Indeed, as much as the academy, the human rights organizations, and the self-elected defenders of civil liberties try to maintain clear distinctions between the domestic and international realms, the doctrinal lines blur and break down in such a war. Our strategy and our law should be nimble enough to keep up with the changes in the battlefield. To preserve our values and to prevail, our strategy for the battle must incorporate healthy doses of idealism and realism. A single dose of either will not do. Just so, this proposal, eschewing the intellectual clarity of any pole, is one attempt at blending these

145. 10 U.S.C. §§ 801–940 (2005).

146. Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (codified at 50 U.S.C.A. § 1541 (West 2004)).

147. 18 U.S.C. § 4001(a) (2004).

148. Margulies, *supra* note 139, at 423.

doses to find the right balance for difficult times.

As another balance, some commentators, while not completely opposed to detaining illegal combatants, have suggested placing time limits on these detentions.¹⁴⁹ The flaw with their suggestion is that it goes counter to the principles of an effective interrogation. The terrorist organizations will train their operatives—and the operatives will be motivated—to withstand the interrogation until the time of the publicized limit. Effective interrogation, by contrast, depends on the isolation and the uncertainty of the detainee.¹⁵⁰

A general critique of time limits, of course, does not preclude us from secretly putting specific limits in place before a special court, cleared for classified information. To be sure, in no event should an endless detention of an illegal combatant be tolerated. Up front a choice should be made: The combatant should be interrogated, tried in a military tribunal, released to another authority, or freed. One option, say interrogation, does not necessarily preclude another option, say trial in a military tribunal, but in no event should a combatant languish outside of a legal category. In Moussaoui's case, although much of his information has gotten cold, this mystery man still must have useful information and corroboration for U.S. interrogators. Therefore, implicit to the proposal that he be transferred outside the criminal system is the notion that all the other options, interrogation, trial, or release, should be available. Back in the criminal system the only option that seems to have been pursued is the circus.

VI. MOUSSAOUI IN LIGHT OF RECENT SUPREME COURT DECISIONS

As important as choosing the correct location for Moussaoui's detention is choosing the correct basis for detaining him. Even if Moussaoui has access to the courts through the writ of habeas corpus, the Executive Branch should be able to conform with some

149. *See id.* at 414.

150. *See* Declaration of Vice Admiral Lowell E. Jacoby (Jan. 9, 2003), *available at* http://www.cnss.org/Jacoby_Declaration.pdf.

Permitting Padilla any access to counsel may substantially harm our national security interests Only after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence from Padilla Providing him access to counsel . . . would break—probably irreparably—the sense of dependency and trust that the interrogators are attempting to create.

Id.

minimal process, perhaps by ex parte, in camera filings, that demonstrates to a court or some other body the probable cause that Moussaoui is a terrorist.¹⁵¹ Therefore, his military detention can be justified under the rule of law.

The following discussion illustrates that the Supreme Court's recent decisions may already provide sufficient authority to detain Moussaoui in a military facility and to interrogate him for an extended period of time. Moussaoui was a non-U.S. citizen, detained in the United States, and part of conspiracy to kill Americans in the United States and outside the United States. Although the Supreme Court denied the Bush Administration's argument that detainees at Guantanamo Bay do not have any right to American courts, the Court did not challenge the Bush Administration's position that, once a non-U.S. citizen's status as an illegal enemy combatant has been demonstrated, he may be held outside the criminal system.¹⁵²

One question is whether Moussaoui needs to be treated any differently from the detainees in Guantanamo. Because the Bush Administration has not disclosed many details about individual detainees at Guantanamo, it is difficult to make specific comparisons to Moussaoui.¹⁵³ The majority of the Guantanamo detainees seemed to have been captured by the United States, by Northern Alliance allies, or by intermediaries during the successful military operation against Al Qaeda and the Taliban in Afghanistan.¹⁵⁴ Accordingly, Moussaoui differs from the typical

151. For this purpose, the definition of terrorist from the United States Criminal Code could be copied or adapted. The water here, however, is quite murky. There is widespread confusion on the precise definition of terrorism. Numerous federal statutes define the term, each with a somewhat different conclusion on what constitutes an act of terrorism. See 6 U.S.C. § 101(15) (2005); 18 U.S.C. § 2331 (2005) (differentiating "international terrorism" from "domestic terrorism"); 18 U.S.C. § 2332b(g)(5) (2005) (listing no fewer than thirty statute sections that can be violated for a crime to be considered a "federal crime of terrorism").

152. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

153. See Press Release, White House Press Secretary, *Status of Detainees at Guantanamo* (Feb. 7, 2002), at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>; News Transcript, Department of Defense, *Briefing on Detainee Operations at Guantanamo Bay* (Feb. 13, 2004), available at <http://www.defenselink.mil/transcripts/2004/tr20040213-0443.html>; Department of Defense, *Guantanamo Detainees* (Mar. 16, 2004), at <http://www.usinfo.state.gov/dhr/Archive/2004/Mar/17-718401.html>.

154. The United States Government has acknowledged approximately 640 detainees in Guantanamo. *Rasul v. Bush*, 124 S. Ct. 2686, 2690 (2004). Some more

detainee in Guantanamo in at least two ways. First, he was arrested in the United States, not overseas. Second, he was arrested before September 11 and before Congress passed the Authorization for Use of Military Force.¹⁵⁵ Whether these factual differences have legal significance is another matter. The threat Moussaoui posed to the United States was as great, if not greater, than that of many Guantanamo detainees who played logistical but not operational roles for Al Qaeda and the Taliban. Further, because the Authorization for Use of Military Force was tied to the September 11 attacks, that Authorization should have an obvious retroactive effect on individuals who were part of the September 11 plot.¹⁵⁶

In relation to earlier Supreme Court precedent, Moussaoui should be in no better legal position than German saboteurs who, along with a German-American citizen, were convicted in a military tribunal and sentenced to death during World War II.¹⁵⁷ Like Moussaoui, these Germans came to the United States on a mission of sabotage.¹⁵⁸ Like Moussaoui, these Germans wore civilian dress, having buried their uniforms once they landed on American beaches.¹⁵⁹ Unlike Moussaoui, these Germans were soldiers in a situation where there had been a mutual declaration of war.¹⁶⁰ As to Moussaoui's organization, Al Qaeda, it took a "second" Pearl Harbor before we reciprocated their declaration of war.¹⁶¹

recent detainees may have come from the Iraqi conflict. See Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A01.

155. Pub. L. No. 107-40, 115 Stat. 224 (2001).

156. *Id.*

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

Id.

157. *Ex parte Quirin*, 317 U.S. 1, 21 (1942); see also Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79 (2004); Carl Tobias, *Punishment and the War on Terrorism*, 6 U. PA. J. CONST. L. 1116 (2004); A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV. 309 (2003).

158. *Quirin*, 317 U.S. at 21.

159. *Id.*

160. *Id.*

161. Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). For anyone who would listen, Usama Bin Laden issued his declaration in a fatwa delivered in August 1996.

My Muslim Brothers of the World: Your brothers in Palestine and in the land of the two Holy Places are calling upon your help and asking you to

Moussaoui should be in no better legal position than Yaser Esam Hamdi, arrested in Afghanistan, held in Guantanamo, and then transferred to a military brig once American authorities confirmed that he was a dual Saudi-American citizen.¹⁶² Unlike Hamdi, however, Moussaoui was not caught “carrying a weapon against American troops on a foreign battlefield.”¹⁶³ In a sense, if the government’s allegations are true, Moussaoui himself could be viewed as a weapon of destruction on American soil. Hamdi was detained and interrogated for over two years, most of it without access to defense counsel.¹⁶⁴ When Hamdi’s case arrived at the Supreme Court, Justice O’Connor wrote a plurality opinion that stated, based on the Authorization for Use of Military Force, that even an American citizen could be held outside the criminal system on a showing that he was an illegal enemy combatant.¹⁶⁵ In Justice O’Connor’s view, Hamdi was entitled to some legal process to confirm his status, but not to the full-blown protections of an Article III court.¹⁶⁶ Further, Justice O’Connor indicated that once the Government has given Hamdi a modicum of due process, he could be held away from the “battlefield” for the duration of the hostilities.¹⁶⁷ What is not clear from the opinion is whether the Government has a separate right to interrogate the illegal enemy combatant. Justice O’Connor states that interrogation is not one of the Government’s interests.¹⁶⁸ But this statement may be limited to Hamdi’s facts. In other words, the Supreme Court may accept a different Congressional authorization that is more specific

take part in fighting against the enemy—your enemy and their enemy—the Americans and the Israelis. They are asking you to do whatever you can, with one own means and ability, to expel the enemy, humiliated and defeated, out of the sanctities of Islam.

PBS, *Bin Laden’s Fatwa*, available at http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html. For those who believe actions are more important than words, Al Qaeda made its intentions clear in the first bombing of the World Trade Center, the bombings of the U.S. embassies in Kenya and Tanzania, and the attack on the U.S.S. Cole.

162. See *Hamdi v. Rumsfeld*, 124 S. Ct 2633, 2636 (2004).

163. *Id.* at 2642 n.1.

164. *Id.* at 2636.

165. *Id.* at 2640 (“There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”).

166. *Id.* at 2648–51.

167. *Id.* at 2640.

168. *Id.* at 2651 (“Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.”).

concerning interrogation for intelligence purposes. As usual, the Supreme Court left the task of sorting out the details to the lower courts. Before this could be done on the Hamdi case, rather than test the limits on detentions of American citizens as illegal enemy combatants, the Bush Administration negotiated a deal with Hamdi.¹⁶⁹ In exchange for Hamdi renouncing his American citizenship, the Bush Administration released him to Saudi Arabia where he had spent most of his life after being born in Texas.¹⁷⁰ The irony to this case is that this illegal enemy combatant seems to have fared better than a comparable criminal defendant, U.S. citizen John Walker Lindh, also arrested in Afghanistan, who struck a twenty-year deal in the Eastern District of Virginia.¹⁷¹

Now it is left to the Padilla case, reversed and remanded because of a procedural error under habeas corpus, to test the limits on detention of U.S. citizens.¹⁷² The lessons of Padilla may or may not apply to Moussaoui. Padilla is said to have made contacts with Al Qaeda in Afghanistan and Pakistan, but was arrested in the United States.¹⁷³ As happened with Hamdi, however, the Bush Administration may reach a deal with Padilla before the courts are given a full opportunity to sort out the case. The district court in the Padilla case, on remand, has ruled that the Bush Administration did not have the authority to detain Padilla as an enemy combatant.¹⁷⁴ The court distinguished *Hamdi* because Padilla was unarmed when he was arrested in the United States.¹⁷⁵ And, to distinguish *Quirin*,¹⁷⁶ the court stated that Congress had not

169. Press Release, Department of Justice, U.S. Releases Enemy Combatant to Return to Saudi Arabia (Sept. 22, 2004), available at <http://www.usinfo.state.gov/dhr/Archive/2004/Sep/23-993718.html>.

170. *Id.*; Richard Willing, *U.S. to Send Detainee Back to Saudi Arabia Without Charges*, USA TODAY, Sept. 22, 2004, http://www.usatoday.com/nes/washington/2004-09-22-us-hamdi_x.htm.

171. Plea Agreement, *United States v. Lindh*, Criminal No. 02-37A (E.D. Va. 2002), available at <http://www.usdoj.gov/ag/pleaagreement.htm>. John Walker Lindh's request to the Justice Department that his sentence be shortened in light of Hamdi's release was denied. This disparate treatment between Lindh and Hamdi should be a warning to the self-designated protectors of civil liberties who seem to always support the criminal process over other venues. In short, be careful what you ask for. See CNN, "I Plead Guilty," *Taliban American Says*, (Jul. 17, 2002), at <http://archives.cnn.com/2002/LAW07/15/walker.lindh.hearing>.

172. *Rumsfeld v. Padilla*, 124 S.Ct. 2711, 2727 (2004).

173. *Id.* at 2715, 2715 n.2.

174. *Padilla v. Hanft*, Civil Action No. 2:04-2221-26AJ, slip op. at 10 (D.S.C. Feb. 28, 2005).

175. *Id.* at 6.

176. *Id.*

specifically authorized Padilla's detention. But this is not necessarily the last word; the Justice Department has filed its notice of appeal.¹⁷⁷

As to non-U.S. citizens, the Guantanamo cases are working their way back through the courts. Now that the Supreme Court has ruled that the Guantanamo detainees are entitled to relief in U.S. courts through habeas corpus petitions, the lower courts are testing how much process they must be given in determining their status as enemy combatants. These determinations are separate from trials in the military tribunals.

Since Justice Department prosecutors have proven the probable cause of their charges against Moussaoui through the presentation of an indictment to a grand jury, since they have appeared many times to defend their case before Judge Brinkema, meeting the standards of a "combatant status review" would be a formality for the Government in the Moussaoui case. Indeed, if the Bush Administration had been wiser in its strategy it would have fully tested its counter-terrorism strategy on non-U.S. citizens, such as Moussaoui and the Guantanamo detainees, before considering these policies on U.S. citizens such as Hamdi and Padilla.¹⁷⁸

VII. CONCLUSION

Zacarias Moussaoui should have been dealt with as we are dealing with Khaled Sheik Mohammed and other members of the Al Qaeda terrorist network: through non-criminal detention. This stands true even if Moussaoui pleads guilty or is convicted in federal court. Al Qaeda is more a military or an intelligence agency problem than a law enforcement problem. Placing him in a federal district court for a criminal trial was a mistake. Continuing the criminal process after evidence, including an in-court confession, confirmed that he was a member of Al Qaeda, was a

177. Notice of Appeal (Mar. 11, 2005), *available at* <http://www.scd.uscourts.gov/Padilla/Images/00000050.pdf>.

178. Professor David Cole, who gives much less leeway to the Executive Branch than I, suggests that this testing on non-U.S. citizens and resident legal aliens is a precursor for restrictions on the rights of U.S. citizens. *See, e.g.*, David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002). For this reason, he argues that we must be vigilant in protecting the "other" because the other could soon become us. Solidarity is in our self-interest. Therefore, while Professor Cole and I probably do not agree on the correct balance between individual liberty and group safety in national security cases, I hope that we agree it was a mistake to test the limits of our Constitution on U.S. citizens before we tested the limits on foreign citizens.

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bigger mistake. Further continuing the criminal process, despite all the costs and complications, despite the risks to intelligence sources and methods, despite the bad precedent it sets, would be an even bigger mistake. The time has come. A military tribunal for Moussaoui is better late than never.