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WHEN YASIR ESAM HAMDI MEETS
ZACARIAS MOUSSAOUI\textsuperscript{1}

\textit{Frank Dunham}\textsuperscript{2}

Martin Niemoeller, a WWI Uboat captain who became a Lutheran pastor in Nazi Germany, in response to the infamous events of the Third Reich, made the following famous statement: "First they came for the Communists. I did not speak out because I was not a Communist. Then they came for the Jews. And I did not speak out because I was not a Jew. Then they came for the trade unionists. I did not speak out because I was not a trade unionist. Then they came for the Catholics. And I did not speak out because I was a Protestant. Then they came for me. And there was no one left to speak for me."

This was in reference to the arrest of people who Nazis deemed enemies of the state — people held incommunicado, secretly interrogated to await various fates, often a show trial and summary execution.

Our country in times of crisis has a history of actions we later decry and discredit. We do not have to go very far from the founding of this great country to find the first incident of that. During the Adams administration, the Alien and Sedition Acts of 1798: Deport aliens that were judged by the executive branch to be dangerous to peace and good order. Now, this was in a day when all aliens were legal. There was no such thing as illegal immigration in 1798, but these people were deported — no trial, no lawyer, no specific accusation, no due process of any kind.

There was the Sedition Act passed that same year. It has been judged unconstitutional by the court of history but not at the time by the men sitting on the Supreme Court. It prohibited criticism of the president and the Congress — imagine that — just a few years after we passed the First Amendment. What was the crisis at the time? A war between Great Britain and France. The Adams administration favored Great Britain, but there were many, many people, including the opposing political party at the time, that supported France. And, of course, the country had many citizens of both countries living within the United States.

\textsuperscript{1} Remarks given on October 24, 2003 at the Richmond Journal of Global Law and Business Symposium \textit{Terrorism and American Business: At Home and Abroad}. These remarks were transcribed by Cook and Wiley, Inc., 113 North Robinson Street, Richmond, Virginia 23220.

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We go forward to the Civil War: the suspension of habeas corpus by President Lincoln, one of the greatest presidents we've ever had. Imagine if George W. Bush suspended the writ of habeas corpus. What would we say about him? But Lincoln did it during the Civil War, or tried to do it. He issued a presidential proclamation: all persons guilty of any disloyal practice shall be subject to court marshal.

Milligan,\(^3\) who was sentenced to death by a military tribunal, was a citizen living in Indiana at the time. He was a civilian; he was not part of the Confederacy, he was not part of the Union. He was accused by the federal military authorities in Indiana, which was a border state to the south, of being disloyal to the federal effort in the Civil War, and he was sentenced to be hanged. Military authorities claimed he was a POW who had violated the laws of war. Milligan filed a petition for writ of habeas corpus with the Supreme Court. Unfortunately, the case was not decided until a year after the war was over.

You know, it does not take much fortitude for a court to decide a controversial question against the chief executive when a war is over. It is much more difficult for a court to go against the executive when war is in full bloom. Nevertheless, the Supreme Court ruled that Milligan was not a POW and that the military had no jurisdiction to try him. The Court concluded Milligan was a civilian, entitled to process in Article III courts when they were open and operating. Chief Justice Rehnquist, in his recent book, *All the Laws But One*, said that *Milligan* is justly celebrated for its rejection of the government's position that the Bill of Rights has no application in the time of war.\(^4\)

In World War I, we had The Espionage Act of 1917:\(^5\) and prosecuted dissenters to the war and the draft. Imagine if we had been doing that during the Vietnam War.

The Sedition Act of 1918:\(^6\) unlawful to publish any disloyal language intended to cause contempt or scorn for our form of government. The Supreme Court in three different cases affirmed convictions under that Act: Debs,\(^7\) Schenk,\(^8\) and Abrams.\(^9\)

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\(^3\) *Ex parte* Milligan, 71 U.S. 2 (1866).
\(^7\) Debs v. United States, 249 U.S. 211 (1919).
\(^8\) Schenck v. United States, 249 U.S. 47 (1919).
The Red Scare of 1919 to 1920: thousands of citizens deported again at a time when illegal immigration was not a thing that this country worried about. Thousands of citizens, individuals, summarily deported without even a minimum of due process.

Then came World War II: The panic of the moment—Japanese internment. “Oh, my gosh. You know, the Japanese hit Pearl Harbor, and when they hit California, man, all these people that are of Japanese descent, they’re not going to side with us, they’re going to side with the Japanese.” So, we locked them all up.

*Koramatsu*, the Supreme Court decision of 1944, said that it was okay to force a person to move many miles away from his home up solely on the basis of his ethnic origin if there was a compelling national security reason—and to lock the person up if he refused to move.

Ronald Reagan, in 1983, said *Koramatsu* did grave injustice, and gave the National Medal of Freedom to Fred Koramatsu who is still alive today at 91.

Cold War, loyalty oaths, McCarthyism, *Dennis v. United States* — the Supreme Court upholds that the communist leaders can constitutionally be punished for speech under the clear and present danger standard, even though there was no danger, nothing was clear, and certainly nothing was present.

The Court—in a less emotionally charged time—later abandoned *Dennis*, in *Yates v. United States* and *Brandenburg v. Ohio*, noting that it had been led astray by fear of the moment. So here you have the Supreme Court, years after it made a bum decision, saying, “Man, we sure blew that one.” Fred Koramatsu would like to see the Supreme Court get these things right at the time, not twenty years later.

Vietnam War, CIA abuses, FBI abuses, spying on civilians, keeping track of political dissenters, the Daniel Ellberg prosecution when he released the Pentagon papers — things like these happen when the country is in a time of crisis.

Now, when I took the job as Federal Public Defender in the Eastern District of Virginia, there was no crisis in this country. The economy might have been sliding a little bit, but we weren’t at war with anybody, we were at peace. We had an administration that had just been elected that looked internally rather than externally, and I took that job in March 2001 after seven years of prosecuting and twenty-three years of private practice defending people I’m now representing for free. When I decided to take the job, I asked myself, “how

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difficult could that job be?” I mean, I’ve been doing criminal [defense] law now for twenty-three years, and the first question you always get from your clients is: “How are you going to prove that I’m innocent?” Well, usually you have a hard time answering that one. So then, the second question is: “How much time am I going to get?” Go to trial or plead—and what are the likely consequences of either approach.

Anyway, that is what criminal law is all about, trying to get clients to make the best choice of some very unpalatable options. And that’s what I was planning on doing, taking a bunch of energetic and maybe in some instances inexperienced lawyers that I could hire and try to get them to learn how to be good lawyers, and spend the last years of my practice investing my time in them and in building an organization. Because when I took the job, there was no federal public defender organization in Alexandria. When I started, I walked in with a pen and a pad and that was it. I didn’t even have a computer. I didn’t have a desk. I didn’t have anything.

So on September 11, 2001, I was in an architect’s office in Arlington, Virginia, planning the layout of my Alexandria office. We were on about the 12th floor of that building when somebody said, “Come over to the window,” and I went over to the window. And you could see the smoke coming up from the Pentagon. And yes, for those conspiracy enthusiasts who to this day are not sure there was a 9/11 attack, a plane really did crash into the Pentagon that day. You could see it. You could see it burning from where we were standing. Little did I know at the time that it would have a dramatic impact on me and on my life.

And so, as the smoke rose from the Pentagon in actions that day that changed the course of the world, a small ripple of that change altered the course of what I had in mind for my last years in practice as a lawyer.

Now, we have heard a lot about the U. S. Patriot Act,¹⁴ and you-all can note that it’s not just the Democrats and the left wing here in the United States that has a problem with the Patriot Act. Mr. Ashcroft supported it. His own colleagues on the Republican side of the aisle have serious problems with this Act.¹⁵ Republican Congressman Charles Eberle stated, “People out here in the West are used to taking care of themselves. We don’t like the government intruding on our constitutional rights.”¹⁶

¹⁶ Id.
The Republican criticism of the Republican Attorney General has been pretty stiff lately about the Patriot Act, and Mr. Ashcroft has begun to take some hits. The fact of the matter is that the criticism of the Patriot Act is really a repository of misdirected criticism that is coming from other acts that the Justice Department is taking. Because, when we look at the Washington Post editorial, it states, "More important, it strikes us that a great measure of the public’s unease over the law, as Senator Patrick J. Leahy (D-Vt) put it, is in fact discomfort — legitimate discomfort — over the Administration’s broader disregard for civil liberties: its insistence that American citizens can be held for months, without access to lawyers, simply by designating them ‘enemy combatants,’ its sweeping round-up of non-citizens in the days after 9/11, and its unapologetic stance toward the treatment of detainees who had nothing to do with terrorism but were held for months. Technically, these are separate matters from the Patriot Act."\(^\text{17}\)

When you go to the Patriot Act . . . it’s really not that bad. I mean, really, the Patriot Act has become a buzz word for taking away our civil liberties, but it’s really not that bad. One of the highlights of the Patriot Act is the sharing of information between criminal investigators and intelligence people.\(^\text{18}\) They used to keep it separate, and now they want to be able to share information. Roving wiretaps against phone use instead of a phone.\(^\text{19}\) The Justice Department has been after that for years, and the advent of cell phones and the mobility people now have with cell phones, putting a tap on a specific hard-wired land-based phone is totally impractical. People move about in their cars while they’re talking, and so they want a roving wiretap for use against terrorism.

Increased penalties for terrorism-related crimes.\(^\text{20}\) Who could be against that? Sneak and peek searches, no notice, even after a search. Well, I have some problems with that, but yet our intelligence has been doing that for years. The FBI for years has been breaking into foreign embassies and going through their bags to find out their diplomatic secrets. I mean, and they can’t leave a note, “Oh, we were in there and we searched.” So sneak and peek. I defended some FBI agents accused of that years ago — I can’t get overly upset about that.

Detention of foreigners suspected of terrorism.\(^\text{21}\) Well, that’s a little bit of a problem if they’re only suspected. Nationwide search

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\(^{17}\) Mr. Ashcroft’s Roadshow, Wash. Post, Aug. 21, 2003, at A22.


\(^{19}\) Id. at § 206, 115 Stat. at 272.

\(^{20}\) Id. at § 810, 115 Stat. at 275.

\(^{21}\) Id. at § 411, 115 Stat. at 274.
warrants, particularly for e-mail. We all know the Internet, the mysteries of the Internet, who knows where the computer is that stores the copies of the e-mail that you need? Getting a search warrant that's limited to the Eastern District of Virginia might not catch that computer that's in Berkeley, West Virginia.

Tools for fighting international money laundering. Acts of terrorism against mass transit have been made federal, more agents protecting our borders.

That's really not a list of civil liberties “horribles” that it's painted up to be. It's the things that are surrounding it, the other things that are going on coming out of our Justice Department that are really alarming people like the editors of the Washington Post and other scholars that are watching what is going on. And I happen to be the public defender in two of those cases.

The first one is United States v. Zacarias Moussaoui. As you all know, he is the alleged twentieth hijacker. That is what they have labeled him.

And the other one is Yasir Hamdi v. Donald Rumsfeld. Hamdi is a young man that was captured by the Northern Alliance in Afghanistan, sold to the United States for I don’t know how many dollars, and is being held as a Taliban enemy combatant, even though he’s an American citizen. He's being held in a Navy brig here in the United States.

Now, these two cases probably could not be more different. Hamdi has never been accused of being a terrorist. It's a civil case, a habeas corpus case. He's not accused of any crime.

On the other hand, Moussaoui refers to himself as a natural born terrorist. It's a criminal case. He's been accused of complicity in the worst crime in American history. Hamdi's father said he went to Afghanistan on a humanitarian mission.

These cases could not be more different, yet there are similarities. Counsel, which I am to both men, cannot talk to either man.

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22 Id. at § 220, 115 Stat. at 273.
23 Id. at § 311, 115 Stat. at 273.
24 Id. at § 801, 115 Stat. at 275.
26 Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002); Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002), rev’d, 316 F.3d 450 (4th Cir. 2003), cert. granted, 124 S. Ct. 981 (2004).
27 Hamdi, 294 F.3d at 600.
28 See cases cited supra note 28.
30 See cases cited supra notes 28 and 31.
31 See cases cited supra note 28.
Imagine that, a case in American law where the counsel cannot talk to his client.

Now, in the Moussaoui case, I cannot talk to Moussaoui because he won’t talk to me. In fact, if he had a gun with only one bullet in it, he’d kill me first.

Hamdi I’m not allowed to talk to. Three times the Fourth Circuit Court of Appeals has said it is unnecessary, and therefore it would be error for the district court to order the government to allow Durham to talk to his client.\textsuperscript{32} Even though the district court had three times ordered the government to let me talk to him, the court of appeals has said there is no need for that. I will discuss the Hamdi case in a little more detail later.

But what brings Hamdi and Moussaoui together is that in both cases the government cites the separation of powers between the Article III courts and the Article II executive branch as the basis for, in Hamdi’s case, not letting a court go behind the government’s assertion that he was an enemy combatant.\textsuperscript{33} They say that to allow an Article III court to question the executive on whether or not Hamdi really was an enemy combatant puts the court in the business of second guessing the military in a time of war, and that fighting the war is a quintessential executive branch function.\textsuperscript{34}

In Moussaoui’s case, there are witnesses that a federal judge has said exculpate him from the events of 9/11 and from eligibility from the federal death penalty.\textsuperscript{35} These witnesses are in the control of the United States. But the United States contends that because of the separation of powers, and because these witnesses are enemy combatants held abroad, that the court has no right, no authority, to order that their testimony be made available to Zacarias Moussaoui.\textsuperscript{36} In fact, in Moussaoui’s case, the government cites Hamdi as precedent.\textsuperscript{37}

I’m going to talk to you a little bit about Mr. Moussaoui’s case. First off, of interest is the fact that it is the largest FBI investigation in U.S. history. Can you imagine? You take a job as federal public defender. You haven’t even opened your Alexandria office. You haven’t hired the first person to work in Alexandria. You’ve got people working in Richmond; some of them are here today. You’ve got people

\textsuperscript{32} Id.


\textsuperscript{34} See Moussaoui, 2003 WL 21263699, at *4-5.

\textsuperscript{35} Id.

\textsuperscript{36} Id.

\textsuperscript{37} Id.
working in Norfolk. You've got open, functioning offices in both of those cities, but you haven't opened Alexandria yet.

And the chief federal judge calls you and says, "Dunham, Moussaoui is coming to this district, and you're going to represent him." It is nothing other than the largest FBI investigation in U.S. history: one hundred and eighty thousand interviews conducted by seven thousand agents, tons of documents, unbelievable number of documents, unmanageable number of documents. You can imagine, it is the entire investigation of 9/11.

Then you meet your client, and you get along with him for a while, but ultimately he has his religion and you have yours. He has his culture and you have yours. You are an enemy; he knows that, and so he fires you.

Now, we were not sure when he did that that he was competent, and many of you may have recently read about, Mohammed, the accused sniper in the Virginia Beach trial. It all happened up in [Washington] D.C., of course. He fired his lawyer but then quickly rehired him.

Many newspaper reporters have asked me, "Do you think Moussaoui is going to rehire you," and I say, "No way. Hell will freeze over before Moussaoui would rehire me like Mohammed rehired Shapiro and Greenspan."

When Moussaoui fired me and the other standby counsel, we were concerned that he was so wrapped up in his Islamic fundamentalism that he couldn't see straight and that he couldn't make a conscious decision; that he saw any American as an enemy; that he couldn't accept the fact that we were there truly to help him. We argued to the district judge that he should not be allowed to represent himself operating on such a false premise that we were actually trying to help the prosecutors kill him. That is what he said he believed.

The judge ordered a mental examination for Moussaoui, and he refused to see the shrink. And in an example of what this man is all about, for a person who is a fundamentalist Islamic, an avowed terrorist, he has a sense of humor and a sense of our culture that is uncanny for somebody who never lived in this country.

For example, this is a handwritten motion [referring to projected image] written by Zacarias Moussaoui when the judge ordered him to see the psychiatrist as a precondition to granting him the right to defend himself. He entitles it, "Do you think that I am crazy to see your Doctor Frankenstein?"

Now, Moussaoui — and I'll just comment briefly on this, these cases, many of them are cited in my syllabus — Moussaoui is allowed to represent himself under a Supreme Court decision called Feretta v.
**United States.** In *Ferretta*, the Court said that the right to counsel includes the right to refuse counsel and represent oneself. It does say that a court can appoint standby counsel, and that is what we have been appointed to be — standby counsel in the district court. In the court of appeals where we are now, we are counsel because they do not allow self-representation in the appellate court.

*Mckaskle,* another Supreme Court decision, spells out what a standby counsel is supposed to do. He is supposed to be a “potted plant” in the words of Ollie North’s lawyer, Brendan Sullivan. He is supposed to be a potted plant and sit there without emotion during the trial and without any attempt to involve himself in it in order to allow the defendant the ability to appear as the beleaguered, oppressed victim of an overpowering government. In other words, our Supreme Court has said if that is how a defendant wants to present himself to the jury, he has an absolute right to do so, and nobody can force counsel on him.

So the standby sits there, acting very neutral, and reacts only when asked for help by the defendant. That’s the role of the standby counsel. Of course, the standby counsel nevertheless is supposed to be prepared to try the entire case in the event the defendant changes his mind, as Mohammed did, or in the event the defendant can’t follow the rules, in which case the judge takes away his right. So that’s a brief explanation of standby counsel and of what that’s all about.

In any event, Moussaoui took over his own defense and with that came the right to file his own pleadings.

Now, one of the pleadings that he filed was a “Motion to Dismiss Ashcroft Case.” What happened here was everybody had always thought that the government’s theory of the case was that he was the twentieth hijacker on 9/11. As you recall, there were nineteen; three planes with five, one plane with four, and there was a guy, Ramsey Ben Al-Shib in Germany that had three times tried to get into the United States that was a friend of one of the pilots, Mohammed Atta. And the theory of the government was and if you read the indictment, you can’t come away with any other conclusion other than that Moussaoui was supposed to take Ben Al-shib’s place on 9/11 and be the fifth hijacker on the fourth plane, because we Americans believe in symme-

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38 422 U.S. 806 (1975).
40 *Id*.
41 *Id*.
42 *Cf. United States v. Frazier El*, 204 F.3d 553 (2000) (holding that the right to represent oneself is not absolute).
43 *McKaskle*, 456 U.S. 806.
try, right? I mean, what kind of hijack operation has five guys on three planes and only four guys on the fourth?

The government was absolutely convinced that Moussaoui was the twentieth. And the way they plead the indictment is the nineteen hijackers went to health clubs; Moussaoui went to a health club. The nineteen hijackers bought knives; Moussaoui bought knives. The nineteen hijackers used a particular e-mail account; Moussaoui used the same e-mail company. They took flying lessons; he took flying lessons. Just a straight parallel of their conduct leading right down to what happened on September 11.

Well, the government ran into a little bit of problem. Because things are classified, and because the case is still pending, I have to be careful about what I say about the case, but the shorthand answer is there came a point in time when that particular theory of convicting Mr. Moussaoui on 9/11 became inconvenient for the government. So it began to argue “no, no, no, he’s not the twentieth hijacker, or the fifth hijacker on the fourth plane, he was supposed to be the pilot of a fifth plane that was supposed to hit the White House.” Now, Moussaoui, of course, refers to the White House as the “Dark House,” but nevertheless, the government changed its theory.

Moussaoui comes in with this motion and it’s called an “Emergency Strike to Force Ashcroft to Show His Ultimate Fantasy Theory or to Throw Out Ashcroft Case.” You notice how he styles it. Instead of “United States v. Zacarias Moussaoui,” he styles it “Slave of Allah, Zacarias Moussaoui v. Slave of Satan, Bush and Ashcroft.” He says, “Ashcroft dementia must be stopped. I, Zacarias Moussaoui, must be informed of the nature and cause of the accusation, because I don’t know what I am. I’m either the twentieth hijacker or the pilot of the fifth plane. What am I?”

And then he provides the ultimate, he provides Ashcroft with a multiple choice question. He says, “Death Judge, you must force Ashcroft to check the box,” and then the boxes are: “(1) 20th hijacker; (2) 5th plane to the Dark House; (3) I, Ashcroft, don’t know; or, (4) let’s just kill Zacarias Moussaoui.”

Even in the court of appeals he files Fifth Plane Pilot Missing on Appeal, and then he repeats his four questions to Ashcroft, and he calls it the “9/11 Lottery Case.”

Now, he also is clever with his words and with his ability to show disrespect for our entire legal system and form of government. For example, in the court of appeals he refers in pleadings he files there to the Court as the “Court of Appall of the Fourth Circus.”
His remarks to the district judge [The Honorable Leonie M. Brinkema], that has the case and who has been extremely patient with him, are just as intemperate. He knows our society. Moussaoui was admonished by the district judge for these kinds of pleadings — the disrespectful pleadings calling people names.\(^{45}\) I haven’t shown you the worst of what he has filed. But after she warned him that he would lose his right to represent himself if he continued filing these scurrilous pleadings,\(^{46}\) Moussaoui files this: “Moussaoui Holiday of a Lifetime. Now that the WTC has been to ground zero, Moussaoui is taking a pro se official break.” And then he says: “Zacarias Moussaoui is on a temporary holiday of a lifetime so there will be no more pleading from the pro se.”

Now his view of me is stated in this pleading, because mind you, now, she said, “quit these repetitive pleadings.” He says, “Taking account that I, Zacarias Moussaoui, was filing one or two pages in comparison with the pile of rubbish of the horde of blood suckers and the chief liar, it is clear that the district judge is looking for an excuse to kill the 20th hijacker.” And then he says, “Of course, Zacarias Moussaoui’s silence is not the silence of the lambs, but the silence before the storm.”

Again, after it turned out that the government was refusing to produce witnesses that the district court thought Moussaoui ought to have, and when it was clear that the district court was about to impose sanctions on the government for failure to produce these witnesses,\(^{47}\) the government asked for a delay. And Moussaoui comes in with, “No delay in Moussaoui Four Weddings Top Celebration and No Funeral.” Bear in mind that, you know, Islam believes in polygamy, multiple marriages, and Moussaoui has always said that he’d like to have four wives. So his pleading is, “No delay in Moussaoui Four Weddings Top Celebration,” notice the letters WTC that are in there, and “No Funeral,” meaning no penalty for Moussaoui.

Moussaoui has a lot of acronyms that he uses for various things. The United States of America is the “United Sodom of America.” Leonie Brinkema, the judge, is “Lie-ony Brinkema.” District Judge Brinkema is “Death Judge Brinkema.” White House is the “Dark House.” The defense team is the “Death Squad” or the “Horde of

\(^{45}\) See United States v. Moussaoui, 2002 WL 1990900, at *4 (E.D. Va. Aug. 29, 2002) (“The defendant’s pleadings have been replete with irrelevant, inflammatory and insulting rhetoric, which would not be tolerated from an attorney practicing in this court”).

\(^{46}\) Id.

\(^{47}\) See United States v. Moussaoui, 282 F.Supp.2d 480, 482 (E.D. Va. 2003) (“In light of the Government’s refusal to comply with the Court’s Orders of January 31 and August 29, 2003, compelling the deposition of an enemy combatant witness, the Court must now determine what sanction is appropriate”).
Blood Suckers.” Me, personally, I’m “Fat Megaloman Dunham,” also known as “F - - - Dunham,” which he always accompanies with a footnote that says, “Don't worry, Leonie, the F stands for Frank.” Alan Yamamoto is the “Fake Kamikaze Yamamoto.” I’ve got a lawyer, Jerry Zerkin, on the case that he refers to as “Jew Zerkin.” The United States Court of Appeals for the Fourth Circuit is the “United States Court of Appall for the Ultimate Circus.” SAMS are the special administrative measures under which we hold people, who are national security risks, in prison, basically holding them in solitary confinement incommunicado, different than other criminals are held. He calls the SAMS “Sanctions Against Muslims.” The U.S. Department of Justice is the “U.S. Sickness of Justice.” And the FBI is the “Fascist Bureau of Inquisition.”

Running through his pages, and pages, and pages of repetitive pleadings, he uses all of these acronyms to describe the court system and the law enforcement system.

He uses the initials “WTC” repeatedly, which you would think he would not want to use. You would think he would realize that some day he might be before a jury that has his life in the balance, and the fact that he makes fun of the World Trade Center events on 9/11 would be absolutely appalling to a jury.

Nevertheless, he calls Ashcroft WTC, “World Top Criminal;” the charges against him, the “World Tyron Conspiracy;” his defense to the charges, “War to Crusader;” the proceedings against him, “World Top Circus;” and his hoped for acquittal, “World Time Celebration.”

Now, if you're interested in this case and you want to see anything about it, you can get it. There is a website that you can dial into and get every pleading in the case, including those of Moussaoui that the judge has not put under seal because they are intemperate or otherwise not appropriate for release.\(^{48}\)

Now, briefly in the case of Yasir Esam Hamdi, we learned that he was being held in the Navy brig in Norfolk after having been brought there from Guantanamo, after having been brought to Guantanamo from Afghanistan where he was taken into custody by U.S. forces after being turned over to them in the same batch of prisoners that included John Walker Lindh.\(^{49}\) These people had been captured by the Northern Alliance forces and turned over to the U.S. military as Taliban fighters.\(^{50}\)

Mr. Hamdi told the people that arrested him that he was born in Louisiana which, of course, makes him a U.S. citizen, even though

\(^{48}\) Moussaoui pleadings are available at http://notablecases.vaed.uscourts.gov.

\(^{49}\) Hamdi v. Rumsfeld, 294 F.3d 598, 601 (4th Cir. 2002).

\(^{50}\) Id. at 601.
he left there when he was three and grew up in Saudi Arabia. When they realized that he was a U.S. citizen, they didn’t hold him in Guantanamo, they brought him to Dulles Airport in the United States.

As I understand the situation, and this is all hearsay, I don’t have any official confirmation of this — they brought him to Dulles Airport because they expected that the Justice Department would treat him the same way they treated John Walker Lindh, the American Taliban; that they would prosecute him for taking up arms against the United States. When they landed on the tarmac at Dulles, they were told by the Justice Department that we really don’t have a case against Mr. Hamdi. You can imagine why. He probably did not even know he was an American citizen. All he knew was that he was born in Louisiana. It would be hard to convict somebody of taking up arms against your country if you did not know it was your country.

So the plane took off, took him down to Norfolk, and locked him up in the Navy brig. Now, I didn’t know all this at the time. All I knew was that I was the public defender; that this guy had been brought in to my district; that John Walker Lindh had been prosecuted in my district: that John Walker Lindh was convicted largely out of statements that they got from his own mouth while he was in custody; that the whole case against him was basically his own statements; and they had no other way of proving that case.

I was concerned about providing Hamdi with appropriate advice, particularly, you know, little things like the right to remain silent which sometimes the military says doesn’t apply to a military interrogation for intelligence purposes.

I requested to see the man, and when I was turned down, I filed a petition for writ of habeas corpus in the federal district court in Norfolk — still thinking in my mind that I was going to ultimately be dealing with a criminal case that I would be appointed to, and so did the federal magistrate. He assumed it was a criminal case that I would be appointed to, and he appointed our office to represent Hamdi in this pretrial status. And it wasn’t until we had been in the case for three or four weeks that for the first time somebody told us, “Oh, we’re not holding him to prosecute him, we’re holding him as an enemy combatant.”

And I scratched my head, and I said, “Well, what’s that?”
“Oh, he’s an enemy combatant.”
“Well, how do you determine who is an enemy combatant?”
“Well, we don’t have to tell you that.”

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51 Id.
52 Id.
53 Id.
54 Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002).
Then they went to federal court and argued that because he was an enemy combatant and he was not being held to be prosecuted, he had no right to have an attorney; he had no right to have a proceeding. And the long and the short of it is that the Fourth Circuit ultimately ruled that he could be held without seeing his attorney; that it was a violation of the separation of powers for the court to order that I see him; that with regard to the facts of his case; in other words, the government said he was fighting for the Taliban. He couldn't challenge that. In other words, the way habeas corpus normally works is — and let me go back and just talk very briefly about the history of habeas corpus.

It started back in England before our country was formed that the Englishmen were concerned when the king would throw somebody into the castle dungeon deep and make him disappear without any process, without any charge, simply because he was an enemy of the state. Does that sound familiar from an earlier part of my talk? He was an enemy of the state, and therefore the king's judgment to throw him into the castle and keep him as a prisoner forever was not subject to question by the British courts at the time. Ultimately, the British won the right, the people won the right, to have what is now known as the writ of habeas corpus, which means "produce the body before the judge and give your reason, King, why you're holding this man."

And as we have developed it, in fact, it is a privilege, not a right, I don't know what difference that makes, but in our constitution we talk about rights, but in Article I, Section 9, we have the privilege of habeas corpus. Notice it's in Article I, not Article II and not Article III, which suggests that only the legislature can suspend it, and it has done so only once—during the civil war. The way it works is, if you file a petition for writ of habeas corpus saying, "I'm being unlawfully held," then the government must respond to that petition and explain why your detention is lawful. Under existing law, the petitioner has the right to come back and say, "Ah, your explanation, King, is not adequate and it's wrong and it's erroneous and it's full of lies."

But in Hamdi's case, he is not allowed that opportunity because if he were to come in and say that what the Pentagon is saying

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57 See Ex parte Merryman, 17 F.Cas. 144, 148 (1861) (Chief Justice Taney commenting, in response to President Lincoln's suspension of habeas corpus, that "the privilege of the writ could not be suspended, except by act of congress."); 18 U.S.C. 4001(a) (2004) (codifying that "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress.").
about him is a pack of lies, then a federal judge would actually have to get into deciding who is telling the truth here — Hamdi or the military. And doesn’t that involve figuring out what happened on the ground in Afghanistan during a war? Do we really want our sergeants and our soldiers, who were taking prisoners while they are taking bullets, to have to also take notes as to what’s going on so if they have to give a civil deposition, they can remember exactly who said what and who struck John? And that was the Fourth Circuit’s rationale as to why all the government had to do was present facts supporting a legal justification as to why they were holding him, and that was sufficient. And once the government does that, Hamdi does not get the opportunity, traditionally afforded by habeas, to traverse the government’s actual allegations by saying, for instance, “I was just selling lemonade to the combatants. I was not involved.”

But the ramifications of this, it seems to me, need to be carefully studied because what if you were an ABC news reporter embedded with a unit in Iraq and the sergeant thought that you were giving hand signals to the enemy. Could he call you an enemy combatant and lock you up? And, when you later tried to say, “No, I was just scratching my nose and I’m an ABC reporter and I have nothing to do with Iraq, and I was just there doing my job,” no court could listen under the rationale of Hamdi. You would just be stuck because the executive said, the king said, “you’re an enemy combatant.” I don’t know what the difference is between enemy combatant and enemy of the state, but the bottom line is — you’re stuck, and you’re detained, and you can be detained forever.

Now, in closing, the question I pose to all of you is: So, have they come for the Muslims in America? That is a political question for you, the people, to decide. History tells us that the people, even in this great country, do not often make good choices in that regard.

Second question: Have a couple of isolated cases, that have fallen upon a beleaguered federal public defender brought against Muslims, threatened to shrink the constitutional protections all citizens probably thought they had until now? One, the privilege known as habeas corpus, to question any detention by the executive branch in court and to vigorously contest facts alleged against you that you believe to be false; second, the right known as Brady, to have favorable evidence known to the prosecutor at your trial in a death penalty case,
or in any case for that matter, produced for your use; third, the right to use the compulsory process clause to compel the attendance of witnesses on behalf of a defendant. These are questions for the courts to decide — the Fourth Circuit [Court of Appeals] in Moussaoui; the Supreme Court now in Hamdi.

History tells us that sometimes the courts have gotten it right, and on other occasions by their own retrospective admissions, they have failed miserably. And I have to say that I have been impressed, even though I was on the losing side in Hamdi, with the seriousness and with the intellectual integrity with which the court pursued its task — the courtesy they gave us to fully expound and explain our positions, and I have to confess that it is a very difficult question. However, I believe the case was wrongly decided am pursuing Hamdi’s rights in the United States Supreme Court at the present time, and I’m very hopeful that I’ll be granted a writ. Thank you very much.

POSTSCRIPT:

The Supreme Court granted certiorari in Hamdi and heard oral argument from Mr. Dunham on April 28, 2004. A decision is expected this summer. Mr. Moussaoui was removed as his own lawyer when his pleadings became repetitive and even more abusive than what was described in Mr. Dunham’s remarks. A district court striking the death penalty and all 9/11 evidence from Mr. Moussaoui’s case because of the government’s refusal to produce witnesses for a deposition was initially reversed by the Court of Appeals which has scheduled a hearing on Moussaoui’s petition for rehearing for June 3, 2004.

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62 Brady v. Maryland, 373 U.S. 83, 87 (1963) (stating that “suppression by the prosecution of evidence favorable to an accused upon request violates due process”).