04-8385

In The

Supreme Court of the United States

ZACHARIAS MOUSSAOUI,
Petitioner,

- *versus* -

UNITED STATES of AMERICA,
Respondent

ON A PETITION FOR A *WRIT OF CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS as *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTERESTS OF *AMICUS CURIAE*

The *National Association of Criminal Defense Lawyers* ["NACDL"] is a non-profit corporation with a subscribed membership of almost 12,200 national members, including military defense counsel, public defenders, private practitioners and law professors, and an additional 28,000 plus state, local and international affiliate members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.[1]

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military. Among the NACDL's objectives are ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of criminal justice and preserving, protecting and defending the adversary system and the U.S. Constitution.

The interest of *Amicus Curiae* in this case stems from the Fourth Circuit's decision which eviscerates the Sixth Amendment's twin guarantees of compulsory process and confrontation. That in turn makes due process totally dependent upon prosecutorial largesse. *Amicus* recognize and respect lawful concerns for national security. But, national security claims however valid and well-founded, must be adjudicated *within* the framework of the Sixth Amendment. We respectfully submit that the rationale and the remedy from the Fourth Circuit fundamentally contravenes both the spirit and text of the Sixth Amendment, thus denying Petitioner fundamental due process. Therefore, we urge this Court to

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[1]No counsel for a party authored this Brief in whole or in part. No person, entity or organization other than the *Amici Curiae* made a monetary contribution to the preparation and submission of this Brief or to counsel.

grant *certiorari* to protect and preserve rights whose lineage goes back millennia before the *Magna Carta* of 1215.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a capital case. The Petitioner designated witnesses who, as found by both courts below, are relevant and material - both on the merits and as mitigation for the death penalty. The Government refused to comply with the District Court's order granting defense access to these witness.[3] The prosecution thus deliberately created the tension between the Executive's claim of "national security" and the Defendant-Petitioner's Sixth Amendment rights, juxtaposed upon the duties of the Judiciary to insure a fair trial and to maintain the integrity of the courts. The remedy must be consistent with the textual mandates of the Sixth Amendment as well as preserving the core concept of compulsory process.

The Fourth Circuit concluded that Petitioner's "right [of compulsory process] must be balanced against the Government's legitimate interest in preventing disruption [of the interrogations] of the enemy combatant witnesses." 382 F.3d at 468. Framing the issue in that manner is fundamentally flawed because it erroneously makes the "balancing" fulcrum the concept of "separation of powers." *Id.,* at 469-71. The balancing herein does not involve separation of powers, rather the balancing necessary is an *intra*-Executive decision, to wit:

> Does the Executive Department's need for uninterrupted interrogation of the witnesses for ***intelligence*** (national security) purposes outweigh the Executive's desire to criminally

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[2]Counsel for the Parties have consented to *Amicus* filing this Brief and such have been filed with the Court.

[3]*United States v. Moussaoui,* 382 F.3d 453, 459-60 (4th Cir. 2004).

prosecute and kill Moussaoui for ***criminal justice*** purposes?

The deliberate decision of the Executive Branch to pursue intelligence gathering and thus deny Petitioner access to his witnesses, in the context of the simultaneous criminal prosecution violates the fundamental right of Petitioner to compulsory process for the three witnesses at issue.[4]

The Executive, having exercised his discretion between intelligence gathering and criminal prosecution (discretion that *Amicus* does not contest), forced the District Court to confront the real issue in this case. Namely, in light of the Executive Branch's decision that intelligence is more important to our national security than complying with a Court Order, what is the appropriate remedy or sanction for the prosecution's violation of Petitioner's Sixth Amendment right to compulsory process?[5] The selection of a remedy, *viz.,* the use of evidentiary substitutions [*Id.,* at 479], invokes a separate and related right - Petitioner's Fifth Amendment right to Due Process and a fundamentally fair trial,[6] especially in the context of a capital case. A judicially imposed remedy - not a prosecutorial decision - is necessary to protect "the rights of the Defendant and [for] protecting the integrity of these judicial proceedings." *Id.,* at 484, n.1 (Gregory, J., dissenting).

Amicus submits that the irony, if not the indictment of the Fourth Circuit's process and remedy, is to provide Moussaoui with *less* procedural protection in a federal district

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[4]The process of substitutions envisioned by the Fourth Circuit may also violate Petitioner's *confrontation* rights to the underlying sources of the substitutions. That issue does not appear to be ripe at this juncture.

[5]*See, Moussaoui,* 382 F.3d at 459, "The District Court then directed the parties to submit briefs concerning the appropriate sanctions. . . ."

[6]*See, e.g., Pennsylvania v. Ritchie,* 480 U.S. 39, 56 (1987) (compulsory process within the parameters of due process).

court prosecution than he would have were he to be tried by an American court-martial.[7]

The NACDL respectfully supports the District Court's remedies of striking the death penalty and precluding certain prosecutorial evidence. First, the Fourth Circuit's decision ignores the historical importance of the right to compulsory process as a deeply-rooted, fundamental right. Second, the use of unsigned, unsworn "substitutions" cannot under any concept of Sixth Amendment jurisprudence, constitute "compulsory process" or due process of law under the Fifth Amendment.

I. THE FOURTH CIRCUIT'S DECISION HEREIN IGNORES THE HISTORICAL PURPOSE OF THE RIGHT TO COMPULSORY PROCESS, THE SEARCH FOR TRUTH.[8]

> The Constitution gives to every man, charged with an offence, the benefit of compulsory process to secure the attendance of his witnesses.[9]

Some millennia before the ratification of the Sixth Amendment, ancient Hebrew law codified in the Old Testament set forth what has evolved into the rights now established within that Amendment.

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[7] *But see, e.g., United States v. Lonetree,* 35 M.J. 396, 405 (CMA 1992) [withholding true name of intelligence agent not confrontation violation); *United States v. Allen,* 31 M.J. 572, 614 (N-MC CMR 1990)[sworn responses to interrogatories for purpose of *motion* not compulsory process violation in espionage case]. While in both cases the "substitutions" were deemed adequate under the circumstances, neither case was a capital case.

[8] "Truth seeking was another theme of our clustered Sixth Amendment clauses." A. Amar, *The Bill of Rights,* 115 (1998).

[9] *United States v. Cooper,* 4 U.S. (4 Dall.) 341 (CC Pa, 1800)(Chase, J.).

> ***At the mouth of*** two witnesses, or three witnesses, shall he that is worthy of death be put to death; but ***at the mouth of*** one witness he shall not be put to death. [emphasis added][10]

Clearly the concept was that witnesses would be produced and give direct ("at the mouth") testimony.

However, by 1776, the virtual denial of compulsory process to defendants in the American colonies, became one of the specific accusations in our Declaration of Independence.[11] Indeed, as one noted scholar concludes: "the American Revolution . . . was promulgated as an attempt to give the people not something new, but that which they had formerly possessed."[12] The majority of the Drafters of both the Constitution and the Bill of Rights were of British heritage and were thus familiar with the historical rights of an accused.[13] And as one leading commentator notes: "The constitutional meaning of compulsory process is deeply rooted in the history of English and American criminal procedure." Westen, *The Compulsory Process Clause,* 73 Mich. L. Rev. 71, 75 (1974).[14]

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[10]Deuteronomy 17:6 (King James Version). *Accord,* Deuteronomy 19:15: "One witness shall not rise up against a man for any iniquity or sin . . . at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established."

[11]"For transporting us beyond the Seas to be tried for pretended offences." By taking the defendant back to England for trial, an accused could hardly exercise any right to compulsory process of defense witnesses at the vicinage where the crime was alleged to have occurred.

[12]Rutland, *The Birth of the Bill of Rights,* at 3 (1983 ed.).

[13]*See,* Kelly, *Fixing The War Power,* 141 Mil. L. Rev. 83, at 106 (1993).

[14]Professor Westen also concludes: "when the original Congress implemented the compulsory process clause it gave broad meaning beyond the subpoena power." *Id.,*at 100.

Or, as one Court observed during our Civil War:

> Our revolutionary fathers having, after eight years of desolating war, achieved their independence of the British crown, were so jealous of their liberty, and so determined to protect it against any further encroachments of power, that they were not satisfied to leave it with the safeguards that appear in the constitution . . . but, in 1789, they submitted to the several states ten amendments . . . in order to give more certain and complete protection to the liberty and rights of the citizen.[15]

The Fourth Circuit, in bowing to the objections by the prosecution over the remedies fashioned by the District Court below, indirectly violated the separation of powers principle by allowing the Executive to control the "process" of the District Court for Sixth Amendment purposes under the mantra of "national security." This is not the first time such Executive encroachment has been contemplated:

> It may not . . . be out of place . . . to glance at the position which some ardent advocates of presidential unlimited prerogative, in seasons of war, rebellion or insurrection, have endeavored to uphold. . . . They have ventured to say that the authors of this [U.S.] constitution would never have intended to deny him in such times all power which may be deemed indispensable for the preservation of the nation. . . . But, if there is anything beyond all controversy in the constitutional history of this

[15] *Ex parte Field,* 9 Fed. Cas. 1, at 3-4 (D. Vt. 1862)(Case No. 4,761).

> nation, it is that the purpose of this constitution and the provisions which it contains were . . . anxiously and deliberately considered and thoroughly discussed . . . and, certainly, any man proposing to confer unlimited power on any department of the government, on any pretext whatever, would not have been deemed sane.[16]

Under separation of powers concepts, it is indeed both the constitutional role and function of the judiciary under Article III, of the Constitution, to interpret and apply the Constitution. *Marbury v. Madison,* 5 U.S. 137 (1803).[17]

Nor can it be said that the proponents of the Bill of Rights were either ignorant of or insensitive to "national security" concerns. They had only recently concluded a war for the very existence and national security of the "United States."[18] No power to suspend or alter the Sixth Amendment was given to the Executive Branch, nor to the Fourth Circuit.

The purpose of the compulsory process clause was simple.

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[16] *Jones v. Seward, Sec'y of State,* 40 Barb. 563, 566 (NY, Sup. Ct. 1863).

[17] Ironically, it was Madison who argued during the Congressional debates on adopting a bill of rights, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights . . . [and] resist every encroachment upon rights expressly stipulated. . . ." Rutland, *op cit.,* at 202 (citing and quoting *Annals of Congress,* 1 Cong., 1 Sess. I, 435-36).

[18] *Cf., United States v. Yasui,* 48 F.Supp. 40, 45 (D. Ore. 1942), *aff'd* 320 U.S. 115 (1943):

> The perils which now encompass the nation, however imminent and immediate, are not more dreadful than those which surrounded the people who fought the Revolution and at whose demands shortly thereafter, the ten amendments containing the very guarantees now in issue were written into the Federal Constitution.

> [It] would allow the whole truth to out by enabling the defendant to present his own witnesses to tell the jury and the gallery what the prosecutor's witnesses had left out.[19]

Compulsory process and national security clashed in the notorious treason prosecution of Aaron Burr. *United States v. Burr,* 25 Fed. Cas. 30 (CC, D. Va. 1807)(Case No. 14,692). Burr filed a motion for a subpoena *duces tecum* directed to the President of the United States. The prosecution argued that the document "might contain state secrets which could not be divulged without endangering the national safety." *Id.,* at 31. Chief Justice Marshall, sitting on Circuit responded:

> So far back as any knowledge of our jurisprudence is possessed, the uniform practice of this country has been, to permit any individual, who was charged with any crime, to prepare for his defence, and to obtain the process of the court, for the purpose of enabling him to do so. *Id.,* at 32.
>
> In the provisions of the constitution . . . which give to the accused a right to the compulsory process of the court, there is ***no exception whatsoever.*** *Id.,* at 34 [emphasis added].[20]

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[19]Amar, *op cit.,* at 115. He notes a second reason. "Notions of basic fairness and symmetry were also at work in the Sixth Amendment. ... If the government could use subpoenas to force unwilling witnesses to testify, why couldn't the defendant?" *Id.,* at 116.

[20]For a more modern treatment of this issue, *see United States v. Poindexter,* 732 F.Supp. 142 (D. DC 1990), where former President Reagan was subpoenaed to testify. Like the matter *sub judice*, the prosecution had access to the witness, but the defense did not. *Id.,* at 154. The Court ordered a videotaped deposition supervised by the Court. *Id.,* at 159.

Lastly, Congress as early as 1790, recognized the importance of compulsory process by expressly legislating it into federal criminal law and procedure.

> . . . And that every person so accused and indicted for any of the crimes aforesaid . . . shall be allowed and admitted in his said defence to make ***any proof*** that he or they can produce by lawful witness or witnesses, and ***shall have the like process of the court*** where he or they shall be tried to ***compel*** his or their witnesses to appear . . . as is usually granted to compel witnesses to appear on the prosecution against them. 1 Stat. 112, at 118-19 (April 30, 1790) [emphasis added].

That this concept was so basic and fundamental to the Founders, is shown by the 1786 *Articles of War*, enacted by the Continental Congress prior to the Constitution, for trials by courts-martial:

> Art. 8. All persons who give evidence before a court-martial, are to be examined on oath or affirmation, as the case may be. . . .
>
> * * * * *
>
> Art. 10. On the trial of cases ***not capital***, before courts-martial, the deposition of witnesses . . . may be taken before some justice of the peace, and read in evidence, provided the prosecutor and person accused are present at the taking of the same.[21] [Emphasis added]

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[21] 4 *Journals of Congress* 649 (May 31, 1786), as reprinted in Winthrop, *Military Law and Precedents,* 2nd ed., 972 *et seq.* (1920 Reprint). Article 10 protected both compulsory process and confrontation rights.

Those concepts are still the law today, almost 220 years later. 10 U.S.C. § 842(b) [witnesses at courts-martial "shall be examined on oath."], and 10 U.S.C. § 849(d) [depositions may *not* be used in capital cases].

The decision and remedy of the Fourth Circuit herein simply cannot be reconciled with the history, the language and the purpose of the Sixth Amendment's compulsory process clause. Unsigned, unsworn "substitutions" neither comport with the Sixth Amendment's truth-seeking function, nor constitute the *process* due under the Fifth Amendment.

CONCLUSION

Amicus Curiae submit that any "balancing" herein is something within and at the discretion of the Executive branch, and as Professor Westen observes:

> [T]he government must choose between its interests in prosecuting the defendant and preserving the privilege. Thus, if the government prefers to prosecute, it must waive its privilege regarding the exculpatory evidence.[22]

Compulsory process is a fundamental right and it indelibly attached to Petitioner upon his being indicted. "Compulsory process does not deny the government's interest in secrecy, but it prohibits the government from invoking secrecy at the defendant's expense."[23] The Fourth Circuit's decision however, does just that - it invokes the Government's claims of "national security" at Petitioner's expense. While

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[22]Westen, *op cit.,*at 162 [citing *Reynolds v. United States,* 345 U.S. 1, 12 (1953)].

[23]*Id.,* at 163 (citation omitted).

national security must be a concern, the *process* cannot eliminate the fundamental rights it is designed to preserve and protect. Absent clear guidance from this Court, the Government's invocation of national security threatens to circumscribe a variety of fundamental constitutional rights for all defendants, including the Sixth Amendment right to compulsory process at issue in this case.

The remedies fashioned by the District Judge below, striking the death penalty and precluding specified evidence, are both consistent with the spirit of the Sixth Amendment and consistent with Congressional interpretation by its enactments, to include those under its war powers, precluding deposition evidence against an accused in capital courts-martial. Surely a defendant in a federal district court, capital prosecution has at least that same right under the Sixth Amendment.

Petitioner must have the right of compulsory process for the three witnesses at issue, for without them, as both courts below agree, he cannot effectively confront the prosecution's case, to include the death penalty. The decision below cannot be the process due under our Constitution, for it is fundamentally unfair.

WHEREFORE, *Amicus Curiae* respectfully urges this Court to grant Petitioner's request for a *writ of certiorari* so as to clarify and correct the Fourth Circuit's application of the Sixth Amendment.

Respectfully submitted.

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