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Fourth Circuit Moussaoui Ruling Is a Loss for the Constitution

by Jacob G. Hornberger

Although the Fourth Circuit Court of Appeals paid the obligatory lip service to the Sixth Amendment in the Zacharias Moussaoui case, in an audacious act of judicial activism, [its ruling](#) effectively rewrote and negated the Sixth Amendment to account for the government's new "war on terrorism." While ostensibly upholding the Constitution, the court's ruling was actually a big win for the government and a big loss for the Constitution.

Facts of the case

The government is prosecuting Moussaoui for, among other things, conspiring to participate in the September 11 terrorist attacks and is seeking the death penalty. It has taken into custody members of al-Qaeda who have stated during government interrogations that Moussaoui was not involved in the September 11 attacks. Moussaoui, who has pled not guilty, has requested the testimony of those witnesses at trial to establish his innocence of the September 11 charges.

The government opposed Moussaou's request on two primary grounds:

1. The Sixth Amendment's compulsory process clause doesn't apply to witnesses abroad; and
2. Permitting Moussaoui to summon the witnesses to trial would unconstitutionally permit the judicial branch of government to intrude on the executive branch of government's warmaking powers, thereby jeopardizing national security.

The pertinent constitutional provision

The Sixth Amendment reads in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor.

What this provision means is that when the federal government charges a person with a crime, he has the right to employ the power of the government to bring witnesses to trial who will testify in his behalf. The process works like this: The accused asks the court clerk to issue what is called a “subpoena,” which is a written document ordering a person to appear in court at an appointed time. The clerk issues the subpoena and delivers it to a U.S. marshal, who then serves the subpoena on the witness. If the person fails to appear as commanded, the judge then issues an arrest warrant for him and orders the U.S. marshal to seek out the witness, take him into custody, and bring him immediately to the court. The judge might even delay the trial until the witness is found and brought to court. The defendant then has the right to call the witness to the witness stand and ask the witness the relevant questions.

The trial court’s ruling

The federal district judge in the Moussaoui case, Judge Leona Brinkema, held that the Sixth Amendment gave Moussaoui the right to subpoena the witnesses in U.S. custody abroad. In lieu of bringing them to the United States to testify at trial, however, Brinkema ordered that the witnesses testify in an oral deposition by video link-up, with all lawyers present and the judge presiding over the deposition, which the Federal Rules of Criminal Procedure permit under extraordinary circumstances. What this would mean is that Moussaoui’s lawyers would be permitted to interrogate the witnesses and the government’s lawyers would be entitled to make objections, just as if the witnesses were testifying at trial. The judge would make evidentiary rulings, just as she would at trial, and would exclude and excise classified information, if necessary.

The government refused to comply with Judge Brinkema’s order to produce the witnesses for oral deposition. The judge then imposed sanctions for the government’s disobedience of her order, which is a customary procedure in such cases. While the usual sanction is dismissal of the case, Brinkema instead ordered something less drastic: she ordered that the government not be permitted to introduce evidence at trial regarding Moussaoui’s alleged participation in the 9/11 attacks and she also ordered that the government not seek the death penalty.

The government appealed Judge Brinkema’s ruling to the Fourth Circuit Court of Appeals in Richmond, Virginia.

The Fourth Circuit’s ruling

Ostensibly upholding the clear and unequivocal language of the Sixth Amendment, a three-judge panel of the Court of Appeals rejected the government’s two primary arguments. First, the court held that the Sixth Amendment’s compulsory process clause extends to witnesses abroad who are in U.S. custody. Second, it held that the express guarantees provided by the Sixth Amendment trumped the government’s war-making power.

So what's the problem? Isn't this a victory for Moussaoui, the Sixth Amendment, and the Constitution? Not when one discovers what the Court of Appeals did next.

Although the Sixth Amendment clearly grants the accused the right to the testimony of favorable witnesses, as the the lead opinion by Justice William W. Wilkins acknowledged, the court proceeded to grant Moussaoui something different. (The two other justices published their own opinions, which partly agreed with Wilkins' opinion and partly disagreed.) The court reversed Brinkema's order permitting Moussaoui to take the oral depositions of the witnesses and ordered instead that Moussaoui be relegated to reading to the jury excerpts from summaries of answers to interrogations that the government has previously shown to Moussaoui.

And who conducted those interrogations? It's not clear, but probably agents of the U.S. government and quite possibly foreign agents as well. What were the circumstances under which the interrogations were held? That is, were the statements made under oath, under duress, or [under torture](#)? We don't know. And who prepared the summaries of the answers to the interrogations? You guessed it — U.S. government officials!

How reliable is all that?

Judge Brinkema held that the summaries were not reliable at all, which is why she rejected such a process and ordered the depositions to be conducted. The Court of Appeals, however, reversed Brinkema's conclusion, summarily holding that the summaries were reliable and, unfortunately, without providing any reasoning for its conclusion.

The Fourth Circuit panel obviously fails to recognize an uncomfortable truth: Government officials, including attorneys in the Justice Department, lie, and they especially lie if they believe that the lie is necessary to protect national security and if they believe that the lie will help them to convict a person they are convinced is guilty.

Recall, for example, the federal [criminal prosecution of Randy Weaver](#), the case in which federal officials were prosecuting Weaver after having shot and killed his wife and teenage son. In that case, Justice Department officials knowingly, intentionally, and deliberately employed false and fake evidence in an unsuccessful attempt to convict Weaver of a crime he hadn't committed.

Or consider [the case of Edwin P. Wilson](#), a former CIA officer whose conviction was recently thrown out by a federal district judge in Houston because the government knowingly, intentionally, and deliberately employed false and fake testimony to secure his conviction.

In fact, how can we ignore recent revelations, as documented so well by the *Los Angeles Times*, that the original U.S. Supreme Court case that established the precedent for protecting "national security" secrets was based on [lies and fake and false evidence](#) that the Justice Department and Pentagon knowingly, intentionally, and deliberately submitted to the United States Supreme Court as part of the case? In fact, that's the main Supreme Court case on which courts today based their decisions to protect "national security" secrets. How ironic is that, given that the decision was rendered on the basis of government lies, falsehoods, and fakery!

So how are the summaries in the Moussaoui case to be prepared? The Court of Appeals has ordered Judge Brinkema to work with the lawyers to prepare satisfactory summaries to the jury. Imagine that — a U.S. district judge, who is supposed to stand above the litigants in the case, prepared to issue fair and impartial rulings on evidentiary and other matters, must now sit in a room and negotiate the wording of summaries with the lawyers in the case on matters that she will ultimately have to rule on when the trial is held. I wonder whether Brinkema will again rule that the summaries are unreliable, when she herself has participated in their preparation. That is actually an extraordinary role for a presiding judge in a case and, some would argue, a quite improper one.

Thus, despite the lip service paid to the Sixth Amendment, the Fourth Circuit Court of Appeals has denied Moussaoui his Sixth Amendment right to bring witnesses to trial who could help establish his innocence of the charges against him. In an era of judicial activism, the court effectively rewrote the Sixth Amendment to now read:

In all criminal prosecutions, the accused shall have the right ... to have compulsory process for obtaining witnesses in his favor ... except in cases involving the government's new "war on terrorism.", where summaries prepared by government lawyers of interrogatories conducted by unknown government agents under unknown circumstances will have to suffice.

Moreover, the Court of Appeals reversed Judge Brinkema's imposition of sanctions, making Moussaoui once again subject to the death penalty. So now he faces the death penalty but is unable to summon witnesses in government custody who could help to establish his innocence of the charges.

As previously noted, there were actually three separate court opinions in the Fourth Circuit's decision. The lead opinion was authored by Justice William W. Wilkins. The second opinion, by Justice Karen J. Williams, is the weakest opinion of the three. While concurring with Justice Wilkins's decision on the use of the summaries, she unequivocally holds that the Sixth Amendment guarantee of compulsory process cannot be used to interfere with the executive branch's warmaking powers. Unfortunately, Justice Williams (and the other two justices) never explains the process by which she arrives at her conclusion that the government's "war on terrorism" is akin to a real war unlike, say, a metaphorical war such as the "war on crime" or the "war on drugs." She apparently simply assumes that because the military is involved in the process the arrest of accused terrorists is a warmaking operation. Given that reasoning, one can only assume that Justice Williams would also rule that the government's Waco operation or the army's active involvement in the war on drugs would also trump the due process guarantees provided in the Bill of Rights. Ironically, none of the justices ever addresses the pertinent issue: If

this is indeed a real war, what in the world is Moussaoui doing litigating in the Fourth Circuit Court of Appeals rather than sitting in a POW camp?

The strongest and best-reasoned opinion was authored by Justice Roger L. Gregory, who dissented from the court's ruling on the summaries, pointing out that Judge Brinkema, not the Court of Appeals, was in the best position to determine their reliability. Moreover, Justice Gregory points out the impropriety of involving the trial judge in the preparation of the evidence to be presented at trial. Most important, Justice Gregory carefully explains that the judicial branch's enforcement of the Bill of Rights in criminal cases does not interfere with the president's warmaking abilities. The judiciary simply provides the executive with a choice: If you wish to prosecute this person, you must bring the witnesses to trial who will help establish the person's innocence. If you choose not to do so, then consequences will follow but those consequences will involve the trial, not the warmaking. As Justice Gregory put it, "How to proceed with the prosecution is a matter for the Executive to decide; how to protect the integrity of the criminal proceeding is a matter for the Judiciary."

Why is the Court of Appeals decision such a weak and conflicted mishmash of compromise? The most likely answer lies with the threat that the executive branch, including the Pentagon, is holding over everybody's head: If the government doesn't get what it wants in the Moussaoui case, it has threatened to remove Moussaoui from the jurisdiction of the federal courts and transfer him to the custody of the Pentagon for execution, after a sham kangaroo proceeding before a military tribunal consisting of U.S. military judges. After all, don't forget that the feds recently "[crossed that Rubicon](#)" by removing a criminal defendant named Ali S. Marri from federal court jurisdiction and transferring him to the Pentagon for punishment as an "enemy combatant" in the "war on terrorism." That threat might well have induced the Court of Appeals to create the appearance of upholding the Sixth Amendment, but in actuality giving the government what it wanted by denying Moussaoui access to the witnesses in the government's custody who could help establish his innocence.

To place matters in context, this is where the Moussaoui case now leaves us: The government, including the Pentagon, is claiming the power to seize and arrest any person, [including U.S. citizens](#), and hold him in a military brig as an "enemy combatant" in the "war on terrorism," denying him the right to counsel, the right to a jury trial, the right to due process of law, the right of habeas corpus, and all other rights guaranteed by the U.S. Constitution and the Bill of Rights.

The government is also claiming the power to transfer such people to its base at [Guantanamo Bay](#), Cuba, which it claims is beyond the jurisdiction of the U.S. Constitution and U.S. courts. At that base, it claims the power to execute any "enemy combatant" after a [show trial](#) in which U.S. military officials are the judges and in which the accused is denied the attorney of his choice and due process of law.

If the government instead decides to prosecute an accused terrorist in its “war on terrorism” in U.S. district court, as it has done with Moussaoui, it can deny him his Sixth Amendment right to compulsory process of witnesses and, by implication, other constitutional guarantees as well — and threaten to transfer him to the military jurisdiction if the courts don’t give the government what it wants.

Worst of all, U.S. officials continue to proclaim that all this is the “freedom” for which U.S. troops are fighting and dying overseas.

Will Moussaoui appeal the Fourth Circuit’s ruling to the U.S. Supreme Court? Not likely, at least at this stage, because it’s in his interest simply to comply with the court’s ruling and then preserve the Sixth Amendment point for an appeal to the U.S. Supreme Court if he’s later convicted. Moreover, if he reads the summaries into evidence, his lawyers know that the government will be precluded from cross-examining the witnesses. Thus, while Moussaoui might actually benefit from the ruling of the Fourth Circuit Court of Appeals, the American people and their constitutional order are the clear losers.

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This article was originally published in April of 2004.