NEW YORK LAW SCHOOL

NYLS Law Review

Volume 56
Issue 1 *Civil Liberties 10 Years After 9/11*

Article 1

January 2012

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VOLUME 56 | 2011/12

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EDITOR'S NOTE: This article is an edited version of Judge Mukasey's remarks. The video of his full address is available at http://nyls.mediasite.com/mediasite/SilverlightPlayer/Default.aspx?peid=8268caacf8b849a9ac1600c51f7768ef1d. The citations to some of the information referenced by Judge Mukasey in his remarks were provided by the *New York Law School Law Review*.

In choosing this topic, where we are in the war on terror and how we got there, it occurred to me that it would be an appropriate topic for me to address, not only because it is a subject that I have been involved with on and off for about eighteen years—ever since a prosecution that eventually came to be known as *United States v. Rahman*[1] landed on my desk as a federal district judge—but also because we have just celebrated (if that is the word), quietly (and that definitely is the word), what was to have been the one-year anniversary of the closing of the facility at Guantánamo Bay.

Now, as you all know, the detention facility at Guantánamo Bay is still open. So I thought I would deal with that topic, how it came to remain open, and also where we are on the war on Islamist terrorism. This entails a discussion of not only why Guantánamo is still open, but also how we got here, and perhaps where we are likely to go. I am going to provide some historical review, both to help find answers to these questions and so that you can understand why the answers are somewhat less than definite and a good deal less than satisfactory.

Based on the evidence that I have seen, the first encounter of this country with Islamist terrorism did not start on September 11, 2001, or indeed on February 26, 1993, which is the date of what was then known as the World Trade Center bombing and later became known as the *first* World Trade Center bombing. It began in the late 1980s, specifically, at a shooting range out in Calverton, Long Island, when a group of FBI agents approached what they thought was a bunch of people who were taking rather aggressive target practice. The agents thought that they would give the group a "toss," as they say in the business, and get their identification, and so on. These people put off the FBI, challenged them, and said that the agents were engaged in what is now known as profiling. The agents, being polite and politically correct, backed off.

Fast forward to 1990. In November of 1990, a right-wing Israeli politician named Meir Kahane was assassinated at a ballroom here in Manhattan after giving a speech. The assailant was quickly caught—a man named El Sayyid Nosair. It was immediately pronounced to be the lone act of a lone actor. The case wound up being so overtried, notwithstanding that Nosair had committed the crime in front of an audience about as large as this one, that he was actually acquitted of murder. But he was convicted of using the gun with which he had committed the murder, and was sentenced to seven and one-third years to twenty-two years in jail. What we now refer to as jihadi literature was seized from his apartment. It discussed, among other things, toppling tall buildings in order to bring down western civilization. But nobody paid any attention to that; it was put in a warehouse and went largely unexamined.

It was not, however, an isolated act by an isolated actor. In February 1993, the first World Trade Center bombing occurred, killing six people, injuring hundreds of others, and causing millions of dollars of property damage. Among the demands of those who carried out that bombing was the demand that Nosair be released from jail. When an amateur video of Kahane's speech was reviewed, it was discovered that

1. 189 F.3d 88 (2d Cir. 1999).

one of the people involved in the 1993 bombing was actually present in the ballroom that night. In fact, Nosair was supposed to have made his escape by getting into a cab that was driven by another of the 1993 plotters, but he jumped into the wrong cab and therefore was captured. Also, it turned out that those people, Nosair, and others had been present on that day in Calverton, Long Island, when the FBI agents challenged them for taking aggressive target practice.

The response to the 1993 bombing was, of course, the conventional response—bring the perpetrators to justice. And they were brought to justice; the 1993 bombers were convicted at a separate trial. Their spiritual leader, Sheik Omar Abdel Rahman, known as the blind sheik, and nine or so others, including Nosair, were convicted of an overarching plot that included the Kahane murder, the 1993 World Trade Center bombing, and a plan to blow up landmarks around New York City. I should tell you that one of the other goals of that conspiracy was to assassinate Egypt's President Hosni Mubarak when he visited New York—shades of today's headlines. Abdel Rahman, even at that time, had an impressive background. He was not only the spiritual advisor behind the 1993 bombing; he had been the spiritual advisor to the assassins of Anwar Sadat in 1981, and he was later, from jail, to issue the fatwa that provided Osama bin Laden with a theological justification for 9/11.

Here I should add that, given what is going on in Egypt today, the western world is, I think, quite fortunate that Abdel Rahman is in jail because he is the sort of charismatic figure who actually could have been, and in fact aspired to be, an Egyptian Khomeini,[2] complete with recorded sermons distributed to his followers. The possibility of a bad outcome today would be a lot more substantial if he were on the street. Although the 1993 bombing led, I think, to the debut of the phrase "wake-up call," in fact there was virtually no public focus at the time on what we were really dealing with and what we were up against.

I stated that from what I have seen, this country's first encounter with Islamists, or Islamism, occurred in the late 1980s out in Calverton, Long Island. But that was not Islamism's first encounter with this country. The first encounter actually goes back to the late 1940s, when a man named Sayyid Qutb, who had been something of a hell-raiser in Egypt, won a traveling fellowship, largely to get him out of the country. Qutb chose to travel to the United States. Specifically, he went to Greeley, Colorado. Now, it would be hard to think of a more placid place than Greeley, Colorado, in the late 1940s. But Qutb was absolutely mortified by what he saw. The haircuts, the enthusiasm for sports, the political system, the mingling of the sexes in church—Qutb was outraged. He went back to Egypt, quit the civil service, and joined up with an organization that was already in existence, having been founded in the 1920s, called the Muslim Brotherhood. The Muslim Brotherhood had been

2. Born in Iran in 1902, Ayatollah Ruhollah Khomeini was a young seminary teacher who later become a leader of the Islamic revolution. A man who hated Western ways, he seized the U.S. embassy in Iran and held fifty-two persons hostage. Khomeini, who died in 1989, was responsible for the deaths of thousands during the last decade of his life. *See* Milton Viorst, *Ayatullah Ruhollah Khomeini*, TIME MAG. (Apr. 13, 1998), http://www.time.com/time/magazine/article/0,9171,988165,00.html.

founded in Egypt by a man called Hassan al-Banna, who was assassinated the year that Qutb left for the United States.

Although the Muslim Brotherhood welcomed Gamal Abdel Nasser's coup in 1952[3] against the British monarchy, believing that it would end corruption and bring about an Islamist state, they again were disappointed when Nasser did not even ban the consumption of alcohol. Qutb continued his agitation, was in and out of jail, was eventually hanged in 1966, and became something of a contemporary saint. Many members of the Muslim Brotherhood fled to Saudi Arabia, where they found refuge and ideological sustenance. Qutb's brother, Muhammad Qutb, was among those who fled, and he taught the doctrine in Saudi Arabia. Among his students was a man named Ayman al-Zawahri, an Egyptian, who was number two in al-Qaeda, second to Osama bin Laden, and bin Laden himself then simply the pampered child of one of the richest construction families in Saudi Arabia.

In 1996, and reiterated in 1998, was bin Laden's declaration of war on the United States, which I think was treated here in the United States as quaint. Imagine some fellow in a cave in Afghanistan declaring war on the United States. Then came the bombing of the East African embassies in Kenya and Tanzania in 1998. The response was another "Bring them to justice!" series of calls and actually an indictment that named bin Laden as a co-defendant. Regrettably, bin Laden did not seem to have been impressed, or at least if he was impressed he was not deterred, because in 2000 we had the bombing of the USS *Cole*. This had actually been preceded by an attempt to bomb another U.S. destroyer called *The Sullivans*, which failed only because the barge carrying the explosives sank.

Throughout this period we heard about terrorism, but not about what the people who were practicing terrorism thought. And unless you attended one or another of the trials involved, there was no suggestion that we should do anything other than round up the perpetrators after the fact and bring them to justice. Notwithstanding bin Laden's declarations, plural, of war and his detailed description of his grounds for the declarations, all of this came upon us as something of a surprise on September 11, 2001, when we finally got specific, or should have gotten specific, about what we were supposed to be waking up to.

President George W. Bush promised to put things on a different footing. To the cries of "Bring them to justice!" was added the cry, "Bring justice to them." But, regrettably, there was not, in fact, time to work out a long-term strategy and a clear focus on precisely what we were dealing with. It was announced we were involved in a war on terror—not a war on Islamist terror and certainly not a war on militant Islamism. And it is hard, for a number of reasons, to blame anybody involved, including the President. This war was something that had to be fit into the grid of American domestic life and political history, and we were very much on guard at the time, and still are, against the repetition of our treatment of the Japanese during

3. Appointed in 1954, Gamal Abdel Nasser was the second president of the Arab Republic of Egypt. "He was the first native Egyptian to rule Egypt in over 2500 years." *Arab Unity: Nasser's Revolution*, Al Jazeera (June 20, 2008), http://english.aljazeera.net/focus/arabunity/2008/02/200852517252821627.html.

World War II and of fomenting religious and ethnic tension in this country. We are also a society that is reluctant to examine other people's religions.

For those two reasons we shun the notion of a war on any movement that is, or claims to be, inspired by a religion. Indeed, President Bush went out of his way to avoid inflaming passions, going so far as to tell us that, as he put it, "Islam is a religion of peace." Second, there was a sense within the Bush administration that this was not simply about an organization called al-Qaeda, based in Afghanistan, but that it was about a more widespread tendency—although it remained unclear how widespread, and precisely what, that was.

There has been of course a great deal of discussion about whether the word "war" adequately describes the War on Terror in either intellectual or practical terms, and I can probably spend all my time here discussing that issue alone. I think it is enough to suggest that it is the most serviceable term that we have, and "war" is certainly a lot better, in my view, than the term "foreign contingency operation," which is the term favored by the current secretary of Homeland Security. I do acknowledge that there are not only intellectual and practical difficulties with the term "war," but there are legal difficulties as well if we are talking about building a legal architecture that not only gives the President the powers that he needs but at the same time allows for the kind of accountability for the use of those powers that can sustain them over a long period of time.

To put it in very mundane terms, it is very hard to sustain public awareness of a war when everybody can still make restaurant reservations and go to the movies. Despite a certain lack of strategic focus, there were, in fact, many successes during those first years of the War on Terror, the most notable being that there were, for the seven-plus years following 9/11, no successful attacks on this country. A great deal of this success, I believe, was due to the CIA interrogation program, which involved sifting through literally tens of thousands of detainees, focusing on those who seemed to have the most potential for providing us with intelligence, and questioning them, even vigorously at times.

CIA agents were knowledgeable in—and people other than those who actually debriefed the detainees were schooled in—what became known as "enhanced interrogation techniques," which I think was probably one of the worst public relations campaigns since New Coke. It sounds like a washday product, doesn't it? I think harsh techniques, or coercive techniques, would have been a whole lot more accurate, and in the end a whole lot less harmful because when you use a euphemism like "enhanced," it sounds as if you are trying to hide something that you believe to be horrible and that you are ashamed of. I think that was a disastrous choice.

We actually learned a great deal through the CIA program. In fact, if you focus on only three of the detainees, Abu Zubaydah, Khalid Sheikh Mohammed (also known as KSM), and Abd al Rahim al Nashiri, you find that we got a huge trove of information. Zubaydah was a lieutenant high up and close to Khalid Sheikh Mohammed and close to Osama bin Laden. Khalid Sheikh Mohammed, I think, needs no introduction to this audience; he was the man who planned 9/11. And Nashiri was the man who was the architect of the USS *Cole* attacks.

Some important things we learned from Zubaydah, according to George Tenet and General Michael Hayden, both former heads of the CIA, included information that led to the arrest of Ramzi bin al-Shibh, who was the operational supervisor of 9/11. We frustrated an attack on the Canary Wharf in England and on London's Heathrow Airport. We got Jose Padilla, known for plotting to plant a dirty bomb in this country and actually prosecuted for something a whole lot more doable and a whole lot more sinister: namely, getting apartments in Florida, filling them with gas, and then detonating them using cell phones.

We also learned from Zubaydah that it was okay for members of al-Qaeda to talk when they reached the breaking point, so long as they resisted to that limit. He said at one point, "Do this for all the brothers." That is, bring them to the breaking point. And that was something that proved enormously valuable with Khalid Sheikh Mohammed when we finally captured him because, when he finally got to the breaking point, he gave chalk talks. He became a lecturer on the subject of al-Qaeda, how it was organized, how it moved money, and how it attracted adherents.

We also learned specific information from KSM that resulted in the capture of people who were planning to develop a biological weapons capability in this country. And on and on. Nashiri, who was giving us stale information at the beginning, wound up giving us information that was a whole lot fresher after he was interrogated by the CIA.

So far as devising a way of dealing with terrorists when they came within the jurisdiction of our legal system, that is a somewhat less successful story. President Bush signed an executive order that there were to be military commissions right away. But there was a delay in implementing them, due in part to negotiations with our allies, including the British, who at first insisted that their nationals be tried first and then objected to many features of the military commissions, which of course would have had to apply to everyone. In the end, the U.S. government released several British nationals to Great Britain rather than adjust the procedures, including some British nationals who were plainly guilty of war crimes.

When a mechanism was finally put in place and military commission trials were ready to begin, the U.S. Supreme Court refused to permit President Bush on his own authority to establish a system of military commissions, and so the Congress obligingly passed the Military Commissions Act.[4] By the time the legal challenges to the act had been exhausted, the principal architects of 9/11 were in custody—including Khalid Sheikh Mohammed and the others who would never have been captured but for the CIA program.

We were at the point where Khalid Sheikh Mohammed's trial was ready to start. He had offered to plead guilty. But by the time that happened, we had a new President, and President Barack Obama disclosed that he would, number one, close Guantánamo within the year, and, number two, immediately shut down the CIA interrogation program and limit interrogation techniques to the Army Field Manual,

4. Pub. L. No. 109-366, 120 Stat. 2600 (2006), *amended by* the Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190, 2574–614 (2009) (codified as amended in scattered sections of 10 U.S.C.).

which is generally available on the Internet and has been used for decades as a training manual for terrorists.[5] Additionally, President Obama shut down the military commissions pending a study, which as far as I know has not yet been completed.

The point of these orders, according to the Obama administration, was to "restore" standards of due process, and constitutional standards generally, and to retake the moral high ground. I do not know how many of you saw the videotape of the signing of these orders, but there was one moment that I found especially telling. After President Obama signed the order to close Guantánamo, he asked whether anybody had prepared or drafted an order for any procedures on how the closing was going to be done, and a voice off-camera said that they were working on it. For me, that was a terrifying moment.

As regards Guantánamo, it is a military, not a CIA, facility. I visited Guantánamo in February of 2008. It is a state-of-the-art detention and trial facility. I have visited not only maximum security but medium security facilities in this country, including, principally, federal facilities, and I will tell you that Guantánamo compares favorably with them. I was able to see the high-value detainees, other than Khalid Sheikh Mohammed, being monitored on closed-circuit television. KSM was out of his cell visiting with a delegation from the International Committee of the Red Cross so that he could report to them on how terribly he was being treated. Nonetheless, I did get to visit his cell and found that it included, in the adjoining room, an exercise facility that included an elliptical machine that was the same make and model as the one I used to use at the Lansburgh when I was attorney general, except that KSM did not have to wait in line at the gym every morning.

The courtroom that exists at Guantánamo is enormously expensive. It can handle high-security detainees and has an advanced computer system that can easily handle classified information. The medical care at Guantánamo given to the prisoners is better than the medical care given to their captors. The library includes many Islamic books and other titles, as well as DVDs, but somehow the most popular title, at least when I was down there, was *Walker, Texas Ranger.*

That is not to say that there is no violence at Guantánamo. There is plenty of violence, but it is directed by the prisoners at the guards, not the other way around. The guards have to wear plastic face shields when they walk the corridors and, of course, when they go anywhere near the cells, to protect themselves against the cocktails of feces, urine, spittle, semen, and other liquids that are thrown at them on a regular basis.

As noted before, the Army Field Manual is now the limit of interrogation and, of course, available as a training method on the Internet. The Manual is limited to techniques that can be used by the most raw recruit. So if what is permissible is four feet wide, the Army Field Manual sets the limit at two feet.

The current attorney general, Eric H. Holder, Jr., said during the 2008 presidential campaign that the prior administration had, in his words,

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5. Dep't of the Army, Field Manual 27-10: The Law of Land Warfare ¶ 31 (1956), http://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf.

> authorized the use of torture, approved of secret electronic surveillance against American citizens, secretly detained American citizens without due process of law, denied the writ of habeas corpus to hundreds of accused enemy combatants and authorized the use of procedures that violate both international law and the United States Constitution.[6]

The reckoning began in April 2009 with the release of the U.S. Department of Justice Office of Legal Counsel (OLC) memos that analyzed the CIA interrogation techniques and described why the techniques were lawful. That release was intended, I think, to create a furor. The furor did not develop, but the memos did disclose, of course, to any terrorist that was reading them, the limits to which the United States would go in interrogations. But there was no outrage; in fact, in response, it was obvious that the CIA and the Justice Department had gone to inordinate lengths to avoid violating the torture statute.

Holder then announced that he was reopening the investigations of the CIA agents who had conducted interrogations. These investigations had been closed years before with detailed prosecution memos describing why they were closed. When Holder announced that he was reopening the investigations, he conceded that he had made that announcement and that decision without reading those prosecution memos. In June of 2009, Ahmed Ghailani, who had been indicted for the East Africa bombings and was being charged at Guantánamo with other crimes as well, was brought from Guantánamo to the United States to stand trial.[7]

In a piece of bad timing, in November of 2009, Captain Nidal Malik Hasan, who had been in touch with Anwar al-Awlaki, the spiritual advisor to a couple of 9/11 plotters, shouted, "Allahu Akbar,"[8] before he shot soldiers at Fort Hood, Texas. He killed thirteen soldiers and wounded about thirty. President Obama told us that we should not jump to conclusions. Three days later, also in November of 2009, Attorney General Holder directed an end to the military commissions proceedings against Khalid Sheikh Mohammed and announced that he was going to bring KSM to the United States and, specifically, to the Southern District of New York, to stand trial. Holder announced that doing so would somehow uphold the rule of law. Which law, I have no idea. Certainly not the Military Commissions Act because that act directs that people who are charged with war crimes be tried before military commissions.

Not only was this action, in essence, a failure to uphold the Military Commissions Act, it was also a frustration of something we have been trying to do for several hundreds of years—civilize the laws of war. Essentially the rule is that if you wear uniforms, follow a recognized chain of command, carry your arms openly, and do

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6. Andrew C. McCarthy, *'The Right Man' to Protect us from Terror?*, National Review Online (Jan. 13, 2009), http://www.nationalreview.com/articles/226682/right-man-protect-us-terror/andrew-c-mccarthy.

7. *See* Peter Finn, *Guantanamo Bay Detainee Brought to U.S. for Trial Move is Part of Obama's Plan to Close Prison*, Wash. Post, June 10, 2009, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/06/09/AR2009060900401.html.

8. "Allahu Akbar," which means "Allah is the greatest," is the opening declaration of every Islamic prayer.

not target civilians, then you have certain rights, and one thing that happens is you are held until hostilities are over.

The decision to move KSM was the U.S. government saying that if you violate all of those rules, you get an even better deal—you get to come to a courtroom, you get a platform, you get a lawyer, and you get the possibility of an acquittal. In Christmas of 2009, Umar Farouk Abdulmutallab, a Nigerian citizen, was caught trying to set off a bomb in his underwear over Detroit. Instead of being treated as an intelligence asset, he was treated as a criminal defendant and given *Miranda* warnings, notwithstanding the fact that the only advantage of *Miranda* warnings is that they allow you to use a statement. Given the fact that Abdulmutallab had committed his crime in front of a couple of hundred witnesses, the need for his statement is, I think, open to question.

It is too bad that we did not use Abdulmutallab as an intelligence asset immediately because the bomb that he tried to set off was the same type of bomb that would later be used by bomb makers who were shipping packages into this country several months ago. Had we been able to find out where Abdulmutallab had gotten his training and who trained him, that incident could conceivably have been prevented. After the incident, the director of National Intelligence suggested that Abdulmutallab should have been interrogated right away under the program for interrogating high-value detainees. This program was supposed to replace the CIA program that had been abolished right after the inauguration of President Obama. The trouble was that the program was not functional at the time Abdulmutallab was captured.

Although that program was not up and running, I should tell you that the reopened investigation of the CIA agents who conducted the interrogations, which had been closed years before, was very much up and running and was calling witnesses before the grand jury at the time. This, I think, is a very eloquent illustration of the priorities that were in force.

On May 1, 2010, the New York City Police Department discovered a primitive explosive device in an SUV parked near Times Square in New York City. If it had gone off, it would have killed hundreds; but it did not, of course, and the incident was treated dismissively at the beginning by many, including by New York City Mayor Michael Bloomberg, who said he thought it would ultimately be found that the device had been planted by somebody who was upset about the health care reform bill.

It turned out that the person who planted the bomb, Faisal Shahzad, if he had any views about the health care bill, had not been motivated by them when he set the device. In fact, he had been trained by the Pakistan Taliban, who helped him do it.

Even though the principal value of both Shahzad and Abdulmutallab when they were captured was as intelligence assets, the main emphasis was on criminal prosecution. And as a result of this emphasis, a rich trove of information, I would suggest to you, was forfeited.

The Ghailani trial appears to have been intended as a demonstration to show that we could try any Guantánamo detainee in a civilian court and thus serve as the

basis for an argument that the expressed concerns over trying Khalid Sheikh Mohammed here in a civilian court were misplaced. Inasmuch as Ghailani had been indicted years before, the case had been investigated years before as a case that was to be presented in a federal court, rather than as a case based on evidence captured on the battlefield.

In other words, even if the trial of Ghailani had been a complete success, it would not have shown that we could try Guantánamo detainees in a civilian court. However, the trial was not a success; it failed in a number of respects, including suppression of the testimony of a key witness against Ghailani, and it resulted in his acquittal on a couple hundred murder counts. Ghailani was convicted on only one count, and that was conspiracy to destroy government property resulting in death.

Since 9/11, more than two dozen Islamist plots have been aimed at this country, including not only those of Major Hasan, Abdulmutallab, and Shahzad, but also those of Najibullah-I Zazi and his cohorts, who are under prosecution in the U.S. District Court for the Eastern District of New York for an alleged plot to detonate explosives in the United States; Bryant Neal Vinas and his plot against commuter railroads and subways in this city; plotters who planned attacks on military personnel at Fort Dix, Quantico, Virginia, and Goose Creek, South Carolina; individuals who murdered an army recruiter in Little Rock, Arkansas, and planned to blow up a synagogue in Riverdale, New York, an office building in Dallas, and a courthouse in Illinois; and many, many others.

Yet, the criminal law paradigm is still setting the limit of the response. Attorney General Holder continues to press for a civilian trial for Khalid Sheikh Mohammed and others. Holder says that is not off the table; they were scheduled long ago to begin their military trials at Guantánamo. Nashiri was supposed to have already been tried at Guantánamo in connection with the USS *Cole* bombing. His trial began and then it was stopped. We are now told that his trial has been put back on the rails.

It is true that Guantánamo remains open, but it is also true that President Obama remains committed as ever to closing it and to figuring out a way to release those who are there, despite a growing body of evidence that alumni of Guantánamo have returned to the battlefield in startling numbers. An interview with a man named Sheikh Abu Sufyan Al-Azdi provides a recent example. Al-Azdi is a deputy commander of al-Qaeda in the Arabian Peninsula, which is a group based in Yemen. This interview was published in the October 2010 issue of al-Qaeda's English magazine called *Inspire*.[9] For those of you do not have a subscription to *Inspire*, I will tell you that you can get a copy of the article on a website called Middle East Media Research Institute (MEMRI), which translates articles of that sort and others. It is a real eye-opener. Al-Azdi, who was released from Guantánamo, was turned over to the Saudis for participation in their celebrated re-education program. However,

9. MEMRI, http://www.memrijttm.org/content/en/report.htm?report=3961&param=APT (last visited June 1, 2011) (subscription required); *see also Interview with Shaykh Abu Sufyan: The Vice Emir of Al-Qaida in the Arabian Peninsula*, Flashpoint Partners (Oct. 11, 2010), http://www.flashpoint-intel.com/images/documents/pdf/1010/flashpoint_abusufyaninspire1010.pdf.

Al-Azdi made his way back to Yemen to resume his jihadi activities. In the *Inspire* interview, Al-Azdi urges Muslims to emulate Hasan, the Fort Hood shooter, and Abdulmutallab, the Detroit airplane bomber. Al-Azdi is by no means the first alumnus to return to the battlefield. In March of 2010, the operational leader of the Afghan Taliban announced that he was promoting an alumnus of Guantánamo to replace someone who had been killed by one of our drones.

In fact, more than twenty percent of those released from Guantánamo have returned to the battlefield, and those are just the ones we know about because they have been recaptured or killed in battle. How many others are still out there? We have no idea. With respect to Guantánamo, there is something of a constitutional standoff at the moment. President Obama wants to close Guantánamo and bring those who are still there to the United States. Congress has said that Obama may not use funds appropriated by Congress for that purpose, and so they are at an impasse. One alternative that some in the Obama administration, and some outsiders, have urged is indefinite detention at Guantánamo with no trials, at least until after the 2012 presidential election.

That indefinite detention option has gotten backing even from some highly respected people outside the government, including a man named Jack Goldsmith, a former assistant U.S. attorney general and someone with whom I ordinarily agree. Make no mistake: I am not here as a proponent of military commissions as a policy matter—although I think the fact that Congress has passed the Military Commissions Act and re-enacted it at the behest of this current administration makes it barely short of lawless for the administration to refuse to use military commissions. But I certainly agree that the record of proceedings in that forum is not encouraging. For example, Omar Khadr, who at the age of 15, without disclosing his identity as a combatant, threw a hand grenade that killed one U.S. soldier and maimed another. Khadr was tried at Guantánamo and was allowed to plead guilty to get a sentence that was capped at eight years. Khadr was further allowed to serve the remainder of his sentence in his native Canada, where the laws are such that he is likely to be out in a year or two.

That sentence itself was harsh compared to the sentence of Osama bin Laden's bodyguard and confidant, a man named Salim Hamdan, who gave his name to a famous Supreme Court case.[10] Hamdan was bin Laden's driver and was captured while in possession of two missiles that were intended for use on U.S. soldiers. Anybody who is familiar with organized crime cases knows that the driver is probably the most trusted member of the family. The driver is closest to the boss, he is the one who is responsible for the boss's safety, and he is the one who hears everything. Notwithstanding that, the military judge could not get his mind around the fact that Hamdan was anything more than a mere driver. The prosecution asked for thirty years. Hamdan got something short of eight and was released immediately because he had already been in custody for longer than that.

10. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

On the other hand, as I said earlier, trying unlawful combatants in civilian court disregards the Military Commissions Act and essentially provides them better treatment than what is accorded to those who obey the laws of war. So what are we to do? One thing that perhaps ought to be done is to go back to first principles and ask why it is we want to have trials, if we even want to have trials.

After World War II, the Allied Forces held the Nuremberg Trials, essentially for two reasons: one was to create a record of what the people involved in the Nazi regime had done, and the second reason was punishment. Not everybody at the time favored the Nuremberg Tribunals. Winston Churchill, in fact, favored summary execution for the senior leadership of the German government; he did not see any need for trials. Today we do not need the recordkeeping feature of Nuremberg because we have a record of precisely what these people have done and why they have done it. I do not think that simple indefinite detention, or even summary execution, is a reasonable choice because it fails to provide for what I think the public has a legitimate, basic right to and a societal need for. And that is to affix moral blame and to impose an appropriate punishment. That is why we have a justice system.

We have, essentially, a social contract, as you know, in which people give up their right to use force in return for the assurance that their government will use force on their behalf when necessary. Telling the families of those who were killed on 9/11 not to worry because we are going to have these people in custody indefinitely, I would suggest to you, is a failure on the government's part of the social contract.

One solution that is available to Congress is to exercise its constitutional power to create a court to try terrorism cases. Article III creates only the Supreme Court. It then says that Congress may from time to time ordain and establish such other courts as it deems necessary.[11] Congress has the power to create courts. Therefore, Congress can create a court that can consider any relevant evidence, is not bound by the rules of evidence, and can be fashioned to try these cases. This court could be presided over by an Article III judge, with the military providing juries and prosecutors.

That is one alternative that has been proposed and there has been a lot written on it. This is not the time to get into a detailed description of how the court would work. But that is certainly one alternative to what we have now. The executive branch, I think, needs to focus on the nature of the adversary that we are confronting. Strategically, there has been not only a failure but an outright act of refusal to consider the nature of the adversary we confront, and that is an adversary that is motivated by a religiously derived ideology that essentially offers to infidels three choices: conversion, dhimmitude,[12] or death. We live in a culture, as I said before, in which we hesitate to ask questions about other people's religion. But when that religion is something they use as a justification for imposing a system on us, we are very well entitled to ask questions about it and draw appropriate conclusions.

11. U.S. Const. art. III.

12. *See* David B. Kopel, *Dhimmitude and Disarmament*, 18 Geo. Mason U. C.R. L.J. 305, 305 (2008) ("Islamic law, shari'a, forbids non-Muslims, known as dhimmi, from possessing arms and defending themselves from attacks by Muslims. The disarmament is one aspect of the pervasive civil inferiority imposed on non-Muslims, a status known as dhimmitude.").

Because we are facing a militant ideology that is not focused in any one particular place, the only way that we can prevail is to try to stay one jump ahead of those who are intent on translating that ideology into concrete action. The only way to do that is through intelligence gathering, both electronic intelligence and, when we can get it, human intelligence. I would not downplay, as many people have, the value of human intelligence. General Michael Hayden, the former director of the CIA, said that trying to work based only on electronic intelligence is like trying to solve a jigsaw puzzle without looking at the picture on the box. Occasionally, we get hold of a person who can describe the picture on the box and that is enormously invaluable.

However, if we have a program for questioning potentially valuable detainees that is limited to the Army Field Manual, which is already available on the web as a training manual, then we are going to get virtually nothing from the questioning. There are certainly those in the intelligence community who understand the nature of the threat and the importance of the intelligence in dealing with the threat. But those in charge appear to be strategically myopic. The President's special assistant, Deputy National Security Advisor John Brennan, made a speech last year at the Center for Strategic and International Studies. This speech was given in 2010 by one of the White House's designated deep thinkers on the subject of terrorism. He said that to speak of a war on terrorism or a war on terror is highly misleading because terrorism is simply a tactic and terror is a state of mind.

When I heard that speech, I thought back to a great comedic routine that was part of a show called *Beyond the Fringe*, which was a revue that ran on Broadway. One of the wonderful bits in that revue involved a harassed Scotland Yard spokesman trying to explain why it was that Scotland Yard had failed to solve the Great Train Robbery of 1963. The spokesman said that Scotland Yard had been very confused by the name: the Great Train Robbery. He said that trains are very large, they are hard to conceal, they run on rails, and it is very difficult to make off with them. He said that we have investigated this and have found that there is no question at all of a missing train. We have the train; it is the *contents* of the train that are missing.

That is a very funny bit but it is part of a British farce. The President and the national security advisor did not, so far as I know, intend themselves to be participating in a British farce when the Deputy National Security Advisor spoke at the Center for Strategic and International Studies about the War on Terror. When he got to the subject of jihad, he cautioned against describing our enemies as jihadists because, as he put it, jihad is "a holy struggle, a legitimate tenet of Islam." And just so nobody missed the point, he said that jihad means simply, as he put it, "to purify oneself or one's community."[13] This person, by the way, says he believes that a twenty percent recidivism rate from Guantánamo is actually not bad because it compares favorably with the recidivism rate in U.S. federal institutions, notwithstanding that we have a much more accurate way of keeping track of the alumni of federal institutions than of the alumni of Guantánamo.

13. *Counterterror Adviser Defends Jihad as 'Legitimate Tenet of Islam*,' Fox News (May 27, 2010), http://www.foxnews.com/politics/2010/05/27/counterterror-adviser-defends-jihad-legitimate-tenet-islam/.

Now, we can wish Muslims of a reformist bent all the luck in the world without forgetting that it is going to take a struggle within Islam, and not just wishful thinking, to change the meaning of jihad or at least the lengths to which some Muslims are willing to go in following it. Jihad may indeed involve purification, but only in the sense of intensifying one's own commitment to calling others to the faith, spreading Shari'a law, and purifying one's community of all non-Islamic influences. We can wish reform-minded Muslims and moderate Muslims all the luck in the world without forgetting that the struggle to spread Shari'a by peaceful means, if possible, but by violent means, if necessary, is, in fact, the meaning of jihad within the religion.

Now, I recognize that all religions, my own included, have universalist visions and look forward to the day when all people worship in accordance with them. But where they differ sharply is on how far they command people to go in bringing that day about. For the people in charge to overlook that, or if they have not overlooked it, to try to get other people to overlook it is, I suggest to you, a bad way to lead us. And that, regrettably, is where we are.

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QUESTION AND ANSWER SESSION

Question: Could you elaborate on your opposition to military commissions, which you said, as a public policy matter, you were not in favor of. And if we do not have civilian trials in the United States and we do not have military commissions, what alternative do you propose?

Judge Mukasey: We have had military commissions since the American Revolution. There was a military commission that convened as late as World War II when German saboteurs landed off Long Island, New York, and Florida in 1943 and were captured. On direct orders of the President, they were not taken to a civilian court; rather, they were put before a military commission, tried, and executed within three months. In fact, the U.S. Supreme Court opinion upholding that entire procedure was issued after they were dead. However, we do not have any experience with military commissions on a long-term basis, and military commissions are something apart from the normal mandate of the military. The military services are there to fight and win wars, and military commissions are, from their standpoint, a sideshow. And justifiably so; I don't mean this as a criticism of them. They are not within the mainstream of the mandate of the military. There is no promotion track for being successful long-term by prosecuting military commission cases. People do a limited term in the commissions and then move on to something else. There is no long-term mechanism in place, and I think there has to be a long-term mechanism in place, which is why I suggested creating a terrorism court. I think civilian courts create enormous security concerns, not to mention the fact that when we bring people within the reach of federal courts what we invite and what we are going to get—because the lawyers involved have announced that is what we are going to get—is a

wave of litigation addressing the facts and the conditions of confinement of people who are brought here. And federal courts are going to be basically imposed upon with an enormous wave of litigation over each of these people.

There are several hundred federal judges across the country. And I have to tell you that I yield to no one, at least to no one except several federal judges, in my admiration for the federal judiciary. However, there is always one federal judge who will release somebody on a habeas corpus writ on a claim that the person's confinement is no longer warranted. That is not possible at Guantánamo, but it *is* possible once people get to the United States. And it will be particularly possible when and if we start withdrawing troops from Iraq and Afghanistan, which will then give rise to the claim that the war is over and therefore we cannot continue to hold people. So I find that part of it enormously dangerous, which is why I believe in a separate court.

Question: I love your analogy to the Great Train Robbery—that the train has not been stolen, rather the contents have been stolen. The contents of our freedom and liberty have been stolen, not the U.S. Constitution, so to speak. What is your remedy for getting back the contents of the Constitution?

Judge Mukasey: I am at a loss to know which of our liberties have been stolen. As far as I know, everybody remains free and, if you consult the blogs, remains quite free to launch whatever criticism and protest they want, fact-based and otherwise. I have never seen such a procession of people line up at microphones like this to complain that their free speech rights are being suppressed.

Question: I am not complaining, and I am very much appreciative of your wonderful analogy. I am just concerned about how we get back the sense of freedom that we had. I think that is a better question.

Judge Mukasey: We get back the sense of freedom that we had when we stop having to wake up every morning wondering whether a bomb is going to go off in the subways.

Question: Do you still feel that the CIA enhanced interrogation techniques had sufficient legal support in the OLC memos that John Yoo and Bob Delahunt and others were involved in producing?

Judge Mukasey: The short answer to your question, until you got to the last part of it, was yes. As far as John Yoo's memos are concerned, those were withdrawn. I think that they were not well done and they had been redone. What is interesting about the fact that they were redone is the fact that the same conclusions were reached, namely, that the techniques were lawful. Torture has a meaning. It is not just an expression.

As far as the enhanced interrogation techniques having sufficient legal support, there is a statute that bars the use of torture and defines torture as acting under color of law for the purpose of causing severe physical or mental pain or suffering. Mental pain or suffering is defined as having long-term consequences. Water boarding, I will tell you, creates virtually no physical pain and has no long-term consequences. Water boarding is used in Survival Evasion Resistance Escape (SERE) training for U.S. Army Special Forces and for Navy SEALS. And it has to be used with great

discretion in SERE training because it can be very demoralizing; the trainees always give up whatever it is they are trying to hold back.

Question: I think you would recognize that there was extreme revulsion among the American people generally when it was learned what water boarding techniques were like.

Judge Mukasey: I recognize that there was extreme revulsion against a general concept of water boarding based on what the Japanese did during World War II and what the Khmer Rouge did later on. This water boarding today bears no relation to that earlier form of water boarding. During World War II, the Japanese laid people down, pumped water down their stomachs, and then stood on their abdomens to push the water back up. They also forced them to eat raw rice and pumped water down their stomachs and waited until it distended and caused enormous pain. That is not what the CIA did. The Khmer Rouge handcuffed people to the bottom of barrels and poured water in until it reached over their heads. That was their idea of water boarding. Again, that is not what the CIA did. I will tell you that only three people, the three people I previously discussed—Zubaydah, KSM, and Nashiri—were water boarded. That is it.

Water boarding involves tying somebody down to a board, putting a cloth over his face, pouring water over his nose and mouth, and holding your hand over the cloth for periods of between twenty and forty seconds so that he cannot move his head to get the water away. That is it. What it creates is the panic that comes with drowning, and it creates this panic even if you know you are not drowning, which you know, of course, by the second or third time they do it. The trainees who undergo SERE training know that they are not going to be drowned, but it still works every single time. It works to force people to be cooperative.

And it is not, by the way, a question of trying to get confessions out of people. I will concede that if you had water boarded KSM enough, he would have confessed to having shot Abraham Lincoln. Confessions are not the point; rather, intelligence is. When somebody lies to you in the course of questioning, you take them out and you engage in coercive techniques with the authorization of somebody at the deputy level or higher within the CIA. You then wait until he becomes more cooperative and then somebody who does the questioning comes in. It is not the same person the entire time.

And the result is certainly not engaging in that technique until somebody discloses a particular piece of information and then running out and using the information. You take the information that you get, fit it into the grid of information that you already have to determine what it is that you are getting. What we received was enormously valuable and water boarding was not the only technique used. There were a whole lot of other unattractive techniques being used, such as sleep deprivation and walling, which involves banging somebody into a hollowed-out wall that makes a sound as if he is being pushed with a whole lot more force than he is, as well as open-handed slaps to the side of the head and the abdomen.

Question: Obviously, you are in sharp disagreement with the current attorney general on a lot of issues.

Judge Mukasey: I have some policy disagreements with him, but I have some agreements with him, too. I think that the current Justice Department has been, in a quiet sort of way, enormously aggressive about pursuing leak cases. And I applaud them for that. I am deadly serious. I think that is an enormous problem, and they are serious about cracking down on it.

Question: How much more difficult is it to conduct our anti-terrorist and anti-jihad operations or relations with other countries when the current administration is not sympathetic to the techniques you described, the sanctions, or the attitude that you show? There is such a sharp difference between what you say and think and the way that anti-terrorism activities are now being conducted. Is that impeding our ability to fight and prevent further incidents?

Judge Mukasey: It is not something that I can prove. I cited the Abdulmutallab incident and the incident in Times Square as examples of situations in which we could have gotten intelligence, but we did not. I do not know what other incidents there were or how many other incidences there were, but what I am saying is that going back to a criminal law paradigm is no way to do it. But that said, they have left in place, and are pursuing, the techniques that were approved for electronic surveillance. Those techniques are very much in place and obviously come in handy. But that is only part of the equation.

Question: I would like to go back to your statement with regard to the difference between the military commissions and the civilian courts. Did I hear correctly that you found the possible right of acquittal reprehensible in the civilian courts?

Judge Mukasey: No, I did not say that at all. What I said was that the fact of the acquittal due to the suppression of evidence was a regrettable result. But you cannot have a trial unless you have the possibility of an acquittal. Otherwise it is not a trial; it is a show trial. You also have the possibility of an acquittal in military courts; in fact, military courts generally, including courts-martial, have a higher record of acquittal than civilian courts. It was the fact and the manner of the acquittal in the Ghalani case that I objected to, not that acquittal is a reprehensible result.