



The Presumption of Innocence

**Difficulties in Bringing
Suspected Terrorists to Trial**

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EXECUTIVE SUMMARY

Shortly after taking office, President Obama asked his advisers why, if those detained at the Guantánamo Bay detention facility in Cuba were so dangerous, ‘can’t we prosecute them?’ This is a question that has been asked on numerous occasions, not just by President Obama and not just about Guantánamo Bay detainees, but by Western liberal democracies about a whole range of suspected terrorists considered non-prosecutable (such as, Abu Qatada in the U.K.).

Since the attacks on New York and Washington, D.C., on 9/11, the U.S. has shifted its emphasis on how to deal with the threat posed by terrorism. Al-Qaeda’s strike was interpreted as an act of war, rather than a crime, an approach that the U.S. continues to regard as necessary (and that continues to prove controversial among some of its allies, particularly in Europe). This post-9/11 rule-of-war world view was given a legal framework by the Congress-approved Authorization for Use of Military Force (A.U.M.F.), which has provided the President with significant powers to wage war against al-Qaeda wherever they were based across the world.

Yet, Western security structures were fundamentally better prepared for an era when nation states, as opposed to non-state actors, were the primary security threats. There was little precedent for the type of attack on 9/11, and little precedent for the way in which a state should respond. Subsequently, detention without charge; rendition; deportation; missile strikes; and military operations have reduced the civilian court system to just one of a variety of responses to the al-Qaeda and al-Qaeda-inspired threat. One particularly controversial manifestation of this is the detention centre at Guantánamo Bay, Cuba.

Therefore, criminal prosecutions are now just one aspect of a much broader strategy of preventing terrorists from carrying out mass-casualty attacks. Yet, politicians – especially those in Europe – have failed to adequately explain to the public as to why this is.

This ongoing inability (or unwillingness), on behalf of liberal democracies, to engage with such issues more forcefully in public, or to explain why some suspected terrorists will not be tried in a criminal court, has led to a lack of public understanding on the issue.

The discourse in the U.K., surrounding the case of Shaker Aamer (the last British resident detained at Guantánamo Bay), exemplifies this. The British government has said that the ‘public pressure’ of Aamer’s supporters ‘adds to that sense [...] that the detention is not right or appropriate’.

Yet, this is a cyclical problem: public pressure increases because the government is not willing to explain the complicated security concerns in such cases. Governments have collectively failed to address why they believe that policies such as detention are necessary, and have failed to explain that the complexities of dealing with modern-day terrorism mean that not all roads lead to a court of law.

Drones, detention, preventative arrests, and deportations are the realities of the ongoing struggle against today’s form of terrorism. The idea that stopping terrorism will always result in prosecutions misunderstands the difference between a preventative approach that stops mass-casualty attacks occurring, and a law-enforcement approach that seeks to punish the perpetrators of such an attack.

The Presumption of Innocence does not contend that one type of approach to counterterrorism is superior to any other nor seek to establish the guilt or innocence of the named suspects; instead, it argues that the criminal-justice system is not always the most realistic way to eliminate terrorist threats, and is not fundamental in order to prove the legitimacy of the threat. It also shows that President Obama’s question, ‘If these people are so dangerous, why can’t we prosecute them?’, has a perfectly good answer; but today’s governments are just not willing to say it.

* * *

There are five broad, and often overlapping, categories that help explain why criminal prosecutions are not always possible as a response to the terrorism threat.

Issue 1: Rule of Law v Rule of War

Successive administrations have interpreted al-Qaeda's strike on the U.S., on 9/11, as an act of war, not merely a crime punishable by law enforcement. This was because such an attack by a state would have been classified as an act of war: civilian and military leadership were targeted, and the attacks had both an ideological and political objective.

As part of the international law of war, armies can remove unlawful enemy combatants from the battlefield; some of these individuals were sent to the Guantánamo Bay detention centre, the island which also serves as the venue for military trials.

However, prosecuting such enemy combatants in either a federal or military court is a significant challenge. Intelligence gained from counterterrorism or military operations abroad does not easily translate into evidence that is admissible in court. Suspects captured in Afghanistan or Pakistan tended to have been in active combat zones, where intelligence and military operatives' primary focus was removing the enemy combatant from the fight, not conducting criminal investigations or finding evidence suitable for court. These are tasks more appropriate for the Federal Bureau of Investigation (F.B.I.) or the police.

Furthermore, some individuals – while considered a threat to the lives of soldiers operating in war zones – have not broken any law. For example, a foreign fighter abroad who cannot be proved to have killed Americans is unlikely to have committed a crime prosecutable in an American court.

Even if a crime has been committed, it is extremely unlikely that it could be brought to a civilian court: witnesses could live thousands of miles away; the military would need to collect evidence from the crime scene; and the U.S. may want to monitor and control the evidence, in order to make sure that it remains untainted, and follow the chain of custody – something that the foreign government allowing the U.S. to operate on its soil may not allow.

Therefore, detention during warfare normally takes place to prevent a perceived immediate threat, not as a prelude to punishment for a criminal offence.

Issue 2: Intelligence & Prevention v Evidence & Prosecution

The operational counterterrorism tactics of intelligence agencies and law enforcement can diverge significantly. Broadly speaking, the goals of intelligence agencies are primarily disruption and prevention, while law-enforcement agencies aim to also assemble information that can be used in court.

Intelligence officials must make fast decisions on whether to act on the information they have, in order to prevent an attack. As such, their work may not be conclusive enough to be presented in court: intelligence can be inconclusive and fragmentary (whereas police evidence has to stand up in an open court of law, and prove guilt beyond a reasonable doubt). Excellent intelligence does not necessarily translate into excellent evidence.

This maxim can lead to conflicts between competing agencies as to when, for example, the arrest of a cell being monitored should take place. If it is made too early, there may not be enough evidence to obtain a conviction in court; however, the longer the authorities wait, the greater the risk that the attack takes place.

Examples from the U.K. include al-Qaeda's transatlantic 'liquid bomb' plot of 2006 (which involved U.K. operatives preparing to detonate liquid bombs on at least seven transatlantic flights from Britain,

heading to Canada and the U.S) and the ‘Easter bomb’ plot of 2009, in Manchester (which likely targeted shopping malls).

For the ‘liquid bombers’, the case was allowed to run long enough – despite American protestations and nervousness over the imminence of the attack – to gain successful convictions. In the ‘Easter bomb’ plot, its feared imminence – and a reliance on classified intelligence – meant that it was not prosecutable in court. This led to a degree of both public and political scepticism about the severity of the conspiracy.

Issue 3: Admissibility of Evidence

Prosecutions may not be sought in some counterterrorism cases, due to a lack of admissible evidence. For example, disclosure of classified information in court may pose a national security threat, by hindering ongoing investigations; revealing sensitive sources; or exposing intelligence-gathering methods.

On other occasions, the level of coerciveness during interrogations has led to evidence gained against suspected al-Qaeda operatives becoming inadmissible in court.

For example, the interrogation of Abu Zubaydah – whom the U.S. suspected of being a senior al-Qaeda figure – was a crucial source of intelligence in alleged al-Qaeda plans involving British resident and former Guantánamo Bay detainee Binyam Mohamed, and José Padilla, an American citizen convicted in August 2007 on terrorism charges. One alleged plot involved the detonation of a nuclear ‘dirty’ bomb; another involved using natural gas to destroy apartment buildings in the U.S.

However, Mohamed’s military trial collapsed due to his mistreatment while in U.S. custody in Morocco (to where had been rendered). This made any inculpatory statements about his terrorist planning against the U.S. inadmissible. Once this evidence was put aside, there were no clear grounds for prosecution.

Mohamed’s suspected co-conspirator, José Padilla, also confessed to ‘exploring’ a ‘dirty bomb’ attack, during interrogation on a Navy brig. However, as Padilla’s confessions had taken place without him being read his *Miranda* rights or having access to a defence lawyer, they were also inadmissible. While Padilla was found guilty of separate terrorism charges, the judge gave him a lesser sentence, due to his previous mistreatment (this verdict, however, is currently under review, for being too lenient).

Therefore, even if a ‘dirty bomb’ plot had existed, the interrogation methods used on these detainees rendered the evidence inadmissible.

Difficulties also emerged in the trial of Ahmed Ghailani, who was involved in the 1998 bombings at the U.S. embassies in Kenya and Tanzania.

After his capture, Ghailani was rendered to a foreign location where, according to a U.S. District Judge, he was subjected to ‘extremely harsh interrogation methods’. This led to the exclusion of certain inculpatory statements at trial. Coercion issues also meant that the government was unable to call a key witness; Ghailani was subsequently acquitted on 284 of his 285 charges.

Issue 4: Politics

Guantánamo Bay detainees are legally defined as enemy combatants who can be detained under the law of war, as opposed to criminals who should be given a criminal trial. While some U.S. politicians disagree with keeping Guantánamo Bay open, there is little willingness within Congress to approve the transferral of prisoners from Guantánamo Bay onto the U.S. mainland; this would be politically unpopular, and would potentially allow the detainees access to greater protection under the U.S. constitution.

Political calculations also contributed to two other Guantánamo Bay detainees not being prosecuted: the British citizens, Moazzam Begg and Feroz Abbasi. The two British detainees were being considered as early candidates to be prosecuted under the newly established military commissions.

Upon learning that Begg and Abbasi were due to be put before a military commission, significant resistance emerged within Britain. Prime Minister Tony Blair, under pressure domestically because of his perceived closeness to the Americans and the Iraq war, needed to show a degree of political separation between the U.K. and the U.S. Subsequently, President Bush agreed that no British citizen would face a military commission. In January 2005, Begg and Abbasi were released.

Issue 5: Drones & Accessibility

As al-Qaeda often operates in ungoverned mountainous regions, the U.S. and its allies have limited access to capturing fighters based there. Furthermore, even if these fighters are captured, President Obama's refusal to house any more detainees at Guantánamo Bay has limited the places to where they could be transferred. This has led to the increased use of armed drones, particularly under the Obama administration, a measure that has proved controversial.

A prominent example of this is the September 2011 drone strike in Yemen, which killed al-Qaeda in the Arabian Peninsula (A.Q.A.P.)'s Yemeni-American cleric, Anwar al-Awlaki. The killing of an American citizen prompted questions and criticism towards the Obama administration, for not giving him a trial or revealing the evidence used to justify him being targeted.

The U.S. government, however, has justified the legality of killing U.S. citizens engaged in terrorism overseas, under the principles of self-defence; the law of war; and the Congressionally approved A.U.M.F. It also stated that, as al-Qaeda is a 'stateless enemy', any military response cannot be limited to Afghanistan, nor is capture always feasible.

There were other practical reasons as to why capturing or prosecuting al-Awlaki would have been unrealistic. While his American citizenship precluded trial by military commission, trial by a civilian court could have revealed the classified methods that the U.S. uses to track terrorists. Furthermore, the U.S. has no military presence or legal jurisdiction in Yemen.

Even if there had been an attempt to apprehend al-Awlaki, dispatching Special Forces teams in such an operation is of exponentially higher risk than a drone strike, as they could meet resistance from al-Qaeda fighters; local civilians; and hostile tribesmen.

Prosecuting al-Awlaki in the U.S. was complicated for other reasons. For example, attempting to get the Yemeni government to carry out the operation was not viable, as even if al-Awlaki had been detained, the Yemeni Constitution prevents its government from turning any of its citizens over to a foreign country. Furthermore, no formal extradition treaty exists between the U.S. and Yemen. This added to the improbability of al-Awlaki being transferred back to the U.S. for trial.

INTRODUCTION

Shortly after taking office in 2009, as President Obama sought to make good on his electoral promise of shutting the Guantánamo Bay detention centre within a year, he asked his advisers: ‘If these [detainees] are so dangerous, why can’t we prosecute them?’¹

This is a common question, and not just about Guantánamo Bay detainees. Between his arrest in 2002, and eventual deportation to Jordan in 2013, it was regularly asked in the U.K. about the jihadist cleric, Abu Qatada.

Since the 9/11 terrorist attacks on New York and Washington, D.C. – and to the consternation of many human-rights groups – the U.S. has shifted its emphasis on how to deal with the threat posed by terrorism. It is a fact that prosecutions in civilian courts have become less of a feature of counterterrorism; some of the highest-profile terrorists, such as former al-Qaeda leader Osama bin Laden and al-Qaeda in the Arabian Peninsula (A.Q.A.P.)’s American-born cleric Anwar al-Awlaki, did not see the inside of a courtroom.

This was because al-Qaeda’s strike on 9/11 was interpreted as an act of war. The subsequent rule-of-war world view was given a legal framework by the Congress-approved Authorization for Use of Military Force (A.U.M.F.), which provides the President with broad power to ‘use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001’.²

This essentially enabled the President to wage war against al-Qaeda across the globe, rather than be restricted to just Afghanistan (the country in which the group was primarily based at the time). As a result, the A.U.M.F. has proved flexible enough to allow the U.S. to legally launch military actions in countries with which it is not at war, but where there is an al-Qaeda presence (such as Yemen), and against groups that only recently became connected to al-Qaeda (such as al-Shabaab, in Somalia).³

Therefore, since 9/11, the threat from thousands of suspected terrorists has been mitigated through channels outside that of criminal prosecutions. Guantánamo Bay is one controversial manifestation of this, and has led to condemnation from staunch U.S. allies. The facility no longer accepts new detainees (and has not since 2008). However, there remains a focus on the U.S. killing, rather than capturing, both al-Qaeda fighters and those from the group’s associated forces. This has on occasion been via drone strikes – which, in of themselves, have also proved controversial.

The legitimacy of the law-of-war framework has been upheld not only by Congress, but by the Supreme Court and two separate Presidents. Yet, liberal democracies in Europe have not explained to the public why a broad range of measures beyond civilian courts of law are required to deal with the terrorist threat. Many Western governments have not formulated a coherent public-relations approach for explaining why prosecutions in civilian court are now just one aspect of a much broader strategy of preventing terrorists from carrying out mass-casualty attacks.

As a result, the U.S. and Europe continue to interpret the correct response to this type of threat differently. For example, European public opinion is overwhelmingly in support of the closure of Guantánamo Bay;⁴

¹ Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (Mariner Books, 2012), p. 128.

² ‘Authorization for Use of Military Force (Enrolled Bill)’, One Hundred Seventh Congress of the United States of America, available at: <http://news.findlaw.com/hdocs/docs/terrorism/sjres23.enr.html>.

³ Al-Shabaab only became an official al-Qaeda affiliate in February 2012.

⁴ ‘Most Muslim Publics Not So Easily Moved: Confidence In Obama Lifts U.S. Image Around The World’, Pew Global Attitudes Project (July 2009), available at: <https://docs.google.com/viewer?url=http://www.pewglobal.org/files/pdf/264.pdf>, p. 5.

in contrast, however, the polling consensus in the U.S. is that it should remain open – with even dissenters not regarding it as a priority issue.⁵

This report attempts to show why a broad approach to combating terrorism is necessary, and why civilian courts are not always the appropriate way of reducing the al-Qaeda and al-Qaeda-inspired threat. Ultimately, it aims to provide an answer to President Obama's question – not just about Guantánamo Bay, but more broadly about terrorist threats considered non-prosecutable.

ISSUE 1: RULE OF LAW v RULE OF WAR

The U.S. treated al-Qaeda's strike on 9/11 as an act of war, and responded – among other measures – with the invasion of Afghanistan, which led to the capture of hundreds of al-Qaeda and Taliban fighters. This section explores issues surrounding the detention of fighters captured overseas, and the often insurmountable challenges of trying them in either a civilian or military court.

The attack on 9/11 saw the U.S. shift its emphasis on how to deal with the threat posed by terrorism. Al-Qaeda's strike was interpreted as an act of war, leading to the invasion of Afghanistan in order to overthrow the Taliban and hunt down al-Qaeda fighters.

The U.S. military response was guided by the A.U.M.F., but the intellectual reasoning and legal framework behind the rule-of-war outlook – as explained by then-Deputy Assistant Attorney General John Yoo – was that if such an attack had been carried out by a nation state, it would have been classified as an act of war. Yoo explained that the 'scope and intensity of the destruction is one that in the past had only rested within the power of a nation-state'. Furthermore, civilian and military leadership were targeted, and the attacks had both an ideological and political objective.⁶

This was reaffirmed by N.A.T.O.'s October 2001 invocation of Article 5 of the Washington Treaty, which considers an armed attack on one member to be an attack against all.⁷ This was the first time that Article 5 was ever invoked.

Yet, Western security structures were fundamentally better prepared for dealing with an era when nation states, as opposed to non-state actors, were the primary security threats; there was little precedent for the type of attack on 9/11, and little precedent for the state to follow in the way that it should respond.

The U.S. response was dictated by a war paradigm, an approach that it continues to regard as necessary (and that continues to prove controversial among some of its allies, particularly in Europe). Subsequently, detention without charge; rendition; deportation; missile strikes; and military operations have reduced the civilian court system to just one of a variety of responses to the al-Qaeda and al-Qaeda-inspired threat.

By the U.S. placing itself on a war footing after 9/11, as opposed to treating the attacks as a crime (as they had with al-Qaeda's 1998 East African Embassy attacks and its bombing of the *USS Cole* in 2000), it was able to rapidly respond.⁸ However, this also led to complications, the most obvious of which was detention policy. Arguably, the most controversial manifestation of this was the creation of a detention centre at Guantánamo Bay, Cuba.

⁵ 'Washington Post-ABC News Poll', *The Washington Post*, 1-4 February 2012, available at: http://www.washingtonpost.com/wp-srv/politics/polls/postabcpoll_020412.html; see also: 'Omnibus Poll', YouGov (May 2013), available at: http://big.assets.huffingtonpost.com/toplines_Guantanamo_0501022013.pdf; see also: 'Domestic Priorities Top Americans' To-Do List for Obama', *Gallup*, 19 January 2009, available at: <http://www.gallup.com/poll/113869/Domestic-Priorities-Top-Americans-List-Obama.aspx>.

⁶ John Yoo, *The Powers of War & Peace: The Constitution and Foreign Affairs after 9/11* (Chicago University Press, 2005), pp. 169-170.

⁷ 'Statement to the Press: by NATO Secretary General, Lord Robertson, on the North Atlantic Council Decision On Implementation Of Article 5 of the Washington Treaty following the 11 September Attacks against the United States', North Atlantic Treaty Organisation, 4 October 2001, available at: <http://www.nato.int/docu/speech/2001/s011004b.htm>.

⁸ William Shawcross, *Justice and the Enemy: Nuremberg, 9/11, and the Trial of Khalid Sheikh Mohammed* (Public Affairs, 2012), p. 55.

As part of the international law of war, armies can remove unlawful combatants from the battlefield. Approximately 60% of the 779 individuals sent to Guantánamo Bay were captured in Afghanistan, post-9/11.⁹ As well as being a long-term detention centre for enemy combatants captured on the battlefield,¹⁰ the Executive Branch of the U.S. government determined that it would be the venue for the military trials being held against some of those detained there. These military commissions were recognised statutorily by the U.S. Congress, in the Articles of War provisions of the 1950 Uniform Code of Military Justice (U.C.M.J.).

However, convicting such individuals in either a federal or military court is a significant challenge. Suspects captured in Afghanistan or Pakistan tended to have been in active combat zones, where intelligence and military operatives' primary focus was both preventing the enemy combatant from continuing to fight, and gathering as much intelligence as possible – not conducting criminal investigations or finding evidence suitable for court.¹¹ As General Michael Hayden, former Director of the Central Intelligence Agency (C.I.A.) has said, 'as a practical matter you can't turn the American armed forces or the C.I.A. into C.S.I. [Crime Scene Investigation, C.S.I.] Miami or C.S.I. Kandahar, or C.S.I. Jalalabad or C.S.I. Peshawar in order to build up that kind of evidence'.¹²

Furthermore, some individuals considered to be enemy combatants have not broken any law. For example, an Algerian fighting against U.S. troops in Afghanistan is considered a threat to American lives, and can be detained as an unlawful combatant if captured on the battlefield. However, as he is a non-U.S. national; is based outside the U.S.; and it cannot be proved that he has killed Americans, he is unlikely to have committed a crime prosecutable in an American court.

This was explained by William Lietzau, former U.S. Deputy Assistant Secretary of Defense for Detainee Policy, in the following way:

[I]f you could graduate from a Taliban boot camp of course you can't be prosecuted for anything, you haven't done anything, you're only a graduate. But if you were captured in war, of course you wouldn't release that person, they're still the enemy, they still want to fight you, they still want to kill you [...] So, you wouldn't release them but on the other hand you can't criminally prosecute them.¹³

Even if a crime overseas has potentially been committed, it is unlikely that it could be brought to a federal court: witnesses could live thousands of miles away from where the trial would take place, and the military would need to collect evidence from the crime scene; make sure it remains untainted; and follow the chain of custody.¹⁴ These are clearly tasks more appropriate for the F.B.I. or police; yet, neither organisation can practically accompany the military on all of its operations.

Even when the law-enforcement approach is utilised, a suspect may potentially only be tracked down with the assistance of a compliant foreign government, complicating prosecutions further. In order to ensure that crucial evidence is not doctored, the U.S. may want to monitor and control such evidence – something that the foreign country may not allow; this runs the risk of rendering the evidence inadmissible, due to the extremely high standards that civilian courts use.¹⁵

⁹ 'Final Report: Guantanamo Review Task Force', United States Department of Justice (January 2010), available at: <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>, p. 15.

¹⁰ While the Bush administration used the phrase 'enemy combatant', the Obama administration describes the same fighters as 'unprivileged enemy belligerents'. For the sake of standardisation, this report uses 'enemy combatant' throughout.

¹¹ 'Final Report: Guantanamo Review Task Force', United States Department of Justice (January 2010), p. 22.

¹² Michael Hayden, 'Getting Counterterrorism Right: A Transatlantic Conversation', *The Henry Jackson Society*, 30 September 2013, available at: <http://henryjacksonsociety.org/2013/09/30/getting-counterterrorism-right-a-transatlantic-conversation>.

¹³ William Lietzau, 'Detention of Terrorists in 21st Century Armed Conflict', *The Henry Jackson Society*, 2 May 2012, available at: <http://henryjacksonsociety.org/2012/05/02/%E2%80%98detention-of-terrorists-in-21st-century-armed-conflict%E2%80%99/>.

¹⁴ Shawcross, *Justice and the Enemy* (2012), p. 118.

¹⁵ Daniel Byman and Benjamin Wittes, 'Tools and Tradeoffs: Confronting U.S. Citizen Terrorist Suspects Abroad', The Saban Center for Middle East Policy at Brookings (June 2013), available at: <http://www.brookings.edu/~media/research/files/reports/2013/07/23%20us%20citizen%20terrorist%20suspects%20awlaki%20jihad%20byman%20wittes/toolsandtradeoffs.pdf>.

It is these types of ‘intelligence collection versus evidence gathering’ dilemmas that have led to the situation where forty-six of those currently in Guantánamo have been assessed to be too dangerous for release, but cannot be tried in either a civilian or military court. This is because, according to Brookings scholar Benjamin Wittes, ‘they have not committed crimes cognizable under American law, because evidence against them was collected in the rough and tumble of warfare and would be excluded under various evidentiary rules, or because the evidence is tainted by coercion’ (for more information on coercion, see p. 18 – 30).¹⁶

These problems do not only apply to Guantánamo Bay. The U.S. and its allies have detained significant numbers of suspected fighters in Afghanistan and Iraq – according to al-Jazeera, over 3,500 in Afghanistan alone –¹⁷ as part of the rule of war. Some of these fighters may previously have been candidates for placement in Guantánamo Bay, were it not U.S. policy to close down the detention centre. Yet, it is also virtually impossible to try these individuals in any court system, in the U.S. or abroad.

The reason for this, as Lietzau has outlined in reference to Afghanistan, is that the detention of these people is not ‘because they have committed some criminal offence that we want to punish them for, but because they are the enemy’, and their detention is to ‘prevent a future threat’.¹⁸ The U.S.; the U.K.; or any of their allies in Afghanistan can theoretically detain a fighter until the end of hostilities with al-Qaeda and its associated forces, or as long as they continue to pose a military threat.

However, a series of safeguards have been put in place, in an attempt to ensure that the correct person has been detained, and to determine whether this person continues to pose a threat. In Afghanistan, capture leads to a commanding officer assessing – within a day – that the right person has been identified. Within sixty days, a review board for detainees considers intelligence reports and a statement from the detainee and witnesses; for this, the suspected fighter is given the assistance of a U.S. Army officer, as part of his defence. This process is then repeated every six months.¹⁹

This type of detention is considered necessary, due to the often unsatisfactory nature of the judicial systems (often because of corruption) in the war zones in which Western troops are engaged. In Afghanistan, N.A.T.O. has attempted to correct this by making structural improvements to the Afghan legal system (which has had only very limited success).²⁰ Similar attempts were also made, by the U.S., in Iraq.²¹

However, the situation remains imperfect. Handing insurgents over to domestic judicial systems which do not have the will or capacity to imprison them threatens the lives of not only the U.S. and N.A.T.O. troops, but the domestic population they are attempting to protect.

Some – including former detainees of Guantánamo Bay – argue that if it is not possible to gain convictions in court, then any detainee must be innocent of wrongdoing.²² Others, such as Pentagon spokesman Todd Breasseale suggest that, ‘there’s a series of logic leaps that have to happen in someone’s understanding of how global operations work, in order to get to that point.’²³

¹⁶ Benjamin Wittes, ‘Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System’, *Brookings*, 4 June 2008, available at: <http://www.brookings.edu/research/testimony/2008/06/04-detainees-wittesb>.

¹⁷ ‘Who controls Afghanistan’s Bagram prison?’, *Al Jazeera*, 12 September 2012, available at: <http://www.aljazeera.com/programmes/insidestoryamericas/2012/09/20129129242282621.html>.

¹⁸ Lietzau, ‘Detention of Terrorists in 21st Century Armed Conflict’, *The Henry Jackson Society*, 2 May 2012.

¹⁹ *Ibid.*

²⁰ For example, see: ‘NATO Rule of Law Field Support Mission (NROLFSM)’, North Atlantic Treaty Organisation, available at: <http://www.isaf.nato.int/images/media/PDFs/110930rollbackground.pdf>.

²¹ ‘U.S. Team Works to Improve Rule of Law in Iraq’, United States Department of Defense, 11 January 2010, available at: <http://www.defense.gov/News/NewsArticle.aspx?ID=57449>.

²² Moazzam Begg has publicly said that ‘[t]he issue here is: Apply the law. If I’ve committed a crime, we say, take this to court. After all of that, if they can’t produce something in court, then shame on them!’ See: ‘Jihadist or Victim: Ex-Detainee Makes a Case’, *The New York Times*, 15 June 2006, available at: <http://www.nytimes.com/2006/06/15/world/15begg.html?pagewanted=all>.

²³ Interview at Guantánamo Bay Detention Centre, June 2013.

No matter how dangerous the individuals involved, executing intelligence-led counterterrorism or military operations abroad does not easily translate into exhaustively gathering the evidence needed to pass the high bar for prosecution in a civilian or military court. The lack of civilian prosecutions of individuals caught in Afghanistan highlights the natural tension between war-zone operations and criminal prosecutions.

A) Efficiency of federal v military courts in overseas captures

Some human-rights organisations have argued that federal courts are perfectly equipped to handle those who are detained at Guantánamo.²⁴ This claim has been backed up within the upper reaches of the U.S. government.

While conceding that military commissions would be required on occasion, Hillary Clinton, Secretary of State during Barack Obama's first term, stated that civilian courts 'have a much better record of trying and convicting terrorists than military commissions do'.²⁵ One of Clinton's predecessors, Colin Powell, Secretary of State during the George W. Bush administration, also stated his belief that civilian courts were suitable venues for dealing with the terrorist threat; Powell lauded the civilian courts' history of 'throwing people in jail religiously', saying that military commissions 'have not gotten up to speed to do that kind of thing'.²⁶

Dianne Feinstein, the current chair of the Senate Intelligence Committee, has also described federal trials as a 'more efficient way' of prosecuting terrorists,²⁷ while Attorney General Eric Holder has proclaimed that 'those who claim that our federal courts are incapable of handling terrorism cases are not registering a dissenting opinion [...] They are simply wrong', describing federal courts 'an unparalleled instrument for bringing terrorists to justice'.²⁸

One frequently cited statistic is that, since September 2001, federal courts have convicted 494 individuals for terrorism-related crimes, while military courts have only convicted five (after two convictions were overturned).²⁹ However, it is unsurprising that federal courts are able to deal with a greater volume of cases. Though *Human Rights First* calculates there to be only 133 terrorism-related charges,³⁰ there are over 4,000 other federal laws within the U.S. code which could, at least theoretically, be used to convict suspected terrorists. Furthermore, of the 494 convictions, the majority of individuals in the dataset that *Human Rights First* uses did not commit al-Qaeda-related offences or were not in any way linked to al-Qaeda or al-Qaeda inspired terrorism. For example, some individuals are connected to the Tamil Tigers (the Sri Lankan terrorist group) or the Revolutionary Armed Forces of Colombia.³¹

Military commissions, in contrast, have a much narrower jurisdiction; they only have authority over potential crimes that have violated the law of war, and they only have thirty-two charges available to

²⁴ 'Trying Terror Suspects in Federal Courts', *Human Rights First*, available at:

<http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Courts.pdf>.

²⁵ 'Clinton backs civilian trials for terror suspects', *Agence France-Presse*, 21 November 2010, available at:

<http://www.google.com/hostednews/afp/article/ALeqM5ii6h3475Nlq3FfoRFp9RS0EA9PvQ>

²⁶ 'Powell: Don't Let Terrorism Change Who We Are', *National Public Radio*, 2 September 2011, available at: <https://web.archive.org/web/20120419152500/http://www.npr.org/2011/09/02/140136054/powell-dont-let-terrorism-change-who-we-are>.

²⁷ Dianne Feinstein, 'Feinstein: A better path to justice', *Los Angeles Times*, 21 March 2013, available at:

<http://articles.latimes.com/2013/mar/21/opinion/la-oe-feinstein-abu-ghaith-terrorism-prosecution-20130321>.

²⁸ 'Holder: Critics of Federal Court Terrorist Prosecution "Simply Wrong"', *Bloomberg*, 12 May 2013, available at:

<http://go.bloomberg.com/political-capital/2013-05-12/holder-critics-of-federal-court-terrorist-prosecution-simply-wrong>

²⁹ National Security Division Statistics on Unsealed International Terrorism and Terrorism-Related Convictions, United States Department of Justice (2012), available at:

<http://www.humanrightsfirst.org/wp-content/uploads/DOJ-Terrorism-Related-Convictions.pdf>.

³⁰ 'Federal Courts Continue to Take Lead in Counterterrorism Prosecutions', *Human Rights First*, available at:

<http://www.humanrightsfirst.org/wp-content/uploads/Federal-Courts-Continue-to-Take-Lead-in-CT-Prosecutions.pdf>.

³¹ See: Robin Simcox & Emily Dyer, *Al-Qaeda in the United States: A Complete Analysis of Terrorism Offenses* (The Henry Jackson Society, February 2012), available at:

<http://henryjacksonsociety.org/wp-content/uploads/2013/02/Al-Qaeda-in-the-USAbridged-version-LOWRES-Final.pdf>.

prosecutors – significantly less than those available under federal law. On top of which, they can only consider crimes committed by non-U.S.-citizen enemy combatants.³²

Furthermore, according to a 2013 *Henry Jackson Society* study, only six of the 494 civilian convictions involved individuals who were captured abroad; had committed an al-Qaeda-related offence; and were charged with ‘Category I’ offences that could conceivably have been tried in a military commission. (The government’s own analysis, using a different methodology of what constitutes an al-Qaeda-related offence, places that figure higher, at eleven).³³

Therefore, when using comparable cases – overseas captures – the numbers of convictions obtained in military commissions (five) and federal courts (six) are actually similar; certainly, federal courts have not outshone military courts when it comes to prosecuting terrorists captured abroad.

The ‘494’ analogy is misleading for a further reason: jurisdiction.

Only 152 of the 494 convicted were individuals who were part of al-Qaeda or associated forces (plus nineteen who committed suicide attacks, leading to an overall figure of 171 individuals who have committed an al-Qaeda related offense in the U.S.).³⁴

Over half (54%) of this 171 were U.S. citizens;³⁵ and there is no precedent for trying U.S. citizens at Guantánamo Bay. Only one U.S. citizen has ever been detained at Guantánamo (Yaser Esam Hamdi – who eventually renounced his citizenship and was transferred to Saudi Arabia), and he was captured in Afghanistan.

Furthermore, 82% of this 171 resided in the U.S. at time of charge or suicide attack. There is also no precedent for sending those arrested in the U.S. to Guantánamo Bay or trying them in a military commission. Only 12% were based abroad at time of incident (with the remaining 5% either of no fixed address or in Guantánamo Bay itself at the time of charge). Therefore, comparing the amount of federal and military convictions to prove any kind of point about the efficiency of either system is inappropriate: they operate on entirely different criteria.

B) Limitation of charges

To add to the problem of prosecuting Guantánamo detainees, there is also an ongoing legal conflict as to the use of the ‘material support for terrorism’ charge in military commissions.

³² ‘Military Commissions Act of 2009’, United States Department of Defense (2009), available at: <http://www.defense.gov/news/2009%20MCA%20Pub%20%20Law%20111-84.pdf>.

³³ The six are Ahmed Khalfan Ghailani, Afia Siddiqui, Oussama Kassir, Wesam al-Delaema, Mohamed Suleiman al-Nalfi, and Mohammed Mansour Jabarah. The government also includes five individuals on this list who were excluded from the study in question, *Al-Qaeda in the United States: A Complete Analysis of Terrorism Offenses*. These five are Oumar Issa; Muhammed Abid Afridi; and Syed Mustajab Shah (who were excluded from *Al-Qaeda in the United States* because their offences involved drug trafficking and/or selling, and it could not be proved that they were specifically inspired by al-Qaeda ideology – as opposed to financial gain), and Mohammed Ali Hasan Al Moayad and Mohammad Mohsen Yahya (excluded as their convictions specifically related to support for Hamas, a group not included in the study because its parameters were limited to al-Qaeda-related offences).

³⁴ Defined as individuals either been convicted in a U.S. federal or military court, or who have committed suicide attacks in the U.S. (specifically in the years between 1997 and 2011). They must also satisfy at least one of the following: be a member of al-Qaeda – defined as having sworn bayat to its emir; have links to al-Qaeda’s senior leadership – either al-Qaeda central, or its regional franchises – for purposes that demonstrably, and knowingly, furthered al-Qaeda or an al-Qaeda -inspired terrorist-cause; have trained at camps known to be closely associated with al-Qaeda – including those in countries such as Afghanistan or Pakistan – and subsequently convicted for al-Qaeda - related terrorism offenses; be a member or associate of a group known to be affiliated or adherent with al-Qaeda and its ideology (including, but not limited to, Lashkar-e-Taiba, al-Shabaab, and Tehrik-e-Taliban). Should the individual not have any formal connections to al-Qaeda, they must instead demonstrate inspiration drawn from al-Qaeda’s ideology, as shown by any of the following: a self-proclaimed al-Qaeda -inspired motive (i.e. a suicide video or letter discussing key al-Qaeda concepts, such as martyrdom and jihad); an al-Qaeda -inspired motive for their offense, as identified and proven as such during trial; possession of jihadist, al-Qaeda or al-Qaeda -inspired material (including, but not limited to, teachings from individuals such as Osama bin laden, Abdullah Azzam, Ayman al-Zawahiri, and Anwar al-Awlaki); frequent contact with members of al-Qaeda, and requests for guidance, as part of the offense; proof of identification with global jihadist, as opposed to purely nationalist, aims; or affiliation with groups known to focus on global aims.

³⁵ Simcox & Dyer, *Al-Qaeda in the United States* (The Henry Jackson Society, 2012), p. viii.

In civilian courts, this charge has proved invaluable. Between 1997 and 2011, a total of 415 separate charges were successfully brought against al-Qaeda-related offenders, almost a quarter (24%) of which were 18 U.S.C. § 2339A and 18 U.S.C. § 2339B: providing material support to terrorists or a designated terrorist group, and conspiring to provide material support to terrorists or a designated terrorist group, respectively.³⁶ It is a potentially useful charge, as it allows for the prosecution of those who supported al-Qaeda and its associated forces yet may not be directly implicated in a specific plot. In U.S. civilian courts, what has constituted ‘material support (or conspiracy to provide material support) for terrorists or terrorist groups’ has ranged from money laundering, to providing martial arts training, and, from attending a terrorist training camp abroad, to intending to provide financial support.

Material support was included in the 2009 M.C.A., which specified the thirty-two different crimes over which military commissions had authority; however, these two statutes could not be applied to extraterritorial, non-American citizens for incidents before October 2001 (for 2339A) or December 2004 (for 2339B).

Therefore, while American citizens were tried *ex post facto* on material-support charges for identical acts as some of those detained at Guantánamo – for example, attendance at an Afghan al-Qaeda training camp – non-U.S. citizens were not; moreover, they could not be, unless the offence took place after October 2001 (highly unlikely in some cases, considering that the training camps were dismantled in the wake of the U.S. invasion). Furthermore, the statute of limitations for material-support offences is normally eight years;³⁷ as 759 out of 779 (97% of the total) of Guantánamo detainees were transferred there before 2006,³⁸ the window for bringing charges against the majority has now closed.

Finally, the fact that the maximum sentence for material-support charges is fifteen years – and many detainees have spent almost fifteen years incarcerated anyway – means that, even if Guantánamo detainees could be tried on the U.S. mainland, this charge would barely be worth pursuing.³⁹ Those found guilty would likely be immediately eligible for release when sentenced, yet possibly remain detained as an enemy combatant (though the unlikelihood of Guantánamo detainees being tried in the U.S. means that this quirk of the system is unlikely to be tested). In fact, the sentences for those convicted in military commissions have been relatively low, with two of the five convicted now repatriated to their homeland:

- David Hicks was convicted of providing material support to terrorism, and sentenced to seven years imprisonment. However, six years and three months of these were suspended, and nine months were to be served in Australia, where he now lives freely.
- Ibrahim al-Qosi was convicted of conspiracy and providing material support to terrorism; he was sentenced to fourteen years, twelve of which were suspended. He has now returned to Sudan.

Even the limited number of material-support convictions that have taken place in military commissions have so far proved contentious.

For example, Salim Hamdan – Osama bin Laden’s driver and bodyguard – was convicted in a military trial in 2008, for actions undertaken between 1996 and 2001. However, in October 2012, the D.C. Circuit reversed this upon appeal (the Supreme Court ruling of 2006, in *Hamdan v Rumsfeld*, reaffirmed detainees’ rights to use the civilian courts to challenge their detention, something not intended when military commissions were initially envisaged by the Bush administration).

This was because, at the time when Hamdan had provided the material support (between 1996 and 2001), it was not a war crime – it still is not, under the international law of war⁴⁰ and the M.C.A. could not act retrospectively to make it so. A similar problem applies to stand-alone conspiracy charges.

³⁶ Simcox & Dyer, *Al-Qaeda in the United States* (The Henry Jackson Society, 2012), p. x.

³⁷ ‘Final Report: Guantanamo Review Task Force’, United States Department of Justice (January 2010), p. 22.

³⁸ *Ibid.*, p. 1.

³⁹ *Ibid.*, p. 22.

⁴⁰ ‘Salim Ahmed Hamdan v. United States of America’, United States Court of Appeals for the District of Columbia Circuit (October 2012), available at: <http://www.lawfareblog.com/wp-content/uploads/2012/10/Hamdan-D.C.-Circuit.pdf>.

The U.S. government is currently appealing the Supreme Court ruling, the verdict of which will dictate the future use of material-support charges in military trials.⁴¹

ISSUE 2: INTELLIGENCE & PREVENTION v EVIDENCE & PROSECUTION

Intelligence agencies' approach to counterterrorism can differ significantly from that of the police. In the wake of 9/11, the law-enforcement focus on arrests and convictions became less important than gathering intelligence about the enemy, leading to an increased focus on prevention via disruption and interrogation. This section analyses the problems that can occur from the differing approaches, especially with regard to being able to prosecute suspected terrorists, and why what may be excellent intelligence does not always translate into admissible evidence.

According to former U.S. Attorney General John Ashcroft, the post-9/11 era required a 'paradigm of prevention' in order to thwart terrorist plots.⁴² Therefore, in order to prevent another attack comparable in scale to 9/11, the U.S. government has relied on improving its intelligence capabilities; less focus has been a law-enforcement model based mainly on arrests and convictions, and more on intelligence gathering, based on prevention via disruption and interrogation.

Yet, the operational tactics of law-enforcement and intelligence agencies can diverge significantly. Evidence collection and intelligence gathering are very different exercises, and primarily dealt with by separate government agencies (who do not always work in harmony).

While the goals of intelligence agencies are 'detection, prevention, and disruption',⁴³ the goals of law-enforcement agencies also include assembling information that can be used in court. When acquiring a target, intelligence officials are not focused on finding prosecutable evidence; instead, they are attempting to interpret a mosaic of information. As British author William Shawcross puts it, 'criminal justice is reactive, fighting terrorism is proactive'.⁴⁴ These practices diverge in a way that can hinder successful prosecution in civilian courts.

Intelligence officials must make rapid decisions on whether to act on the information they have, in order to prevent an attack. Their work may not be conclusive enough to be presented in court, and they cannot consult legal officials with every operational decision.⁴⁵

Therefore, intelligence can be inconclusive and fragmentary, whereas evidence has to prove guilt beyond a reasonable doubt. What may be excellent intelligence does not necessarily translate into excellent evidence.

This can lead to conflicts between competing agencies as to when, for example, the arrest of a cell being monitored should take place. If an arrest is made too early, there may not be enough evidence for a prosecution; however, the longer the authorities wait, the greater the risk that the attack takes place.

A) Transatlantic 'liquid bomb' plot – U.S. & U.K., 2006

A good example of this 'arrest conflict' was the transatlantic 'liquid bomb' plot of 2006. The al-Qaeda plot involved U.K. operatives setting off liquid bombs on at least seven transatlantic flights from the U.K. to Canada and the U.S. While British intelligence services were monitoring the conspirators, the U.S.

⁴¹ 'U.S. to Press Fight of Detainee's Appeal', *The New York Times*, 9 January 2013, available at:

<http://www.nytimes.com/2013/01/10/us/us-to-press-fight-of-detainees-appeal.html?ref=charliesavage&r=0>.

⁴² David Cole, 'Military Commissions and the Paradigm of Prevention', Georgetown University Law Center (2013), available at: <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2119&context=facpub>, p. 3.

⁴³ James Renwick and Gregory F. Treverton, 'The Challenges of Trying Terrorists as Criminals', RAND Center for Global Risk and Security (2008), available at: http://www.rand.org/content/dam/rand/pubs/technical_reports/2008/RAND_CF249.pdf, p. 8.

⁴⁴ Shawcross, *Justice and the Enemy* (2012), p. 122.

⁴⁵ Renwick and Treverton, 'The Challenges of Trying Terrorists as Criminals', RAND Center for Global Risk and Security (2008), p. 8.

government was concerned that the U.K., in its determination to compile evidence that could be usable in court, would inadvertently allow the attack to take place.

In a 2012 retrospective documentary, General Michael Hayden, Director of the C.I.A. at the time of the conspiracy, summarised the American concerns as follows:

[H]ow long do you let it run before you disrupt it? [...] letting it run has a hidden assumption, and the assumption is that you know enough about it; that you know enough about all the players; that there isn't some element of this plot that's actually ahead of the other elements.⁴⁶

Or, as Michael Chertoff, former Head of the Department of Homeland Security, also said in the same documentary:

Once you identify the people you know are plotting, you are confident you can stop them before they actually detonate a bomb or get on an airplane. The problem is what about the people you don't know about?⁴⁷

From the British perspective, Andy Hayman, then-Assistant Commissioner Metropolitan Police Service, commented:

It is all very well to be sitting over in America and say "why don't you go arrest them?"...but if we take them into custody too early and there is nothing to charge them with and we release them, that releases them back into the community.⁴⁸

As the plot progressed, the U.S. government became increasingly agitated at the imminence of the threat and the British determination to gain more evidence. Speaking in 2012, Hayden spelled out the security concerns clearly:

Let me just be very candid. It's really hard to think up the public diplomacy strategy to say "yes we are sorry that the airliners went down. But, we were delaying the disruption of the plot so that we could build up evidence that was permissible in court." There is no way to put that press release together.⁴⁹

Eventually, the Pakistani authorities arrested Rashid Rauf, a member of al-Qaeda who had served as the British plotters' contact in Pakistan and who was operationally key to the plot. This arrest – possibly at the behest of the U.S. government – forced the British authorities to arrest the U.K. plotters immediately, as, once they knew that Rauf had been compromised, the cell could attempt to either escape the country or set their bombs off early.

In this case, the U.S. was less concerned about prosecution, and much more focused on prevention. This is something that Hayden is clear on, saying – in September 2013 – that '[w]e genuinely were getting impatient [...] Truly our primary concern was disruption of the plot. No question about it'.⁵⁰

While American security concerns were understandable, British fears over the amount of evidence needed in order to gain convictions were equally well-founded. Despite collecting 26,000 exhibits, searching 102 properties, and seizing over 300 computers; 15,000 CDs; 500 floppy disks; and 14,000 GB of data,⁵¹ the U.K. could only prosecute eleven of the twenty-four individuals initially arrested. Of these eleven, one – whom British intelligence sources regarded as the key al-Qaeda operative in Britain – was acquitted

⁴⁶ 'Stopping the Second 9/11: Liquid Bomb Plot', National Geographic, 2012, available at: <http://channel.nationalgeographic.com/videos/liquid-bomb-plot/>.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Hayden, 'Getting Counterterrorism Right: A Transatlantic Conversation', *The Henry Jackson Society*, 30 September 2013.

⁵¹ 'Liquid bomb plot: What happened', *BBC News*, 7 September 2009, available at: <http://news.bbc.co.uk/1/hi/uk/8242479.stm>.

entirely.⁵² Overall, it took three trials before the government was able to obtain a set of convictions that matched the severity of the crime.⁵³

This case further highlighted the tensions between the rule of armed combat and the law-enforcement approaches. To Hayden, '[t]his was an armed attack by an opposing armed enemy force. The short word for that is "war"'. And the objective of war is to kill or capture the enemy and to prevent him from attacking us.'⁵⁴ This was not an interpretation shared by all of his British counterparts.

B) Manchester 'Easter bomb' plot – U.K., 2009

Another case which highlights the difficulties within the prevention/prosecution dynamic is that of a thwarted al-Qaeda plot in Manchester, England.

On 8 April 2009, ten Pakistanis and one British citizen were arrested on suspicion of planning to carry out a major attack between 15 April and 20 April (a time period that covered the Easter weekend).⁵⁵ Potential targets included shopping centres and malls (the suspects had photographed each other outside several busy Manchester shopping areas).⁵⁶

These suspicions were founded upon a series of e-mails between a Pakistani-based al-Qaeda associate and Abid Naseer, one of the accused.⁵⁷ While the e-mails appeared to refer to Naseer's various girlfriends and a forthcoming wedding, the British Security Service and police believed that these were, respectively, codes referring to explosives ingredients (including their availability) and the date of the attack itself.⁵⁸

As the attack appeared to be imminent, the police moved to detain the cell. However, after then-Assistant Commissioner Bob Quick of the Metropolitan Police was photographed by the press, carrying a document which outlined the times and places of these forthcoming arrests, the police were forced to bring their plans forward nine hours, in case these details were leaked.⁵⁹

Following police raids on residences across North West England, officers found maps with certain streets marked and the surveillance photographs of shopping centres, yet no evidence of bomb-making.⁶⁰ With insufficient evidence available to sustain a prosecution, the police released all suspects without charge.

Of the ten Pakistani cell members, eight returned to Pakistan voluntarily, after being freed. A further two – Abid Naseer and Ahmad Faraz Khan – could not initially be deported, on human-rights grounds. However, in January 2013, Naseer was extradited to the U.S., to face trial for his role in the plot (which was regarded as one branch of three separate, planned al-Qaeda attacks of 2009 – with the other two occurring in New York City and Norway). For his activities in the U.K., Naseer was charged, in the U.S., with providing and conspiring to provide material support to al-Qaeda, and conspiring to use a destructive

⁵² 'Four Al Qaeda terror suspects under surveillance in Brum', *Birmingham Mail*, 19 September 2010, available at: <http://www.birminghammail.co.uk/news/local-news/four-al-qaeda-terror-suspects-249408>.

⁵³ "'Astonishment" at terror verdicts', *BBC News*, 9 September 2008, available at: <http://news.bbc.co.uk/1/hi/uk/7605583.stm>.

⁵⁴ 'Stopping the Second 9/11', *National Geographic*, 2012.

⁵⁵ 'Abid Naseer, Ahmad Faraz Khan, Shoaib Khan, Abdul Wahab Khan and Tariq Ur Rehman and Secretary of State for the Home Department', Special Immigration Appeals Commission (May 2010), available at: http://www.siac.tribunals.gov.uk/Documents/outcomes/1_OpenJudgment.pdf, p. 4.

⁵⁶ 'Terror plot: How Bob Quick's blunder forced MI5's hand', *The Telegraph*, 9 April 2009, available at: <http://www.telegraph.co.uk/news/uknews/law-and-order/5132512/Terror-plot-How-Bob-Quicks-blunder-forced-MI5s-hand.html>.

⁵⁷ Naseer et al. and Secretary of State for the Home Department, Special Immigration Appeals Commission (May 2010).

⁵⁸ 'Cars and girls: email "codewords" that put MI5 on terrorist alert', *The Telegraph*, 30 July 2009, available at: <http://www.telegraph.co.uk/news/uknews/law-and-order/5935416/Cars-and-girls-email-codewords-that-put-MI5-on-terrorist-alert.html>.

⁵⁹ 'Terror plot: How Bob Quick's blunder forced MI5's hand', *The Telegraph*, 9 April 2009.

⁶⁰ 'Cars and girls: email "codewords" that put MI5 on terrorist alert', *The Telegraph*, 30 July 2009.

device.⁶¹ He is now awaiting trial. Khan decided to return to Pakistan voluntarily, after finding the British attempts to track his movements too overbearing.⁶²

The lack of prosecutions (let alone convictions) that occurred in this case led some to claim that it was not a viable plot, and that those arrested were not engaged in any kind of wrongdoing.

For example, the Muslim Council of Britain – a large Muslim umbrella group for mosques, charities, and schools – said that the government should apologise for treating the suspects ‘in a dishonourable fashion’.⁶³ Inayat Bunglawala of *Engage* – a British, Muslim, advocacy group – called the government’s behaviour ‘reprehensible’; ‘underhand’; and ‘cowardly’, and said that it ‘shames our country’. He believed that the suspects deserved an apology from the government, having been ‘disgracefully’ smeared.⁶⁴

Two Labour politicians – Khalid Mahmood and Mohammed Sarwar – wrote a letter to the Labour Home Secretary, Jacqui Smith, in which they claimed to be ‘amazed, shocked and indeed worried’ that no charges were being brought, saying that the treatment of the ‘innocent young men’ was ‘deeply disturbing and gravely unjust’.⁶⁵ The Liberal Democrats’ then-Home Affairs Spokesman, Chris Huhne, called the episode an ‘embarrassment’, and referred to contemporary accusations that the government had ‘exaggerated the national security threat’ in the past.⁶⁶

However, Justice Mitting, the Special Immigration Appeals Commission judge who heard Naseer’s deportation case, had access to classified intelligence regarding the nature of the plot. In 2010, Mitting concluded that Naseer was ‘an Al Qaeda operative who posed and still poses a serious threat to the national security of the United Kingdom’, and was supported by ‘committed Islamist extremist’ operatives who were ‘knowing participants in Naseer’s plans’.⁶⁷

Evidence of al-Qaeda’s involvement was further outlined in May 2011, when documents discovered at Osama bin Laden’s Abbottabad compound linked him directly to the plot. Among these files was a list of names, including those of the men arrested as part of the Manchester cell.⁶⁸

The comparison with the cell in the transatlantic ‘liquid bomb’ case is instructive: one was allowed to run long enough to (eventually) gain successful prosecutions; the imminence of the other – and reliance on classified intelligence – meant that it was not.

The legal outcome of both cases was different, and, subsequently, so was public perception of the seriousness of the arrests.

C) Attendance at training camps – British Guantánamo Bay detainees

Department of Defense intelligence assessments state that several British detainees at Guantánamo Bay attended training camps and fought alongside al-Qaeda and the Taliban. However – while the

⁶¹ ‘Alleged Al-Qaeda Operative Extradited To United States For Role In International Terrorism Plot Targeting New York City, United Kingdom, and Scandinavia’, United States Department of Justice, 3 January 2013, available at: <http://www.justice.gov/usao/nye/pr/2013/2013jan03.html>.

⁶² ‘Terror suspect Ahmad Faraz Khan returns to Pakistan despite claiming “torture” threat’, *The Telegraph*, 19 July 2010, available at: <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/7897279/Terror-suspect-Ahmad-Faraz-Khan-returns-to-Pakistan-despite-claiming-torture-threat.html>.

⁶³ ‘Pakistani student held under terror law in UK says he was “mentally tortured”’, *The Guardian*, 11 June 2009, available at: <http://www.theguardian.com/world/2009/jun/11/pakistani-student-detention-terror-law-uk>.

⁶⁴ Inayat Bunglawala, ‘Deporting these students shames us’, *The Guardian*, 22 April 2009, available at: <http://www.theguardian.com/commentisfree/libertycentral/2009/apr/22/pakistani-students-terrorism>.

⁶⁵ ‘Birmingham MP Khalid Mahmood angered over deportation’, *Birmingham Mail*, 23 April 2009, available at: <http://www.birminghammail.co.uk/news/local-news/birmingham-mp-khalid-mahmood-angered-91248>.

⁶⁶ ‘Anti-terrorist raids: case of the 12 men arrested for “bomb plot” will be reviewed’, *The Telegraph*, 23 April 2009, available at: <http://www.telegraph.co.uk/news/5204143/Terror-raids-case-of-the-12-men-arrested-for-bomb-plot-will-be-reviewed.html>.

⁶⁷ Naseer et al. and Secretary of State for the Home Department, Special Immigration Appeals Commission (May 2010), p. 14.

⁶⁸ ‘Osama bin Laden planned Easter bomb campaign, files seized in US raid show’, *The Telegraph*, 20 May 2011, available at: <http://www.telegraph.co.uk/news/worldnews/al-qaeda/8527369/Osama-bin-Laden-planned-Easter-bomb-campaign-files-seize-d-in-US-raid-show.html>.

intelligence case against these individuals may have been strong – for a variety of reasons, they could not be tried.

One such reason was the limitation on charges. For example, while receiving weapons training and receiving terrorist training were both covered in the U.K. Terrorism Acts of 2000 and 2006, it could not be applied retrospectively.⁶⁹ Therefore, in British law, any British detainee who was present at training camps in the 1990s was not acting illegally.

Furthermore, the military interrogation summaries of such detainees – from where much of the prosecution evidence would come – was essentially hearsay⁷⁰ and, therefore, inadmissible in the U.S. and U.K. civilian trial system.⁷¹ Lawyers would certainly have challenged the reliability of such evidence in court, as well as how the information was acquired, minimising the possibility of gaining a conviction.

Other practical issues also possibly prevented the U.K. government charging British citizens at Guantánamo Bay with offences upon their return home.

For example, the U.S. believed that Richard Belmar (who returned to the U.K. in January 2005) had received weapons training at al-Qaeda's al-Farouq training camp, in the summer of 2001,⁷² an offence – theoretically – illegal under the Terrorism Act of 2000; however, the likelihood of a successful prosecution taking place after the fact was minimal. The alleged offence had been committed three-and-a-half years prior to his return, and his statements to interrogators at Guantánamo Bay would be classified as hearsay and, therefore, inadmissible.

Without an admissible confession, the case against Belmar would require physical evidence or witness testimony; yet, the possibility of being able to recover physical evidence – if it existed (such as fingerprints) – from an abandoned training camp (that had since been bombed), in an Afghan war zone, was remote.

If there were eyewitnesses whose evidence was admissible (i.e. there was no suggestion of coercion), and who would have been able to testify (i.e. individuals whom the state could fly over from Afghanistan to testify, or who were not already detained at Guantánamo Bay, for example), they would have been extremely hard to find.

In October 2002, the U.S. managed to avoid these practical difficulties, and brought charges in a civilian court against six men from Lackawanna, New York, who had trained at al-Farouq at a similar time as Belmar.

These convictions were possible for a variety of reasons: the U.S. had tougher anti-terrorism legislation; the men had already returned to the U.S., voluntarily; there was no suggestion of coercion during their questioning; and at least one member of the cell was under F.B.I. scrutiny upon his return from Afghanistan.⁷³ However, most significant one was that one of the defendants – Faysal Galab – agreed to testify against other members of the cell, prompting similar pleas from the rest of the co-accused.⁷⁴

⁶⁹ 'Terrorism Act 2000', H.M. Government, 20 July 2000, available at: <http://www.legislation.gov.uk/ukpga/2000/11/section/54>; see also: 'The Terrorism Act 2006', H.M. Government, 11 April 2006, available at: <https://www.gov.uk/government/publications/the-terrorism-act-2006>.

⁷⁰ Legally defined as an 'out-of-court statement offered to prove the truth of whatever it asserts'. See: 'Hearsay', *Cornell University Law School*, 19 August 2010, available at: <http://www.law.cornell.edu/wex/hearsay>. In UK law, "Hearsay" in criminal proceedings is "a statement not made in oral evidence in the proceedings that is evidence of any matter stated" (section 114 (1) Criminal Justice Act 2003). See: 'Hearsay – Definition of Hearsay', *The Crown Prosecution Service*, available at: http://www.cps.gov.uk/legal/h_to_k/hearsay/#hearsay.

⁷¹ Shawcross, *Justice and the Enemy* (2012), p. 120.

⁷² 'Combatant Status Review Tribunal Transcripts – Richard Dean Belmar', United States Department of Defense, available at: <http://projects.nytimes.com/guantanamo/detainees/817-richard-dean-belmar/documents/4>.

⁷³ 'Interview: Sahim Alwan', *Public Broadcasting Service*, 24 July 2003, available at: <http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/interviews/alwan.html>.

⁷⁴ 'Convicts grilled on al-Qaeda', *Rochester Democrat & Chronicle*, 3 September 2003.

❖ Shaker Aamer

The ‘intelligence versus evidence’ problems that have meant that previous British detainees have not been able to be tried continue to apply with the remaining British resident at Guantánamo Bay: Shaker Aamer.

According to the U.S., Aamer was captured in Tora Bora, Afghanistan, in December 2001, shortly after the U.S. and its allies attacked al-Qaeda and Taliban positions there. Under the international law of war, enemy belligerents can be removed from the battlefield until hostilities cease; as Aamer was assessed to have been fighting alongside al-Qaeda and its associated forces, entities against whom the U.S. is at war, he was detained upon capture. The U.S. say that Aamer was in possession of an AK-47 and false passport at the time of his capture.

The U.S. also believes that Aamer served as a sub-commander at Tora Bora, under the authority of Ibn al-Sheikh al-Libi. Aamer is suspected of knowing al-Libi from a previous trip to Afghanistan, as he had attended training at Khalden, the Afghan camp where al-Libi was *emir*. Seven separate sources at Guantánamo Bay (including Moazzam Begg and al-Qaeda-affiliated militant Abu Zubaydah) outlined Aamer’s connections to either al-Qaeda or Osama bin Laden.

Aamer, assessed as weapons-trained, is suspected of visiting Afghanistan multiple times, and of joining up with the *mujahideen* in 2000. He is thought to have been an associate of Abu Qatada; the ‘shoe bomber’, Richard Reid; and Zacarias Moussaoui (the only person to be convicted of an offence relating to 9/11). He also regularly attended Abu Hamza al-Masri’s Finsbury Park Mosque, a London-based recruitment centre and clearing house for terrorist training and planning in the late 1990s.⁷⁵

Alternately, Aamer’s U.K. supporters claim that he was in Afghanistan to carry out voluntary work for an Islamic charity.⁷⁶ This claim has been repeated by the Member of Parliament (M.P) for Bolton South East, Yasmin Qureshi, who believes that Aamer was in Afghanistan ‘legitimately, teaching’.⁷⁷

Some argue that the only way to reconcile these two competing accounts of Aamer’s conduct is by a trial in court. Aamer’s British lawyer, Clive Stafford Smith, has stated that he is ‘utterly convinced that Shaker was not involved in extremism’. He went on to say, ‘don’t take my word for it, let’s have a trial – that’s the British way of doing things, and it’s the American way too’.⁷⁸ A similar line has been repeated in the U.K. House of Commons, where an April 2013 parliamentary debate focused on Aamer being detained without charge, rather than the complex issues surrounding such cases.⁷⁹

Conservative M.P. Mike Freer referred to Aamer’s situation as ‘akin to the treatment in Soviet gulags’; Jane Ellison, Aamer’s M.P., said that her constituent’s detention was ‘the ultimate stain on democracy’, and that there was ‘no credible evidence’ that Aamer had been engaged in ‘hostilities’; and Qureshi agreed that Aamer’s detention was ‘completely illegal, fundamentally flawed and against all principles of justice’.⁸⁰

Green M.P. Caroline Lucas has claimed that any evidence that the U.S. had against Aamer was because he had been tortured and had ‘confessed to whatever the Americans wanted just to make the torture stop’. Other M.P.s alleged that Aamer’s detention was because he was apparently a ‘key witness in exposing the torture and rendition’ carried out by the U.S. and U.K.⁸¹

⁷⁵ JTF-GTMO Detainee Assessment – Sawad al-Madani’, United States Department of Defense (November 2007), available at: <http://wikileaks.org/gitmo/pdf/sa/us9sa-000239dp.pdf>.

⁷⁶ ‘Cases – Shaker Aamer’, *Reprieve*, available at: <http://www.reprieve.org.uk/cases/shakeraamer/>.

⁷⁷ ‘Commons Debates – House of Commons’, Hansard, 24 April 2013, available at: <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130424/halltext/130424h0001.htm>.

⁷⁸ ‘Guantanamo inmate Shaker Aamer to sue UK for defamation’, *BBC News*, 14 December 2012, available at: <http://www.bbc.co.uk/news/uk-20715511>.

⁷⁹ ‘Commons Debates – House of Commons’, Hansard, 24 April 2013.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

These allegations require acceptance of Aamer's (and his lawyers') version of events; they also ignore the fact that others inmates who have possibly been tortured – such as Binyam Mohamed – have already been released by the U.S.

It is British-government policy that Aamer should be returned to the U.K.⁸² Aamer's decade-plus detention and the fact that the U.S. has not charged him with a crime have also led to human-rights groups and sections of the media supporting his release.⁸³ While Aamer wants to return to the U.K., so far he has only been cleared for transfer to Saudi Arabia, his country of birth.

ISSUE 3: ADMISSIBILITY OF EVIDENCE

Not all evidence that the state has against terrorism suspects is admissible in court. This section looks at why this is, with particular focus on: the difficulties in bringing to trial both current and former Guantánamo Bay detainees, due to the nature of their past interrogation; accusations of torture; and why this makes prosecution unlikely.

A) Classification, enhanced interrogation, and torture

Disclosing classified information in court may pose a national security threat, by hindering ongoing investigations; revealing sensitive sources; or exposing intelligence-gathering methods, and there will be times when intelligence agencies will be understandably reluctant to do so. The obvious security implications mean that states must balance their national security interests with their legal obligations.

One controversy has been over whether particular interrogation methods have been excessively coercive. As Jess Bravin, *Wall Street Journal* journalist and author of *The Terror Courts* (2013), has written, 'battlefield interrogations inherently are coercive; the prisoner knows his life rests in enemy hands'.⁸⁴ However, there have been times when the level of coerciveness – and, on occasion, the classified nature of the methods used – has led to evidence gained against some al-Qaeda operatives becoming inadmissible in court. This is the case not only in civilian courts – where statements made under duress, or before *Miranda* rights have been read, are inadmissible – but also in U.S. military commissions.⁸⁵

Military commissions have more leeway with the 'fruits' of involuntary statements; yet, even those become inadmissible 'unless the military judge determines by a preponderance of the evidence that— (i) the evidence would have been obtained even if the statement had not been made; or (ii) use of such evidence would otherwise be consistent with the interests of justice'.⁸⁶

These are not simple assessments for judges to make, as they need to evaluate four separate factors: firstly, whether abuse took place; secondly, how serious this abuse was; thirdly, whether any – or, indeed, all – subsequent statements must be regarded as unreliable; and, fourthly, whether subsequent statements made in non-abusive conditions, by previously coerced detainees, can also ever be reliable.⁸⁷

⁸² 'The 2012 Foreign & Commonwealth Office Report – Guantanamo Bay', The Foreign & Commonwealth Office, 2012, available at: <http://www.hrdreport.fco.gov.uk/human-rights-in-safeguarding-britains-national-security/working-in-partnership-to-counter-terrorism-overseas/guantanamo-bay/>.

⁸³ 'Shaker Aamer: "I may have to die. I hope not. I want to see my family again"', *The Independent*, 21 April 2013, available at: <http://www.independent.co.uk/voices/comment/shaker-aamer-i-may-have-to-die-i-hope-not-i-want-to-see-my-family-again-8581966.html>; see also: 'Shaker Aamer: My fight for justice in Guantánamo', *The Guardian*, 14 June 2013, available at: <http://www.theguardian.com/commentisfree/2013/jun/14/shaker-aamer-justice-guantanamo>; see also: 'Shaker Aamer, the Briton still locked in Guantánamo, will not be forgotten', *The Guardian*, 13 February 2012, available at: <http://www.theguardian.com/commentisfree/2012/feb/13/shaker-aamer-guantanamo-bay>; see also: 'Shaker Aamer: Amnesty urgent action', *The Observer*, 15 January 2012, available at: <http://www.theguardian.com/world/2012/jan/15/shaker-aamer-amnesty-urgent-action>; see also: 'Guantánamo's last British inmate: the mystery of Shaker Aamer', *The Guardian*, 11 January 2012, available at: <http://www.theguardian.com/world/2012/jan/11/shaker-aamer-guantanamo>.

⁸⁴ Jess Bravin, *The Terror Courts: Rough Justice At Guantanamo Bay* (Yale University Press, 2013), p. 290.

⁸⁵ 'Military Commissions Act of 2009', United States Department of Defense (2009).

⁸⁶ 'Manual for Military Commissions', United States Department of Defense (2010), available at: <http://www.defense.gov/news/d2010manual.pdf>, p. III-9.

⁸⁷ Benjamin Wittes, Robert M. Chesney & Larkin Reynolds, 'The Emerging Law of Detention 2.0: The Guantánamo Habeas Cases as Lawmaking', Brookings (2011), available at: http://www.brookings.edu/~media/Research/Files/Reports/2011/5/Guantanamo%20wittes/05_Guantanamo_wittes_chapter_7.pdf, p. 90.

Yet, the enhanced interrogation of a suspect does not necessarily stop prosecution, providing that other evidence is available. For example, al-Qaeda's 9/11 mastermind, Khalid Sheikh Mohammed (K.S.M.), is currently being prosecuted in a military commission, for his role in those attacks; this trial is taking place despite the waterboard being used on K.S.M. 183 times.⁸⁸

Nevertheless, a series of other legal rulings, in *habeas* law suits, have suggested that even statements gained from suspects voluntarily may be inadmissible.⁸⁹ In one case, a judge treated all comments made by a detainee at Bagram detention centre in Afghanistan – where abuse had previously taken place – with scepticism. This was because, even if the detainee himself was not personally mistreated, his potential knowledge of coercion taking place in that institution would make his statements potentially involuntary.⁹⁰

As is argued by Brookings Institution scholars Benjamin Wittes; Robert Chesney; and Larkin Reynolds, '[w]e still lack a clear answer to the underlying question of how much and what type of mistreatment a detainee has to experience before the alleged abuse renders the resulting statements inadmissible or deserving of little or no weight'.⁹¹

However, there is little doubt that coercion of a small number of detainees has contributed to an inability to prosecute more terrorism suspects.

❖ Abu Zubaydah

One of the most controversial cases to which these coercion arguments could apply is that of Abu Zubaydah, suspected by the U.S. of being a senior member of al-Qaeda and an 'operational planner, financier and facilitator of international terrorists and their activities'.⁹²

Abu Zubaydah was captured in March 2002, in Faisalabad, Pakistan. He was, according to then-U.S. Vice President Richard Cheney, 'the highest ranking al-Qaeda member we had captured to date'.⁹³ Donald Rumsfeld, then-Defense Secretary, said that Abu Zubaydah was, 'a close associate of [bin Laden's], and if not the number two, very close to the number two person in the organization'.⁹⁴ Overall, he was regarded by the U.S. as an integral figure within al-Qaeda; one of the highest-value operatives it was possible to apprehend; and an invaluable source of intelligence.

When captured, Abu Zubaydah had been shot three times.⁹⁵ Severely wounded, he was taken to a C.I.A. facility, for interrogation and medical treatment. The F.B.I. and C.I.A. initially planned to question him together.⁹⁶ Abu Zubaydah was not read his *Miranda* rights by the F.B.I.,⁹⁷ which claims to have utilised relationship-building techniques in order to make Abu Zubaydah compliant. He revealed his identity, and – in hospital, as his health was declining – identified a photograph of K.S.M.⁹⁸

⁸⁸ 'The CIA Interrogation of Abu Zubaydah', The Central Intelligence Agency (April 2010), available at: http://www.aclu.org/files/assets/CIA_Interrogation_of_AZ_released_04-15-10.pdf. 'Waterboarding' is a practice which has not been used since March 2003, and was removed from the C.I.A.'s list of approved interrogation techniques, in 2006.

⁸⁹ Wittes, Chesney & Reynolds, 'The Emerging Law of Detention 2.0', Brookings (2011), p. 96.

⁹⁰ 'Mohammed Al-Adahi, et al., v. Barack H. Obama, et. al., – Memorandum Opinion', United States District Court for the District of Columbia (August 2009), available at: <http://www.scotusblog.com/wp-content/uploads/2009/08/Al-Adahi-opinion-8-21-09.pdf>.

⁹¹ Wittes, Chesney & Reynolds, 'The Emerging Law of Detention 2.0', Brookings (2011), p. 95.

⁹² 'JTF-GTMO Detainee Assessment – Abu Zubaydah', United States Department of Defense (November 2008), available at: <http://wikileaks.org/gitmo/pdf/gz/us9gz-010016dp.pdf>.

⁹³ Dick Cheney and Liz Cheney, *In My Time: A Personal and Political Memoir* (Threshold Editions, 2011), p. 357.

⁹⁴ 'DoD News Briefing - Secretary Rumsfeld and Gen. Myers', United States Department of Defense, 1 April 2002, available at: <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3384>.

⁹⁵ 'JTF-GTMO Detainee Assessment – Abu Zubaydah', United States Department of Defense (November 2008).

⁹⁶ 'A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq', United States Department of Justice (May 2008), <http://www.justice.gov/oig/special/s0805/final.pdf>, p. 67.

⁹⁷ The warning that is given to suspects in U.S. custody, prior to questioning, to ensure that their answers are admissible in court.

⁹⁸ 'A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq', United States Department of Justice (May 2008), p. 67.

The C.I.A. then took control of the interrogation – apparently, according to President Bush, because Abu Zubaydah had stopped being responsive but was assessed to have more information to reveal.⁹⁹ The C.I.A. regarded Abu Zubaydah as ‘withholding critical threat information’, and someone who had ‘employed a host of resistance techniques’. It also believed him to be the ‘author of a seminal al-Qaida manual on resistance to interrogation methods’.¹⁰⁰ As a result, it devised a list of enhanced interrogation techniques – approved as legal, by the Office of Legal Counsel at the Department of Justice – that could be used to extract further intelligence.

Abu Zubaydah was subsequently waterboarded.¹⁰¹ According to former F.B.I. agent Ali Soufan, he was also subjected to sleep deprivation; forced nudity; and loud music.¹⁰² Furthermore, despite the on-scene interrogation team declaring Abu Zubaydah now ‘compliant’, the belief within elements of the C.I.A. that he was still withholding information led to the use of the waterboard on Abu Zubaydah an additional time. The Department of Justice’s Office of Legal Counsel would later describe this, in retrospect, as a potentially ‘unnecessary use of enhanced techniques’.¹⁰³

President Bush claimed that these enhanced interrogation techniques led to Abu Zubaydah revealing ‘large amounts of information on al-Qaeda’s structure and operations [and] leads that helped reveal the location of Ramzi bin al-Shibh, the logistical planner of the 9/11 attacks’.¹⁰⁴ Others, such as Hayden, have also stressed the importance of these techniques in extracting information about al-Qaeda from Abu Zubaydah.¹⁰⁵

Abu Zubaydah is now detained at Guantánamo Bay. However, his actual importance has come to be hotly disputed. In a 2007 Combatant Status Review Tribunal held there, Abu Zubaydah claimed that his jailers had apologised to him, as they realised ‘you are not Number 3 [in al-Qaeda], not a partner, not even a fighter’.¹⁰⁶ As the external leader, or *emir*, of the Khalden training camp in Afghanistan, Abu Zubaydah’s role was increasingly suspected to be that of a ‘fixer’ and facilitator who assisted Muslims – especially Arabs – with passports and travel in and out of training camps.¹⁰⁷ His role as a terrorist mastermind linked to a series of al-Qaeda plots – including prior knowledge of 9/11 – began to be doubted.

Different government officials briefed the press with competing information on Abu Zubaydah. Some claimed that he was ‘intimately involved with al-Qaeda’, as one of their ‘key facilitators’, and that he had ‘offered new insights into how the organization operated, provided critical information on senior al-Qaeda figures ... and identified hundreds of al-Qaeda members’.¹⁰⁸ Another downplayed Abu Zubaydah’s importance, and said that ‘to make him the mastermind of anything is ridiculous.’¹⁰⁹

⁹⁹ George W. Bush, *Decision Points* (Crown, 2010), p. 168.

¹⁰⁰ ‘The CIA Interrogation of Abu Zubaydah’, The Central Intelligence Agency (April 2010).

¹⁰¹ ‘CIA Bans Waterboarding in Terror Interrogations’, *ABC News*, 14 September 2007, available at: <http://abcnews.go.com/blogs/headlines/2007/09/cia-bans-water/>; see also: ‘U.S. acknowledges use of waterboarding’, USA Today, 5 February 2008, available at: http://usatoday30.usatoday.com/news/nation/2008-02-05-2043959432_x.htm; see also: ‘The CIA Interrogation of Abu Zubaydah’, The Central Intelligence Agency (April 2010).

¹⁰² ‘An Interrogator Writes “The Inside Story Of 9/11”’, *National Public Radio*, 13 September 2011, available at: <http://m.npr.org/story/140313125>.

¹⁰³ ‘Memorandum for John A. Rizzo – Senior Deputy General Counsel, Central Intelligence Agency’, United States Department of Justice (May 2005), available at: http://www2.gwu.edu/~nsarchiv/torture_archive/docs/Bradbury%20memo.pdf, p. 31.

¹⁰⁴ Bush, *Decision Points*, p. 169.

¹⁰⁵ ‘CIA Chief: We Waterboarded’, *ABC News*, 5 February 2008, available at: <http://abcnews.go.com/Blotter/TheLaw/story?id=4244423&page=1>.

¹⁰⁶ ‘CIA Says It Misjudged Role of High-Value Detainee Abu Zubaida, Transcript shows’, *The Washington Post*, 16 June 2009, available at: <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/15/AR2009061503045.html?hpid=moreheadlines>; see also: ‘Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10016’, United States Department of Defense (March 2007), available at: <http://www2.gwu.edu/~nsarchiv/torturingdemocracy/documents/20070327.pdf>.

¹⁰⁷ Ali H. Soufan, *The Black Banners: The Inside Story of 9/11 and the War Against al-Qaeda*, (W. W. Norton & Company, 2011), p. 373; see also: Omar Nasiri, *Inside the Jihad: My Life with Al Qaeda*, (Basic Books, 2008), p. 201.

¹⁰⁸ ‘Detainee’s Harsh Treatment Foiled No Plots’, *The Washington Post*, 29 March 2009, available at: <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/28/AR2009032802066.html>.

¹⁰⁹ *Ibid.*

In the *habeas* hearing, *Zayn al Abidin Muhammad Husayn v. Robert Gates* (2009), the government made it clear that it did not consider Abu Zubaydah (the ‘Petitioner’)

a “member” of al-Qaida in the sense of having sworn *bayat* (allegiance) or having otherwise satisfied any formal criteria that either Petitioner or al-Qaida may have considered necessary for inclusion in al-Qaida.¹¹⁰

Instead, he was labelled an ‘affiliate of al-Qaida’, who was ‘part of’ and ‘substantially supported’ hostile forces.¹¹¹

It is possible that the U.S. government was not asserting Abu Zubaydah’s membership label for tactical reasons – as attempting to prove that he was a member of al-Qaeda would lead to greater exploration of the circumstances under which he was interrogated. Alternatively, it is possible that initial assessments of Abu Zubaydah’s importance were flawed. Either way, he – along with all other Guantánamo Bay detainees – will not be tried in a civilian court.

Yet, the U.S. has not given up on trial in a military commission; recently declassified U.S.-government documentation continues to list Abu Zubaydah as someone whom it hopes to prosecute.¹¹² On the surface, however, this appears unlikely. The possibilities that the government unnecessarily waterboarded someone who was not as important as it had suspected, and that the precise nature of his interrogation would be discussed in court, suggest that a prosecution would be challenging.

❖ **Binyam Mohamed**

The interrogation of Abu Zubaydah was a crucial source of intelligence in another suspected plot: a supposed al-Qaeda plan to detonate a nuclear ‘dirty’ bomb in the U.S.

Abu Zubaydah revealed the existence of this plan during his interrogation. He said that the plan was presented to him by the Ethiopian (and U.K. resident), Binyam Mohamed, and an American citizen, José Padilla.¹¹³ However, prosecution was significantly complicated by allegations of torture.

This was especially resonant in the case of Binyam Mohamed, who was arrested at Karachi International Airport in April 2002.¹¹⁴ In July 2002, he was rendered – by U.S. authorities – to officials in Morocco, who detained him until January 2004. He was then transferred to Bagram, Afghanistan, in May 2004. During this time there, he was questioned about a range of issues, including the ‘dirty bomb’ plot, before being transferred to Guantánamo Bay in September 2004.¹¹⁵

The U.S. Department of Defense’s assessment of Mohamed was as follows. It believed that Mohamed met Abu Zubaydah and Abdul Hadi al-Iraqi (a senior member of al-Qaeda, now detained at Guantánamo Bay – where he is facing perfidy charges in a military commission)¹¹⁶ in Afghanistan, in January 2002. Al-Iraqi told Mohamed of a camp in Pakistan where could receive electronics training, including in remote-controlled I.E.D.s (improvised explosive devices). Mohamed, in a group of ‘mostly al-Qaida

¹¹⁰ ‘Zayn Al Abidin Muhammad Husayn vs. Robert Gates’, United States District Court for the District of Columbia (2009), available at: <http://www.truth-out.org/archive/files/memorandum.pdf>, p. 36.

¹¹¹ Ibid.

¹¹² ‘Guantanamo Review Depositions’, United States Department of Justice (January 2010), available at: <http://www.documentcloud.org/documents/714599-savage-final-response.html>.

¹¹³ ‘JTF-GTMO Detainee Assessment – Muhammad Binyam’, United States Department of Defense (December 2008), available at: <http://wikileaks.org/gitmo/pdf/et/us9et-001458dp.pdf>.

¹¹⁴ Ibid.

¹¹⁵ Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs (Rev 31-07-2009) [2008] EWHC 2048 (Admin), High Court of Justice, 21 August 2008, available at: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2008/2048.html&query=binyam+and+mohamed+and+morocco&method=boolean>.

¹¹⁶ ‘DOD Announces Charges Against Abd al Hadi al Iraqi’, United States Department of Defense, 10 June 2013, available at: <http://www.defense.gov/releases/release.aspx?releaseid=16086>.

members',¹¹⁷ subsequently relocated to a nearby Islamic school, where he met with a range of other individuals – including José Padilla. He was then chosen by al-Iraqi to attend the electronics training, with the agreement that he would return to Afghanistan to either train others or construct bombs on their behalf.

Mohamed; Abu Zubaydah; and approximately thirty other operatives then departed for Pakistan, eventually arriving in Lahore. Here, Mohamed learned from Padilla that the two of them were to be used for a terrorist attack, and of plans to use a hydrogen bomb. Abu Zubaydah discussed both the use of a gas tanker to cause an explosion, and a cyanide attack to be carried out with Padilla and Mohamed's assistance. Mohamed and Padilla downloaded online information about how to construct a hydrogen bomb, and presented the idea to Abu Zubaydah, who recommended that they speak to K.S.M. regarding its viability.

In March 2002, Mohamed and Padilla made their way to Karachi, Pakistan, to meet K.S.M. and Saif al-Adel (an al-Qaeda military commander). They were told that their plot was too complicated, and K.S.M. instead suggested that Padilla use his explosives training to destroy apartment buildings in the U.S., using natural gas; K.S.M. and his nephew, Ammar al-Baluchi, provided Mohamed and Padilla instruction on how to perform this operation. Mohamed was advised to return to the U.K., to obtain valid travel documents, and then to meet up with Padilla again, in the U.S. He was therefore given a false passport and cash by al-Qaeda leaders.

However, he was arrested when trying to leave Pakistan, leading to his led detention in Pakistan; Morocco; and Afghanistan.¹¹⁸

As a result of the interrogations, Mohamed was assessed by the Department of Defense to be a 'member of al-Qaida' who 'developed a plan to detonate a radiological device within the US and presented the plan to senior al-Qaida members for approval'. It claimed that Mohamed had 'admitted ties with senior al-Qaida operational planners and facilitators', and had:

extensive terrorist training in Afghanistan at camps associated with al-Qaida and North African extremists, and [had] traveled to Afghanistan in preparation for combat [...and had] expressed his desire for martyrdom and willingness to attack US forces, US civilians, and any other opponent of al-Qaida.¹¹⁹

Mohamed's actions, including the potential use of a 'dirty bomb', led to a military charge of conspiracy being sworn against him, in November 2005.¹²⁰ A Supreme Court ruling against the government temporarily stopped proceedings; yet, once they were renewed, a 'providing material support to terrorism' charge was added in May 2008.¹²¹

However, by October of that same year, the case had collapsed;¹²² and, by February 2009, Mohamed had returned to the U.K., where he was immediately freed.¹²³

There are several potential reasons why Mohamed's case broke down; however, a key one was that, in the time period in which Mohamed was detained prior to his transfer to Guantánamo Bay, he was mistreated. According to U.S. District Court Judge Kessler,

¹¹⁷ JTF-GTMO Detainee Assessment – Muhammad Binyam', United States Department of Defense(December 2008).

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ 'United States of America v. Binyam Ahmed Muhammad', United States Department of Defense (November 2005), available at: <http://www.defenselink.mil/news/Nov2005/d20051104muhammad.pdf>.

¹²¹ 'Charge Sheet – Binyam Ahmed Mohamed', United States Department of Defense (May 2008), available at: <http://www.defense.gov/news/Mohamed%20-%20sworn0603.pdf>.

¹²² 'U.S. drops charges against 5 Guantanamo captives', *Reuters*, 21 October 2008, available at: <http://www.reuters.com/article/2008/10/21/us-guantanamo-hearings-idUSTRE49K65120081021?sp=true>.

¹²³ 'Binyam Mohamed returns to Britain after Guantánamo ordeal', *The Guardian*, 23 February 2009, available at: <http://www.theguardian.com/uk/2009/feb/23/binyam-mohamed-guantanamo-plane-lands>.

[Mohamed] was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitchblack cell. All the while, he was forced to inculcate himself and others in various plots to imperil Americans.¹²⁴

This evidence – as part of another detainee’s *habeas* hearing – was not disputed by the government (again, either because it was true, or because the government did not want to have its interrogation methods exposed further in an open court). However, the government argued that it did not render statements which Mohamed gave at Guantánamo Bay as invalid. This was because the agent at Guantánamo Bay who had questioned Mohamed had ‘developed a relationship with him that was non-abusive, and, in fact, cordial and cooperative’, with the two sharing ‘a rapport that allowed [Mohamed] to voluntarily provide accurate information’.¹²⁵

Judge Kessler acknowledged that ‘[t]he use of coercion or torture to procure information does not automatically render subsequent confessions of that information inadmissible’, as ‘[t]he effects of the initial coercion may be found to have dissipated to the point where the subsequent confessions can be considered voluntary’.

However, she ruled that, ‘[f]rom Binyam Mohamed’s perspective, there was no legitimate reason to think that transfer to Guantánamo Bay foretold more humane treatment; it was, after all, the third time that he had been forced onto a plane and shuttled to a foreign country where he would be held under United States authority’. As his earlier abuse had ‘dominated’ his mind, Mohamed’s confessions at Guantánamo Bay could not be relied upon to be considered voluntary;¹²⁶ as a result, the information that Mohamed had provided against another detainee (in this case, Farhi Saeed bin Mohammed) was seen as unreliable.

Therefore, even if the U.S. government had proceeded with a trial against Mohamed, his mistreatment while in custody would likely have meant that statements extracted from him during his detention would have been inadmissible in both civilian and military courts anyway. Once this evidence was put aside, there were no clear grounds for prosecution of any specific crime.

However, there were arguably reasonable grounds to continue holding Mohamed as an enemy combatant. At Guantánamo, Mohamed claimed that the information on the ‘dirty bomb’ plot had been extracted ‘under duress’.¹²⁷ Yet, at the same time, he admitted that he had travelled to Afghanistan in May 2001, saying that the purpose of this trip was to receive training in preparation for fighting jihad in Chechnya, and that he had trained at the al-Qaeda-linked al-Farouq training camp in Afghanistan – receiving instruction from an al-Qaeda operative there. Mohamed did not claim that these admissions came under duress.¹²⁸

He, as with all British-based Guantánamo Bay detainees but one, was allowed to return to the U.K., where he was released without charge.

❖ José Padilla

Mohamed’s suspected co-conspirator, José Padilla, was convicted in a civilian court. However, the charges of which he was convicted did not relate to the ‘dirty bomb’ plot, and his trial was also complicated by the treatment he had received while in custody.

¹²⁴ ‘Farhi Saeed Bin MOHAMMED, et al., Petitioners, v. Barack H. OBAMA, et al., Respondents’, United States District Court, District of Columbia, 19 November 2009, available at: <https://www.casetext.com/case/mohammed-v-obama-2/>.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ ‘Personal Representative Notes’, United States Department of Defense, 18 November 2004, available at: <http://projects.nytimes.com/guantanamo/detainees/1458-binyam-mohamed/documents/4>.

¹²⁸ ‘Unclassified Summary of Evidence for Administrative Review Board in the case of Mohammad, Binyam Ahmed’, United States Department of Defense, 15 January 2008, available at: <http://projects.nytimes.com/guantanamo/detainees/1458-binyam-mohamed/documents/9>; see also: ‘Summary of Evidence for Combatant Status Review Tribunal – MOHAMMAD, Binyam Ahmed’, United States Department of Defense, 10 November 2004, available at: <http://projects.nytimes.com/guantanamo/detainees/1458-binyam-mohamed/documents/5>.

Padilla, too, had confessed to a ‘dirty bomb’ plot being hatched against the U.S. His arrest occurred at Chicago O’Hare International Airport, on 8 May 2002. Padilla was returning from Pakistan, and was in possession of \$10,526 (in cash) and the names; phone numbers; and e-mail addresses of other al-Qaeda operatives.¹²⁹ One month later, on 9 June, he was transferred into military custody and given ‘enemy combatant’ status.¹³⁰ During this time, Padilla was held at a Navy brig in South Carolina, where U.S officials claim that he admitted to ‘exploring’ the ‘dirty bomb’ plot.¹³¹

As a result of this interrogation, Padilla claimed that, in the summer of 2001, he was tasked by al-Qaeda’s top military commander, Mohammed Atef, with blowing up apartment buildings in the U.S. He went on to suggest that he was sent to Kandahar, Afghanistan, to receive training alongside another al-Qaeda fighter, Adnan el-Shukrijumah; however, the two did not get on, and the mission was abandoned.

Following the U.S.-military bombing raid that killed Atef in November 2001, Padilla attempted to flee to Pakistan. At the Afghanistan–Pakistan border, he met Abu Zubaydah for the first time. Once in Pakistan, Padilla and Mohamed approached Abu Zubaydah with the idea of detonating a nuclear bomb, having found online instructions on how to make one. They were subsequently dispatched to K.S.M., in March 2002, where the plan to use natural gas to destroy apartment buildings was discussed.¹³²

Then, in March 2003, K.S.M. was also captured, in Pakistan.

Under interrogation (he, too, was subjected to enhanced interrogation techniques – including extensive waterboarding), K.S.M. confirmed Mohamed’s story of a ‘dirty bomb’ plot being initiated by Abu Zubaydah. However, K.S.M. revealed that he had instead directed Padilla to pursue a more feasible plot, where he would travel to Chicago; rent an apartment block; and initiate a natural-gas explosion. He also said that he had directed Padilla to study the feasibility of an operation in which he would set fire to a hotel or gas station in the U.S.¹³³ As late as March 2007, K.S.M. told a Combatant Status Review Tribunal that he was in ‘directly in charge’ of ‘following up on. [sic] Dirty Bomb Operations on American soil’.¹³⁴

However, Padilla’s counsel had filed for a writ of *habeas corpus*, in June 2002, and, on 28 February 2005, a District of South Carolina court ruled that the government either charge Padilla or release him (with Judge Floyd stating that ‘this is a law enforcement matter, not a military matter’).¹³⁵

On 17 November 2005, terrorism charges were filed against Padilla. However, as the confessions that he had made on the Navy brig took place when he had not been read his *Miranda* rights or given access to a defence lawyer, they were inadmissible in a civilian court.¹³⁶ Therefore, none of the charges related to a

¹²⁹ ‘Summary of Jose Padilla’s activities with Al Qaeda’, Federation of American Scientists, available at: <http://www.fas.org/irp/news/2004/06/padilla060104.pdf>.

¹³⁰ ‘Padilla indictment avoids high court showdown’, *NBC News*, 22 November 2005, available at: http://www.nbcnews.com/id/10152846/ns/us_news-security/t/padilla-indictment-avoids-high-court-showdown/#.TmjjsJNT47k9.

¹³¹ ‘Padilla convicted on terrorism support charges’, *NBC News*, 16 August 2007, available at: http://www.msnbc.msn.com/id/20298703/ns/us_news-security/t/padilla-convicted-terrorism-support-charges/#.TmiyuNT47k9.

¹³² ‘Summary of Jose Padilla’s activities with Al Qaeda’, Federation of American Scientists.

¹³³ ‘JTF-GTMO Detainee Assessment – Khalid Shaykh Muhammad’, United States Department of Defense (December 2006), available at: <http://wikileaks.ch/gitmo/pdf/ku/us9ku-010024dp.pdf>.

¹³⁴ ‘Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10024’, United States Department of Defense, 10 March 2007, available at: <http://projects.nytimes.com/guantanamo/detainees/10024-khalid-shaikh-mohammed/documents/7>.

¹³⁵ ‘Jose Padilla vs. Commander C.T. Hanft, Consolidated Naval Brig – Memorandum Opinion and Order’, United States District Court for the District of South Carolina – Charleston Division (February 2005), available at: <https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&ved=0CE4QFjAC&url=http%3A%2F%2Fnews.findlaw.com%2Fwp%2Fdocs%2Fpadilla%2Fpadhnft22805opn.pdf&ei=tZAcUpaUFcP30gX31ICQAg&usg=AFQjCNEX5OZPRFtjPHLM7NRUEABIL-rpmA&sig2=KPEQWj0uXJs3ya2AxNd0iw&bvm=bv.51156542,d.d2k>.

¹³⁶ ‘Jose Padilla sentenced on terrorism charges’, *NBC News*, 22 January 2008, available at: http://www.nbcnews.com/id/22784470/ns/us_news-security/t/jose-padilla-sentenced-terrorism-charges/#.UhSUOYYUZK2; see also: ‘Padilla indictment avoids high court showdown’, *NBC News*, 22 November 2005.

‘dirty bomb’ or K.S.M.’s apartment plot, which was not referred to in his indictment.¹³⁷ In August 2007, Padilla was found guilty of conspiracy to murder; kidnap; and maim persons in a foreign country, conspiracy to provide material support to terrorists, and providing material support to terrorists.

Padilla’s legal team argued that he was tortured while incarcerated – by being kept in darkness and isolation, and being deprived of sleep and religious materials.¹³⁸ His attorneys released photographs of Padilla in chains and wearing blacked-out goggles and noise-reducing ear coverings.¹³⁹ During sentencing, Judge Cooke said that ‘conditions were so harsh for Mr. Padilla ... they warrant consideration in the sentencing in this case’.¹⁴⁰ Consequently, he was initially sentenced to seventeen years and four months in jail.

However, in September 2011, a federal court ruled that his sentencing had been too lenient, and that ‘Padilla poses a heightened risk of future dangerousness due to his al Qaeda training. He is far more sophisticated than an individual convicted of an ordinary street crime.’¹⁴¹ Furthermore, the court said that, while it was permissible to reduce Padilla’s sentence on account of the harsh conditions of his detention, it should not have been reduced by the amount that it was. The case has now been sent the case back to the district court for a new sentencing hearing.

There remains doubt as to the existence of the ‘dirty bomb’ plot. However, if one had existed the interrogation methods used on these detainees rendered any evidence gained as impermissible.

❖ Ahmed Ghailani

The difficulty in prosecuting international terrorists in civilian courts was also displayed by the trial of Ahmed Ghailani, an al-Qaeda militant and associate of Osama bin Laden. Ghailani was being tried for his involvement in the 1998 bombings, at the U.S. embassies in Kenya and Tanzania, which killed 224 people. He was the first – and remains the only – Guantánamo Bay detainee to be tried in a U.S. civilian court.

Ghailani had been charged *in absentia* in the U.S., in March 2001,¹⁴² prior to his capture in Pakistan in July 2004.¹⁴³ In March 2008, under President Bush, the Department of Defense initially announced its intention to try Ghailani in a military court.¹⁴⁴ Yet, in May 2009, the Obama administration instead revealed that it planned to prosecute Ghailani in a civilian court.¹⁴⁵

However, in an August 2010 U.S. District Court memorandum opinion, District Judge Kaplan stated that Ghailani – soon after his capture – had been placed in the C.I.A.’s Rendition, Detention, and Interrogation Program (R.D.I.), and had been subjected to ‘extremely harsh interrogation methods’.¹⁴⁶

¹³⁷ United States of America v. Adham Amin Hassoun et al., – Superseding Indictment, United States District Court, Southern District of Florida (November 2005), available at: <http://www.abcnews.go.com/images/US/Padilla-Indictment-11-17-05.pdf>; see also: ‘Jose Padilla Charged With Conspiracy To Murder Individuals Overseas, Providing Material Support To Terrorists’, United States Department of Justice, 22 November 2005, available at: http://www.justice.gov/opa/pr/2005/November/05_crm_624.html.

¹³⁸ ‘Jose Padilla lawsuit against Pentagon thrown out in US’, *BBC News*, 18 February 2011, available at: <http://www.bbc.co.uk/news/world-us-canada-12501627>.

¹³⁹ ‘Padilla convicted on terrorism support charges’, *NBC News*, 16 August 2007.

¹⁴⁰ ‘Padilla sentenced on terrorism charges’, *NBC News*, 22 January 2008.

¹⁴¹ ‘Appeals court: 17 Years Not Enough for “Dirty Bomber” Jose Padilla’, *ABC News*, 19 September 2011, available at: <http://abcnews.go.com/blogs/politics/2011/09/appeals-court-17-years-not-enough-for-dirty-bomber-jose-padilla/>.

¹⁴² National Security Division Statistics on Unsealed International Terrorism and Terrorism-Related Convictions, United States Department of Justice (2012).

¹⁴³ ‘Pakistan captures high-level al Qaeda operative’, *CNN*, 3 August 2004, available at: <http://edition.cnn.com/2004/WORLD/asiapcf/07/29/pakistan.alqaeda.capture/>.

¹⁴⁴ ‘Charges Sworn Against Detainee Ghailani’, United States Department of Defense, 31 March 2008, available at: <http://www.defense.gov/releases/release.aspx?releaseid=11795>.

¹⁴⁵ ‘Accused East Africa Embassy Bomber Held at Guantanamo Bay to Be Prosecuted in U.S. Federal Court’, United States Department of Justice, 21 May 2009, available at: <http://www.justice.gov/opa/pr/2009/May/09-ag-496.html>.

¹⁴⁶ ‘United States of America, -against- Ahmed Khalfan Ghailani – Memorandum Opinion’, United States District Court, Southern District of New York (August 2010), available at: <http://www.nylj.com/nylawyer/adgifs/decisions/090310kaplan.pdf>, p. 7.

His trial was subsequently sharply impacted by his treatment following his capture and designation as an enemy combatant. The government not only chose not to challenge Ghailani's claims that his admissions to the C.I.A. had been coerced, it also chose not to include as evidence any statements that Ghailani had made while being interrogated in custody – as they could be the basis of an appeal (on the grounds that they were tainted, and should not have been admitted into evidence). As a result, while the jury was not given full details about Ghailani's treatment by the C.I.A., neither were they told about statements from Ghailani that prosecutors said 'amount[ed] to a confession'.¹⁴⁷

Also problematic was the government's inability to call a key witness – Hussein Abebe, the supplier of the Tanzanian cell's T.N.T. – to testify or be received in evidence. Abebe had been due to testify that Ghailani had bought the explosives from him with knowledge and intent; the prosecution described him as a 'giant witness for the government', stating that '[t]here's nothing bigger than him', and that, without Abebe, the prosecution had 'no way of putting such evidence in front of the jury at all'.¹⁴⁸

Yet, Abebe's identity was only discovered due to statements that Ghailani had made while being interrogated by the C.I.A.¹⁴⁹ As a result of this testimony, Abebe was arrested in Arusha, Tanzania, in August 2006, by Tanzanian authorities. He was flown to Zanzibar, and questioned by Tanzanian officials and the F.B.I., for a week; he subsequently agreed to testify against Ghailani – willingly, according to both sets of authorities who had undertaken the interrogations.¹⁵⁰

However, the government failed to satisfy the judge that Abebe's statements were voluntary, or that his agreement to testify had not been coerced. In his August 2010 memorandum opinion, Judge Kaplan stated,

The record discloses nothing about what happened while he was in Tanzanian custody, and it is sketchy even about what took place after the FBI arrived. We know only that [Abebe] was released after he was questioned by the FBI and promised to appear as a witness in this case.¹⁵¹

Judge Kaplan was of the opinion that Abebe 'was no volunteer in the first place. Quite the contrary. He was induced to testify only out of fear of the consequences of not doing so, including possible prosecution and, conceivably, worse.' Abebe's claims to be testifying of his own volition, Kaplan asserted, 'cannot be squared with the facts [...] That testimony, the court finds, was false'.¹⁵²

Furthermore, Judge Kaplan found that the government had failed to prove that 'Abebe's testimony would be so attenuated from Ghailani's coerced statements' to permit its receipt in evidence,¹⁵³ using the 'fruit of the poisonous tree' metaphor to suggest that since Ghailani's original testimony was coerced, it subsequently tainted Abebe's statements.¹⁵⁴ He concluded that 'the link between the C.I.A.'s coercion of

¹⁴⁷ 'At Terror Trial, Big Questions Were Avoided', *The New York Times*, 18 November 2010, available at: <http://www.nytimes.com/2010/11/19/nyregion/19ghailani.html?pagewanted=all>.

¹⁴⁸ 'Terrorist trial judge excludes witness over possible torture links', *The Guardian*, 7 October 2010, available at: <http://www.theguardian.com/world/2010/oct/07/guantanamo-terrorist-trial-witness-excluded>.

¹⁴⁹ 'United States of America, -against- Ahmed Khalfan Ghailani – Memorandum Opinion', United States District Court, Southern District of New York (August 2010).

¹⁵⁰ 'United States of America, -against- Ahmed Khalfan Ghailani – Memorandum and Order', United States District Court, Southern District of New York (October 2010), available at: <http://static1.firedoglake.com/28/files/2010/10/100817-Kaplan-Opinion.pdf>.

¹⁵¹ 'United States of America, -against- Ahmed Khalfan Ghailani – Memorandum Opinion', United States District Court, Southern District of New York (August 2010), p. 31.

¹⁵² 'UNITED STATES of America, v. Ahmed Khalfan GHAILANI, Defendant.', United States District Court, Southern District of New York, 6 October 2010, available at: <https://www.casetext.com/case/us-v-ghailani/>.

¹⁵³ *Ibid.*

¹⁵⁴ 'United States of America, -against- Ahmed Khalfan Ghailani – Memorandum Opinion', United States District Court, Southern District of New York (2010), p. 11.

Ghailani and Abebe's testimony is direct and close',¹⁵⁵ and, therefore, that Abebe's testimony 'would be the product of statements made by Ghailani to the CIA under duress'.¹⁵⁶

The lack of usable evidence from Abebe's interrogation – and the fact that the government chose not to litigate the details of Ghailani's treatment, in order to avoid discussion of the R.D.I. programme – compromised the entire case. In November 2010, Ghailani was found guilty on one count of conspiracy to destroy buildings and property of the United States (and was eventually jailed for life); however, he was acquitted on 284 other counts of conspiracy- and terrorism-related charges – including conspiracy to kill Americans, and to use weapons of mass destruction.

While Abebe's lack of testimony was highly significant, Judge Kaplan stated that '[i]t is very far from clear that Abebe's testimony would be admissible if Ghailani were being tried by military commission', as that too excludes evidence obtained via torture and cruel; inhuman; or degrading treatment.¹⁵⁷

Ghailani's verdict was regarded by those within the Obama administration, including Attorney General Eric Holder, as the 'death-knell' for the Obama administration's plans to try K.S.M. and fellow 9/11 conspirators in a civilian court.¹⁵⁸

❖ **Mohamedou Ould Slahi**

The previous treatment of Guantánamo Bay detainees has negatively impacted other potential trials as well; one such example is that of the Mauritanian, Mohamedou Ould Slahi.

Slahi's habeas hearing – which excluded information potentially gained via torture – outlined his connections to al-Qaeda: he had travelled to Afghanistan in 1990, in support of the *mujahideen*, where he had attended an al-Qaeda-run training camp, swearing an oath of loyalty in March 1991. While he claimed to have severed ties in 1992, the government believed that he continued to recruit for al-Qaeda, and had provided 'sporadic support' until his arrest in November 2001.¹⁵⁹ He was also an associate of Ramzi bin al-Shibh (one of al-Qaeda's key co-ordinators in the 9/11 plot) and Abu Hafs al-Mauritani (who was on al-Qaeda's shura council). In March 2010, District Court Judge Robertson concluded that Slahi was, at the very least, an 'al-Qaida sympathizer'.¹⁶⁰

Western intelligence also suspected that Slahi was linked to al-Qaeda's 1998 East African Embassy bombings, and the Los Angeles International Airport plot of New Year's Eve 2000. Furthermore, it believed that he persuaded al-Shibh; Ziad Jarrah; and Marwan al-Shehhi (two future 9/11 hijackers) that, instead of fighting Russians in Chechnya, they should join al-Qaeda in Afghanistan.¹⁶¹ He was also suspected of running websites that had secret portals in which al-Qaeda sympathisers with passcodes could share information.¹⁶²

¹⁵⁵ 'Judge Says Key Figure In Embassies Bombing Case Isn't Credible', *The New York Times*, 14 October 2010, available at: <http://www.nytimes.com/2010/10/15/nyregion/15ghailani.html>.

¹⁵⁶ 'US judge nixes star government witness in terror trial', *Agence France-Presse*, 6 October 2010, available at: <http://www.google.com/hostednews/afp/article/ALeqM5iQKrfjq0kESlaQC6BapuTJ23RXgw?docId=CNG.36c968730fd0001136face931b7e113.171>. Another Tanzanian witness was also scheduled to testify; but, according to the judge, 'changed his mind and refused to appear'. See: 'Judge Says Key Figure In Embassies Bombing Case Isn't Credible', *The New York Times*, 14 October 2010.

¹⁵⁷ 'UNITED STATES of America, v. Ahmed Khalfan GHAILANI, Defendant.', United States District Court, Southern District of New York, 6 October 2010.

¹⁵⁸ Klaidman, *Kill or Capture* (2012), p. 230.

¹⁵⁹ 'Salahi v. Obama', United States Court of Appeals, District of Columbia Circuit, 2010, available at: <http://caselaw.findlaw.com/us-dc-circuit/1543844.html>.

¹⁶⁰ 'Mohammedou Ould Salahi v. Barack H. Obama, et al., – Memorandum Order', United States District Court for the District of Columbia (April 2010), available at: <https://www.aclu.org/files/assets/2010-4-9-Slahi-Order.pdf>, p. 5.

¹⁶¹ 'JTF-GTMO Detainee Assessment – Mohamedou Ould Salahi', United States Department of Defense, 3 March 2008, available at: <http://projects.nytimes.com/guantanamo/detainees/760-mohamedou-ould-slahi/documents/11>; see also: Bravin, *The Terror Courts* (2013), p. 69. Bravin believes that this information came from bin al-Shibh.

¹⁶² Bravin, *The Terror Courts* (2013), p. 97.

Slahi was captured in Mauritania, in November 2001, and rendered to Jordan, before being transported to Bagram, Afghanistan. He was moved to Guantánamo Bay in 2002, where he was questioned for five months by the F.B.I. However, from July 2003, with the perception being that little progress was being made – and, as Slahi was regarded as a high-value detainee because of his links to the 9/11 attacks –¹⁶³ he underwent enhanced interrogation techniques at Guantánamo;¹⁶⁴ these included exposure to extreme temperatures, sensory manipulation, and sexual degradation.¹⁶⁵ He also claimed to have been physically attacked,¹⁶⁶ although these accusations were rejected by the Department of Defense.¹⁶⁷

Slahi eventually began to divulge large amounts of information on al-Qaeda operatives and how the group worked; however, his treatment meant that a prosecution had become impossible. While he remains detained at Guantánamo Bay, a District Court judge stated in April 2010 that some of the evidence against Slahi was ‘attenuated, or so tainted by coercion and mistreatment, or so classified, that it cannot support a successful criminal prosecution’.¹⁶⁸ As Bravin wrote in *The Terror Courts*, ‘[t]he trial could end up being more about what the government did to Slahi than what he did for al-Qaeda’.¹⁶⁹

Despite this, in *Salahi v. Obama*, Judge Robertson found ‘ample evidence’ that, despite Slahi’s mistreatment, at some point – after the passage of time and intervening events, and considering the circumstances – the taint of abuse and coercion may be attenuated enough for a witness’s statements to be considered reliable[.]¹⁷⁰

Judge Robertson essentially decided that the ‘taint’ from earlier abuse might fade to the extent that a subsequent confession from Slahi, after his ‘coercive interrogation’, could be considered voluntary. This approach, however, is not applied consistently from judge to judge, as each has differing interpretations on what steps need to be taken to remove the ‘taint’ of earlier mistreatment, and on what the government is required to do to disprove that such a ‘taint’ even exists.¹⁷¹

This inconsistency makes it hazardous for governments to pursue prosecutions, as there is considerable uncertainty as to whether or not a judge will rule against them and open up previous examples of coercion to greater public scrutiny.

❖ Mamdouh Habib

Similar problems arose in the case regarding Mamdouh Habib, an Egyptian-born resident of Australia. Habib had moved to Afghanistan in the summer of 2001, before being captured in Pakistan and rendered to Egypt in November 2001. He arrived in Guantánamo Bay in May 2002.

The U.S. attempts, of 2004, to bring charges against him for a military commission was partly a political calculation, as the then-Australian Prime Minister, John Howard, had already shown support for the prosecution of Australian citizens in such courts.

¹⁶³ JTF-GTMO Detainee Assessment – Mohamedou Ould Salahi’, United States Department of Defense, 3 March 2008.

¹⁶⁴ Bravin, *The Terror Courts* (2013), pp. 101-105.

¹⁶⁵ ‘Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility’, United States Department of Defense (July 2005), available at: <http://www.defense.gov/news/jul2005/d20050714report.pdf>.

¹⁶⁶ Bravin, *The Terror Courts* (2013), pp. 105-108; see also: ‘The Guantánamo Memoirs of Mohamedou Ould Slahi’, *Slate*, 2 May 2013, available at: http://www.slate.com/articles/briefing/foreigners/2013/05/mohamedou_ould_slahi_s_guantanamo_memoirs.html.

¹⁶⁷ ‘Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility’, United States Department of Defense (July 2005).

¹⁶⁸ ‘Mohammedou Ould Salahi v. Barack H. Obama, et al., – Memorandum Order’, United States District Court for the District of Columbia (April 2010), p. 23.

¹⁶⁹ Bravin, *The Terror Courts* (2013), p. 110.

¹⁷⁰ ‘Mohammedou Ould Salahi v. Barack H. Obama, et al., – Memorandum Order’, United States District Court for the District of Columbia (April 2010), p. 11.

¹⁷¹ For example, see: ‘Al Madhwani v. Obama’, United States Court of Appeals, District of Columbia Circuit, 2011, available at: <http://caselaw.findlaw.com/us-dc-circuit/1568953.html>.

Yet, during interrogation, Habib offered wildly contradictory information. Nevertheless, the most significant piece of evidence against him was a phone call that he had made to his wife, on 9/11. Habib was thought to have called her two hours prior to the attacks on the World Trade Center, warning that they were about to take place; such knowledge would have placed Habib within the higher echelons of al-Qaeda's leadership. In addition, at one stage, Habib said that he had trained six of the 9/11 hijackers in martial arts, and that he had planned to hijack a flight himself.¹⁷²

However, he also claimed that, while detained in Pakistan, he had been electrically shocked and beaten, and that, while in Egypt, he was tortured. An Australian court heard that, in Egypt, Habib had suffered:

the removal of fingernails, the use of electric prods, threatened sexual assault with a dog, forcible injection with drugs, extinguishment of cigarettes on flesh, the insertion of unspecified objects and gases into his anus and the electrocution of his genitals.¹⁷³

Again, such alleged treatment complicated any trial. Ultimately, despite the intelligence suggesting Habib's prior knowledge of 9/11, the case was dropped in January 2005, due to a lack of enough evidence to warrant a military-commission trial. As President Bush had assured Prime Minister Howard that Australian citizens would either be tried or released, Habib was returned to Australia that month, where he still lives today.¹⁷⁴

❖ **Mohammed al-Qahtani**

Arguably, the most significant figure who could not be tried due to concerns over his previous treatment was Mohammed al-Qahtani – widely thought to have been the 'twentieth hijacker' on 9/11, who, on 4 August 2001, was refused entry into the U.S. Mohamed Atta, the ringleader of the 9/11 operation, was waiting to pick al-Qahtani up at Orlando International Airport, and K.S.M. and Mustafa al-Hawsawi (key planners of the 9/11 attacks) confirmed that he was the final member of the hijackings teams.¹⁷⁵ Al-Qahtani was due to be the fifth member of the team on UA93, the plane that eventually crashed in Shanksville, Pennsylvania, after the passengers fought back against the hijackers.

Al-Qahtani was captured while fleeing Tora Bora in December 2001, and sent to Guantánamo Bay in February 2002. His fingerprints matched those of the individual who had unsuccessfully attempted to enter the U.S. via Orlando, Florida, in August 2001.¹⁷⁶ However, extracting intelligence from al-Qahtani was likely prioritised over prosecuting him in a military commission.¹⁷⁷ Between November 2002 and January 2003, he was subjected to almost two months of physical and psychological interrogation methods – including being forced to listen to loud music and white noise, being sexually humiliated, and being made to perform dog tricks.¹⁷⁸

Charges against al-Qahtani were dismissed in May 2008. In a 2009 interview, Susan Crawford (the military commissions Convening Authority, whose task it was to decide which cases were to be brought to military commission) explained that, despite the interrogators using approved methods, it was her belief that al-Qahtani had been tortured: '[h]is treatment met the legal definition of torture. And that's why I did not refer the case'.

¹⁷² 'JTF-GTMO Assessment – Mamdouh Ahmed Habib', United States Department of Defense, 6 August 2004, available at: <http://projects.nytimes.com/guantanamo/detainees/661-mamdouh-ibrahim-ahmed-habib/documents/11>.

¹⁷³ 'Habib v Commonwealth of Australia [2010] FCAFC 12', Federal Court of Australia (February 2010), available at: http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/Habib_v_Commonwealth_25-02-2010.pdf.

¹⁷⁴ Bravin, *The Terror Courts* (2013), p. 237.

¹⁷⁵ 'JTF-GTMO Detainee Assessment – Maad al-Qahtani', United States Department of Defense, 30 October 2008, available at: <http://projects.nytimes.com/guantanamo/detainees/63-mohammed-al-qahtani>.

¹⁷⁶ Bravin, *The Terror Courts* (2013), p. 253.

¹⁷⁷ *Ibid.*, p. 255.

¹⁷⁸ 'Interrogation Log: Detainee 063', Center for Constitutional Rights, available at: http://ccrjustice.org/files/Publication_AIQahtaniLog.pdf.

However, Crawford simultaneously outlined the constant tension between liberty and security that makes such cases so problematic:

[H]e would've been on one of those planes had he gained access to the country in August 2001 [...] He's a muscle hijacker....He's a very dangerous man. What do you do with him now if you don't charge him and try him? I would be hesitant to say, "Let him go."¹⁷⁹

Al-Qahtani, who remains at Guantánamo Bay, is on a list of those whom the U.S. still hopes it can prosecute at a military commission.¹⁸⁰

B) *Miranda* rights

A 1966 U.S. Supreme Court ruling requires law-enforcement officers to inform suspects of their rights (and have the suspects acknowledge that they understand their rights), as well as have a lawyer present during an interrogation.

There are public-safety exceptions, and, since 1984, suspects have been allowed to be questioned without being read their *Miranda* rights – if there is an imminent threat. In 2011, the Obama administration expanded this, to give interrogators greater freedom and flexibility in being able to waive *Miranda* rights in 'exceptional cases' where 'unwarned interrogation is necessary to collect valuable and timely intelligence not related to any immediate threat'.¹⁸¹

This public-safety exception was utilised in order to interrogate one of the Boston Marathon bombers of February 2013, Dzhokhar Tsarnaev, for sixteen hours before he was read his *Miranda* rights. During this time, he accepted responsibility for the bombings; yet, after being informed of his constitutional rights, Tsarnaev did not offer any more information. It is unclear at present as to whether the information extracted from Tsarnaev prior to his *Miranda* rights being read will be admissible in court.¹⁸²

However, *Miranda* issues have arisen in other terrorism cases, even if convictions have eventually been gained. This issue is especially pertinent in relating to overseas captures. The reading of *Miranda* rights to a combatant captured on the battlefield, for example, does not guarantee that all evidence gained subsequently is easily usable in a civilian court if other safeguards – such as humane treatment of the combatant – are not met.

❖ John Walker Lindh

An example of one type of *Miranda* problem was provided in the case of John Walker Lindh, an American citizen who trained at an al-Qaeda camp and subsequently served alongside the Taliban in Afghanistan in 2001.¹⁸³

Lindh was captured by Northern Alliance forces, in November 2001, and detained at the nearby Qala-i-Jangi compound, Afghanistan, which was being used by the U.S.; U.K.; and Northern Alliance to house Taliban and al-Qaeda fighters. Several hundred prisoners staged a violent uprising at this compound, during which Lindh was shot in the leg.

¹⁷⁹ 'Detainee Tortured, says U.S. Official', *The Washington Post*, 14 January 2009, available at: http://articles.washingtonpost.com/2009-01-14/politics/36830647_1_interrogation-harsh-techniques-qahtani.

¹⁸⁰ 'Guantanamo Review Depositions', United States Department of Justice (January 2010).

¹⁸¹ 'Rights Are Curtailed for Terror Suspects', *The Wall Street Journal*, 24 March 2011, available at: <http://online.wsj.com/article/SB10001424052748704050204576218970652119898.html>.

¹⁸² 'Boston Bomber Read His Miranda Rights, Immediately Clams Up', *Fox Nation*, available at: <http://nation.foxnews.com/dzhokhar-tsarnaev/2013/04/25/boston-bomber-read-his-miranda-rights-immediately-clams#ixzz2c8s9kCdJ>.

¹⁸³ 'United States of America, v. John Lindh – Statement of Facts', United States District Court for the Eastern District of Virginia, available at: <http://www.justice.gov/ag/statementoffacts.htm>.

The uprising was eventually quelled, and, on 1 December 2001, Lindh was taken back into custody and handed over to the U.S. forces.¹⁸⁴ However, the bullet in his leg was not removed (and would not be until 14 December).¹⁸⁵

On 7 December, Lindh arrived at a U.S. base just outside Kandahar, for questioning.¹⁸⁶ Before the F.B.I. began conducting its interrogation, it notified the Department of Justice that it was planning to question Lindh without a lawyer present – something, it was warned by Justice Department lawyers, that was ‘not authorised by law’.¹⁸⁷

Despite this, the interrogation took place. Lindh was read his ‘advice of rights’ form and given his *Miranda* warning, which he waived, and agreed to be questioned without legal representation.¹⁸⁸

During this interview, Lindh made a series of incriminating statements – including claiming to have attended an al-Qaeda training camp, to have come into contact with Osama bin Laden, and to have fought with the Taliban.

Upon learning that this interrogation had taken place, the Justice Department’s legal advisor stated that the information revealed may only be used for national security purposes, and not in a criminal court. As Lindh had been read his *Miranda* rights, the prosecution would eventually argue that the confession was lawful; however, the Justice Department believed that there remained an issue over whether or not it had been ‘coerced’, as Lindh had been blindfolded and tied up.¹⁸⁹ Furthermore, Lindh was not told that his father had a lawyer on retainer.¹⁹⁰

In 2002, the U.S. attempted to prosecute Lindh in a civilian court, on ten separate charges – including conspiracy to murder U.S. nationals, and supplying services to al-Qaeda. Yet, his attorneys claimed that Lindh had only confessed to his crimes in an attempt to gain food, and medical attention for his still-untreated bullet wound, and also accused the U.S. of inhumane treatment towards their client.¹⁹¹ They also attempted to suppress the use of any evidence gained from Lindh’s interrogation.¹⁹²

As a result, a plea bargain was struck, in which Lindh pleaded guilty to two offences – for which he was sentenced to twenty years in jail – but would have all remaining charges dropped.¹⁹³ Lindh pleaded guilty to supplying services to the Taliban, and to using or carrying an explosive during the commission of a felony. However, his was an early example of the problems that could emerge when *Miranda* warnings needed to be read, and of the problem of converting intelligence into evidence that could be used in court.

¹⁸⁴ ‘Lindh plea removes risks of trial’, *USA Today*, 16 July 2002, available at: http://usatoday30.usatoday.com/news/nation/2002-07-16-lindh-inside_x.htm.

¹⁸⁵ ‘United States of America v. John Phillip Walker Lindh – Defendant’s Memorandum of Points and Authorities in Support of Motion to Suppress Statements for Violation of his Fifth Amendment Rights’, United States District Court for the Eastern District of Virginia (June 2002), available at: https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CD8QFjAC&url=http%3A%2F%2Fnews.findlaw.com%2Fhdocs%2Fdocs%2Flindh%2Fuslindh61302sup5th.pdf&ei=DedKUv-8BKH40gXjtYDQCA&usq=AFQjCNEylEen7hRA59_xDP2QfXKAajaGMA&sig2=RB7UGadkOxsuQw4yalOslA&bvm=bv.53371865,d.d2k.

¹⁸⁶ ‘Lindh plea removes risks of trial’, *USA Today*, 16 July 2002.

¹⁸⁷ ‘The Lindh Case E-Mails’, *Newsweek*, 24 June 2002.

¹⁸⁸ ‘United States of America v. John Phillip Walker Lindh – Indictment’, United States District Court for the Eastern District of Virginia (February 2002), available at: http://www.investigativeproject.org/documents/case_docs/129.pdf.

¹⁸⁹ ‘The Lindh Case E-Mails’, *Newsweek*, 24 June 2002.

¹⁹⁰ ‘Lost in the Jihad’, *The New Yorker*, 10 March 2003, available at: http://www.newyorker.com/archive/2003/03/10/030310fa_fact2.

¹⁹¹ ‘Lindh Pleads Guilty, Agrees to Aid Inquiry’, *Los Angeles Times*, 16 July 2002, available at: <http://articles.latimes.com/2002/jul/16/nation/na-lindh16>.

¹⁹² ‘U.S. says Walker Lindh treated well’, *CNN*, 1 July 2002, available at: <http://edition.cnn.com/2002/LAW/07/01/walker.lindh/index.html?related>.

¹⁹³ ‘“I Plead Guilty,” Taliban American says’, *CNN*, 17 July 2002, available at: <http://edition.cnn.com/2002/LAW/07/15/walker.lindh.hearing/>.

ISSUE 4: POLITICS

Political calculations can also affect national security policy. This section provides case studies of why prosecutions have not taken place due to political manoeuvring and compromises.

A) **Khalid Sheikh Mohammed**

Another reason as to why those currently held at Guantánamo Bay cannot be tried in a civilian court is down to the political machinations surrounding such a prospect. This was especially the case when, in November 2009, Attorney General Eric Holder announced his intention to try K.S.M. and his fellow 9/11 conspirators in New York.

Some within the U.S. political system – primarily, although not exclusively, Republicans – regard the likes of K.S.M. as soldiers from an enemy force, as opposed to common criminals who should be given a trial. For example, Lindsey Graham (Republican, South Carolina) and John McCain (Republican, Arizona) wrote in May 2009 that:

[t]he detainees held at Guantánamo are not common criminals, but warriors the vast majority of whom are fundamentally committed to the destruction of our way of life. The appropriate legal foundation upon which detainee policy should be built is the law of war, along with procedures adapted from our military justice system.¹⁹⁴

Others objected to the idea of K.S.M. being given such a public platform from which to proselytise. A cross-party group of six senators wrote to President Obama, to declare that a New York trial would provide the defendants ‘one of the most visible platforms in the world [on which] to exalt their past acts and to rally others in support of further terrorism’.¹⁹⁵

For such reasons, there is little willingness within Congress to approve the transferral of Guantánamo Bay detainees onto the U.S. mainland, and potentially allow them access to greater protection under the U.S. constitution.

Another reason why the K.S.M. civilian trial failed was the potential financial cost. In January 2010, New York’s mayor, Michael Bloomberg – who was initially supportive of holding the trials there, before reversing course – wrote to the White House, to inform its staff that providing security for the trial would cost \$216 million in the first year and \$200 million for every year afterwards.¹⁹⁶ This led to disputes as to who should pay – the federal government or the city.¹⁹⁷ These were legitimate concerns – with the trial potentially lasting five years, the cost may have been up to \$1 billion.¹⁹⁸

The objections to the financial costs went hand in hand with other concerns about the disruptiveness of such a trial; then-New York Governor, David Paterson, expressed worry as to the economic impact and

¹⁹⁴ ‘How to Handle the Guantanamo Detainees’, *The Wall Street Journal*, 6 May 2009, available at: <http://online.wsj.com/article/SB124157680630090517.html>. Graham would later go on to say that ‘[m]ost Americans believe that the people at Guantanamo Bay are not some kind of burglar or bank robber. They are bent on our destruction [...] The people who attacked us on 9/11, in that prison, want to destroy our way of life. They don’t want to steal your car. They don’t want to break in your house [...] I think the American people are [saying...], “Have you lost your mind? We’re at war. Act like you’re at war.”’ See: ‘Sen. Lindsey Graham calls Guantanamo Bay detainees “crazy bastards”’, *Politico*, 30 November 2012, available at: <http://www.politico.com/story/2012/11/sen-lindsey-graham-calls-guantanamo-bay-detainees-crazy-bastards-84449.html#ixzz2f4dEOG9s>.

¹⁹⁵ ‘Bloomberg Balks at 9/11 Trial, Dealing Blow to White House’, *The New York Times*, 27 January 2010, available at: <http://www.nytimes.com/2010/01/28/nyregion/28bloomberg.html>.

¹⁹⁶ ‘NYC mayor: Big price tag for terror trial security’, *Associated Press*, 6 January 2010, available at: <http://www.nwcn.com/news/national/80833862.html>.

¹⁹⁷ ‘Bloomberg Says Security for Terror Trial to Cost \$216 Million’, *Fox News*, 6 January 2010, available at: <http://www.foxnews.com/politics/2010/01/06/bloomberg-says-security-terror-trial-cost-million/>.

¹⁹⁸ Klaidman, *Kill or Capture* (2012), p. 182.

disruption the trial could cause.¹⁹⁹ Furthermore, polling suggested that the majority of Americans favoured a military tribunal, over a civilian court, for the defendants.²⁰⁰

In January 2011, President Obama signed that year's National Defense Authorization Act, which prevented the use of Pentagon funds for transferring Guantánamo detainees into the U.S. or – unless the Secretary of Defense was willing to guarantee that there was no possibility of recidivism – for transferring Guantánamo detainees to live abroad. While the plan to try these detainees in the U.S. was always likely to prove impossible (for the political and evidentiary reasons discussed), this act essentially ended any prospect of it.

B) Moazzam Begg & Feroz Abbasi

Several years before the controversy concerning the 9/11 defendants, political calculations contributed to two other Guantánamo Bay detainees not being prosecuted: the British citizens, Moazzam Begg and Feroz Abbasi. Feroz Abbasi was a convert to Islam who used to live in London's Finsbury Park Mosque when, between 1997 and 2003, it was run by Abu Hamza al-Masri. He stayed there for approximately a year, and was part of the mosque's security detail.²⁰¹

The U.S. believed that Abbasi was dispatched, by Abu Hamza, to the al-Farouq training camp in Afghanistan, where he received military training and heard Osama bin Laden speak.²⁰² He was then suspected to have travelled to Kandahar, where he met K.S.M. and outlined his willingness to take part in a 'martyrdom' mission.²⁰³

According to a memoir that he wrote in Guantánamo Bay, Abbasi also met two of Osama bin Laden's military commanders, Mohammed Atef and Saif al-Adel, telling them that he 'would like to take action against the American and Israeli forces because Jihad is an obligation on my person'.²⁰⁴ He reiterated this to Saif al-Adel after al-Qaeda had killed Northern Alliance leader Ahmed Shah Massoud, on 9 September 2001.²⁰⁵

After 9/11, that same Guantánamo diary of Abbasi's said that he had volunteered to join a group of al-Qaeda fighters who were defending Kandahar Airport (which, he claimed, was 'the most dangerous' task that he could be given).²⁰⁶ Following U.S. bombing raids and the fighters losing control of the airport, Abbasi attempted to flee to Pakistan; he was captured en route.²⁰⁷

Moazzam Begg, meanwhile, had moved to Afghanistan with his family, in July 2001. He says that he moved there to help set up both a girls' school²⁰⁸ and a school for 'refugee children'.²⁰⁹ However, the U.S. believed

¹⁹⁹ 'New York Politicians call for 9/11 trial to be moved', *The Guardian*, 29 January 2010, available at: <http://www.theguardian.com/world/2010/jan/29/september-11-trial-new-york>.

²⁰⁰ 'Poll: Americans don't want 9/11 terror trials in New York – or any court', *NY Daily News*, 11 February 2010, available at: <http://www.nydailynews.com/news/politics/poll-americans-don-9-11-terror-trials-new-york-court-article-1.197363>; see also: 'Over half against terrorists' trial in NYC', *New York Post*, 17 November 2009, available at: <http://nypost.com/2009/11/17/over-half-against-terrorists-trial-in-nyc/>.

²⁰¹ 'The Reminiscences of Feroz Ali Abbasi: Cageprisoners Caseworker and former Guantánamo Bay detainee', *The Rule of Law Oral History Project*, Columbia University, 13 May 2011, available at: <http://www.youtube.com/watch?v=1tJWfv92sRI>.

²⁰² 'Combatant Status Review Board – Feroz Ali Abbasi', United States Department of Defense, 23 September 2004, available at: <http://projects.nytimes.com/guantanamo/detainees/24-feroz-ali-abbasi/documents/5>.

²⁰³ 'Recommendation to Retain under DoD Control for Guantanamo Detainee, Feroz A Abbasi', United States Department of Defense (November 2003), available at: <http://wikileaks.org/gitmo/pdf/uk/us9uk-000024dp.pdf>.

²⁰⁴ Cited in: Peter L. Bergen, *The Osama Bin Laden I Know: An Oral History of al Qaeda's Leader* (Free Press, 2006), p. 275. In the same diary, Abbasi described Atef as 'the brains behind al Qaeda, Osama bin Laden was just there for show'.

²⁰⁵ Bergen, *The Osama Bin Laden I Know* (2006), p. 299.

²⁰⁶ *Ibid.*, p. 326.

²⁰⁷ 'Recommendation to Retain under DoD Control for Guantanamo Detainee, Feroz A Abbasi', United States Department of Defense (November 2003).

²⁰⁸ 'Moazzam Begg interviews Mahmoud Abu Rideh', Cageprisoners, 17 June 2008, available at: <https://web.archive.org/web/20130408032052/http://old.cageprisoners.com/articles.php?id=25056>.

²⁰⁹ Moazzam Begg, 'Response to Tribunal Process', The Guantánamo Docket, available at: <http://projects.nytimes.com/guantanamo/detainees/558-moazzam-begg/documents/4>.

him to be a trained al-Qaeda fighter, funder, recruiter, and supporter who had fought alongside both al-Qaeda and the Taliban in Tora Bora, Afghanistan, in December 2001.²¹⁰

Begg was detained in Islamabad, Pakistan, in January 2002. He was held in Bagram, Afghanistan, between February 2002 and February 2003. While here, Begg claims he was tortured.²¹¹

According to *The Terror Courts* author Jess Bravin, the Department of Justice had built a case against Begg. They believed that, while he had been held without charge and denied counsel following his capture, the precedent set by the prosecution of John Walker Lindh meant that this was not an insurmountable problem. Furthermore, they believed their case was strengthened by his detention taking place in Afghanistan, a war zone.²¹²

In *Terror Courts*, Bravin states that the Department of Justice planned to use the information provided by Begg and Abbasi, who had been captured in Afghanistan, to help build a case against Abu Hamza. According to Bravin, Begg agreed to a deal in Bagram, whereby he would plead guilty to (as yet, undisclosed) charges and then co-operate with the F.B.I. – with a view to becoming a witness in terrorism trials against al-Qaeda suspects. As a result, charges were set to be filed against Begg once he was sent to the U.S.²¹³

However, Begg was scheduled to be the first candidate to be prosecuted under the newly established military commissions.²¹⁴ The Department of Defense transferred Begg to Guantánamo Bay, on 2 February 2003. This damaged the prospect of a federal prosecution, as his detention at a site so far removed from the Afghan battlefield would lead a federal judge to question whether Begg's subsequent detention without charge; lack of counsel; and – as Begg's lawyers would claim – coercion; was justifiable.²¹⁵

Once at Guantánamo, the Department of Defense's Criminal Investigations Task Force, and agents from the F.B.I., presented Begg with a confession to sign that mirrored the crimes to which he had confessed in Bagram. He was also scheduled to be put into a witness-protection programme. According to the F.B.I., Begg's statement outlined his sympathies for al-Qaeda's cause; his attendance at training camps; his association with 'prominent terrorists', with whom he had discussed potential terrorist acts; and how he had been involved in the recruitment of jihadist operatives, and the financial support of training camps. Begg made some edits, but signed the document.²¹⁶

Begg has since said that 'there still wasn't a crime in the statement, certainly not one that I could see'.²¹⁷ He would later go on to say, 'There is no specific allegation; there are no specific charges... Whom did I recruit? When did I recruit them? Who told them this? What is the corroborating information – names, times, places?'²¹⁸ He has also stated that he 'was made to sign [the confession], in effect, by coercion, and under duress'.²¹⁹

The U.S Department of Justice's Office of the Inspector General investigated Begg's claims and 'concluded that the evidence did not support the allegation that [FBI agents] coerced Begg into signing the statement.'

²¹⁰ 'Combatant Status Review Board – Feroz Ali Abbasi', United States Department of Defense, 23 September 2004.

²¹¹ 'Moazzam Begg interview: "Two people were beaten to death"', *Channel 4 News*, 24 February 2005, available at: <http://www.channel4.com/news/articles/uk/moazzam+begg+interview+two+people+were+beaten+to+death/256788.html>.

²¹² Bravin, *The Terror Courts* (2013), p. 120.

²¹³ *Ibid.*, pp. 115-120

²¹⁴ 'A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq', United States Department of Justice (May 2008), p. 266.

²¹⁵ Bravin, *The Terror Courts* (2013), p. 121.

²¹⁶ 'A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq', United States Department of Justice (2008), p. 275.

²¹⁷ Moazzam Begg, *Enemy Combatant: A British Muslim's Journey to Guantánamo and Back*, Free Press (2006), p. 201.

²¹⁸ 'Jihadist or Victim: Ex-Detainee Makes a Case', *The New York Times*, 15 June 2006.

²¹⁹ 'Guantanamo account: "I was shackled, beaten, suffocated by a plastic bag and deprived of sleep. This is how they forced my confession"', *Independent*, 30 January 2005, available at: <http://www.independent.co.uk/news/uk/this-britain/guantanamo-account-i-was-shackled-beaten-suffocated-by-a-plastic-bag-and-deprived-of-sleep-this-is-how-they-forced-my-confession-6153703.html>.

The Department of Defense performed three investigations into Begg's claims of abuse, and 'found no evidence to substantiate his claims.'²²⁰

Begg's charges were formally sworn in July 2003.²²¹ The Pentagon's general counsel expected Begg to agree to his plea bargain, and that the trial would be concluded within a fortnight.²²² Prosecutors began to discuss the appropriate sentence length (which ranged between twelve and twenty years);²²³ and he would have likely served this sentence at Guantánamo Bay.

Yet, upon learning that Begg and Abbasi were due to be put before a military commission, members of the British parliament demanded that the men be repatriated to the U.K.²²⁴ Lord Goldsmith, the British government's then-Attorney General, stated that the defendants should be given access to British counsel and be able to challenge their statements and appeal their convictions, in civilian courts.²²⁵ Goldsmith also turned down a White House offer to allow Begg and Abbasi to serve their sentences in the U.K.²²⁶ The British government pressured the U.S. to allow a British attorney to join Begg's legal team and ensure that he could not be sentenced to death.

As late as August 2003, some U.S. officials considered guilty pleas inevitable;²²⁷ however, by November, both Begg and Abbasi's potential trials had collapsed. According to Bravin, Prime Minister Tony Blair (under intense domestic pressure because of his perceived closeness to the U.S. and the Iraq war) believed that he needed to show a degree of political separation between the U.K. and the U.S. As a personal favour, President Bush subsequently agreed that no Britons would face a military commission;²²⁸ he then went one step further, in sanctioning the British detainees' releases. By doing so, President Bush ignored objections from the Pentagon; C.I.A.; and F.B.I., all of whom regarded Begg as a national security threat.²²⁹

The cancellation of the Begg and Abbasi trials had a significant impact on the nascent military-commissions system as a whole. Theirs were regarded as some of the strongest cases that prosecutors had,²³⁰ and one Pentagon official stated that '[m]any, many people in [the Department of Defense] were very upset about how it all played out with the British detainees'.²³¹ A memorandum from within the Office of Military Commissions, to William Lietzau (then-U.S. Deputy Assistant Secretary of Defense for Detainee Policy), would later cite the release of 'serious offenders' Begg and Abbasi as a reason for 'extremely low' morale within the Office.²³²

Begg was returned to the U.K. in January 2005. He did not face any charges there. His confessions at Bagram and Guantánamo Bay would likely have been challenged in court and there was uncertainty about the precise nature of what he would be charged with in the civilian court system.

Once back in the U.K., Begg became the Director of Cageprisoners, an organisation which campaigns for the release of detained terrorist suspects and which describes itself as a 'human rights organisation that exists solely to raise awareness of the plight of the prisoners at Guantánamo Bay and other detainees held as part of the War on Terror'.

²²⁰ 'A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq', United States Department of Justice (2008), p. 268.

²²¹ 'Background Briefing on Military Commissions', United States Department of Defense, 3 July 2003, available at: <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2797>.

²²² Bravin, *The Terror Courts* (2013), p. 123.

²²³ *Ibid.*, p. 122.

²²⁴ *Ibid.*, p. 124.

²²⁵ *Ibid.*, p. 125.

²²⁶ *Ibid.*, p. 126.

²²⁷ 'Guilty Pleas Expected at Tribunals', *The Wall Street Journal*, 11 August 2003, available at: <http://online.wsj.com/article/0,,SB106055534827798900,00.html>.

²²⁸ Bravin, *The Terror Courts* (2013), p. 126.

²²⁹ 'Jihadist or Victim: Ex-Detainee Makes a Case', *The New York Times*, 15 June 2006.

²³⁰ Bravin, *The Terror Courts* (2013), p. 127.

²³¹ *Ibid.*, p. 126.

²³² *Ibid.*, p. 241.

ISSUE 5: DRONES & ACCESSIBILITY

The previously identified problems that the state has had in prosecuting terrorists, the ongoing political controversy over detention policy, and the geographical inaccessibility of certain al-Qaeda forces has led the Obama administration to place a greater emphasis on killing terrorists via drone strikes. However, these have also proved controversial, especially the targeting of Anwar al-Awlaki, a U.S. citizen.

In a May 2013 speech, President Obama stated that,

Al Qaeda and its affiliates try to gain foothold in some of the most distant and unforgiving places on Earth. They take refuge in remote tribal regions. They hide in caves and walled compounds. They train in empty deserts and rugged mountains. In some of these places [...] the state only has the most tenuous reach into the territory.²³³

The difficulties surrounding the capture and prosecution of such individuals has led to the increased use of armed drones.

Drones were first used by President Bush: the first armed Predator drone was launched over Afghanistan, on 7 October 2001, with its first use in a targeted killing occurring a year later.²³⁴ However, the use of drones has increased exponentially under President Obama. According to the *New America Foundation*, Obama has approved 318 drone strikes in Pakistan, and ninety-three in Yemen. In contrast, Bush approved forty-eight drone strikes in Pakistan, and only one in Yemen.²³⁵

While Obama has stated that ‘our preference is always to detain, interrogate, and prosecute’ terrorists,²³⁶ al-Qaeda operatives abroad – despite the potential threat that some of them have posed – are unrealistic candidates for trials in court, and are now under constant threat of drone attack.

A) ‘Signature’ strikes

‘Signature’ drone strikes take place against groups of military-age males, primarily in Yemen and tribal areas of Pakistan, but also in Afghanistan and Somalia. These attacks are usually against anonymous operatives who match a pre-determined pattern of behaviour that the U.S. links to terrorist activity, based on (for example) signal intercepts; human sources; and aerial reconnaissance that shows individuals clustered around a known al-Qaeda compound, or using particular vehicles or communications equipment, or assembling or unloading explosives at a known al-Qaeda base.²³⁷

For example, on 14 January 2010, a drone strike was launched against seventeen individuals at a suspected Taliban training camp in Pakistan, after they were assessed to be undertaking ‘assassination training, sparring, push-ups and running.’ This training camp was connected ‘by vehicle’ to an al-Qaeda compound which was struck in 2007.²³⁸

²³³ ‘Remarks by the President at the National Defense University’, The White House, 23 May 2013, available at: <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

²³⁴ There is some dispute as to whether the first time was in February 2002, in Afghanistan, or November 2002, in Yemen. For example, see: ‘The Killing Machines’, *The Atlantic*, September 2013, available at: <http://www.theatlantic.com/magazine/print/2013/09/the-killing-machines-how-to-think-about-drones/309434/>; see also: ‘The Predator War’, *The New Yorker*, 26 October 2009, available at: http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.

²³⁵ Information correct as of 14 November 2013. See: ‘Drone Wars Pakistan: Analysis’, *New America Foundation*, available at: <http://natsec.newamerica.net/drones/pakistan/analysis>; see also: ‘Air & Drone Wars Yemen: Analysis’, *New America Foundation*, available at: <http://natsec.newamerica.net/drones/yemen/analysis>.

²³⁶ ‘Remarks by the President at the National Defense University’, The White House, 23 May 2013.

²³⁷ ‘CIA seeks new authority to expand Yemen drone campaign’, *The Washington Post*, 18 April 2012, available at: http://articles.washingtonpost.com/2012-04-18/world/35453346_1_signature-strikes-drone-strike-drone-program; see also: ‘Viewpoint: Drones, modern war, and the US’, *BBC News*, 19 July 2012, available at: <http://www.bbc.co.uk/news/world-us-canada-18896236>.

²³⁸ ‘Secret memos reveal explicit nature of U.S., Pakistan agreement on drones’, *The Washington Post*, 23 October 2013, available at: http://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story_2.html.

Advocates of the ‘signature’ drone strike approach to disrupting terrorism argue that it provides the capacity to kill a significant number of terrorists; that it is unmatched in its precision; and that it makes terrorist groups wary of meeting in large numbers to plan attacks, reducing the overall scale of the threat that al-Qaeda can pose.²³⁹

‘Signature’ strikes balance the odds that a group of individuals who behave in a certain way are terrorists: targeting based on the theory that, as one American counterterrorism official put it, ‘Al Qaeda is an insular, paranoid organization – innocent neighbors don’t hitchhike rides in the back of trucks headed for the border with guns and bombs’.²⁴⁰ According to a former official, a ‘signature’ strike is ‘targeting on a percentage basis’.²⁴¹

B) ‘Personality’ strikes

❖ Anwar al-Awlaki

The other type of drone attack – ‘personality’ strikes – target specific individuals.

The most high-profile example of this would be the drone strikes launched against A.Q.A.P.’s American cleric, Anwar al-Awlaki, who was on a Presidentially authorised ‘kill or capture’ list. The first strike, in May 2011, missed;²⁴² the next – in al-Jawf, Yemen – on 30 September of that same year, successfully killed him.²⁴³

Al-Awlaki’s death prompted questions and criticism towards the Obama administration, for not giving him a trial, or for revealing the evidence used to justify his being targeted.²⁴⁴ Obama’s open instruction to his advisers to kill al-Awlaki was described, by one journalist, as ‘the first instance in American history of a sitting President speaking of his intent to kill a particular U.S. citizen without that citizen having been charged formally with a crime or convicted at trial’.²⁴⁵ The fact that this attack took place in Yemen (a country where the U.S. is not formally engaged in military activities), as opposed to Afghanistan, further heightened this controversy.

Both President Obama and Attorney General Eric Holder have rejected this view.

According to Holder, the right to use ‘lethal force’ in self-defence is a principle established under both U.S. and international law. As the U.S. is at war, it is ‘authorized to take action against enemy belligerents’ – with the U.S. Constitution enabling the President ‘to protect the nation from any imminent threat of violent attack’, and international law recognising ‘the inherent right of national self-defense’.²⁴⁶ The ongoing

²³⁹ Klaidman, *Kill or Capture* (2012), p. 41.

²⁴⁰ ‘Secret “Kill List” Proves a Test of Obama’s Principles and Will’, *The New York Times*, 29 May 2012, available at: <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>.

²⁴¹ ‘The Rise of the Killer Drones: How America Goes to War in Secret’, *Rolling Stone*, 16 April 2012, available at: <http://www.rollingstone.com/politics/news/the-rise-of-the-killer-drones-how-america-goes-to-war-in-secret-20120416?print=true>.

²⁴² ‘Drone Strike in Yemen was Aimed at Awlaki’, *The New York Times*, 6 May 2011, available at: http://www.nytimes.com/2011/05/07/world/middleeast/07yemen.html?_r=0.

²⁴³ ‘Islamist cleric Anwar al-Awlaki killed in Yemen’, *BBC News*, 30 September 2011, available at: <http://www.bbc.co.uk/news/world-middle-east-15121879>.

²⁴⁴ For example, see: ‘Killing Our Citizens Without Trial’, *The New York Review of Books*, 24 November 2011, available at: <http://www.nybooks.com/articles/archives/2011/nov/24/killing-our-citizens-without-trial/?pagination=false>; see also: ‘ACLU Lens: American Citizen Anwar Al-Aulaqi Killed Without Judicial Process’, *American Civil Liberties Union*, 30 September 2011, available at: <https://www.aclu.org/blog/national-security/aclu-lens-american-citizen-anwar-al-aulaqui-killed-without-judicial-process>; see also: ‘An American Teenager in Yemen: Paying for the Sins of His Father?’, *TIME*, 27 October 2011, available at: <http://content.time.com/time/world/article/0,8599,2097899,00.html>.

²⁴⁵ Steve Coll, ‘Kill or Capture’, *The New Yorker*, 2 August 2012, available at: <http://www.newyorker.com/online/blogs/comment/2012/08/kill-or-capture.html>.

²⁴⁶ ‘Attorney General Eric Holder Speaks at Northwestern University School of Law’, United States Department of Justice, 5 March 2012, available at: <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

threat posed by al-Qaeda and its associated forces, covered under the Congressionally approved A.U.M.F., allows the President ‘to use all necessary and appropriate’ countermeasures.²⁴⁷

Furthermore, Holder rejected the suggestion that this American military response should be limited to Afghanistan – as these were not restrictions placed upon the President by Congress or federal courts, and because the U.S. is ‘at war with a stateless enemy, prone to shifting operations from country to country’.²⁴⁸ Holder described the targeting of ‘specific senior operational leaders of al Qaeda and associated forces’ as ‘entirely lawful’ (and, therefore, not assassinations).²⁴⁹

With regard to the apparent lack of judicial process for American citizens targeted in a drone strike (a reference to al-Awlaki, but, more broadly, to any hypothetical U.S. citizen who is/was part of an A.U.M.F.-covered group and who is/was attempting to kill Americans), Holder stated that targeting was lawful under the following circumstances: firstly, that there is an ‘imminent threat of violent attack’ posed by the individual;²⁵⁰ secondly, that the strike adhered to the international law of war; and thirdly, that ‘capture is not feasible’ because of ‘the nature of how terrorists act and where they tend to hide’.²⁵¹

Holder also outlined how the President was under no obligation to consult a federal court, saying that ‘[t]he Constitution guarantees due process, not judicial process’, and that ‘it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen’.²⁵²

Regarding al-Awlaki specifically, Obama said that as the cleric was waging war against the U.S. from abroad; was ‘actively plotting’ to kill U.S. citizens; and, as neither the U.S. nor its partners were able to capture him, ‘his citizenship should no more serve as a shield than a sniper shooting down on an innocent crowd should be protected from a SWAT [Special Weapons And Tactics] team’.²⁵³ It should also be considered that, as a U.S. citizen, al-Awlaki could not be detained at Guantánamo Bay.

This is the legal position against al-Awlaki; however, there are several other factors that would have made his trial practically difficult.

Firstly, only foreign citizens can be tried by military commission, making al-Awlaki ineligible for such a process; therefore, it would have been necessary to try him in a civilian court, which would have risked classified intelligence surveillance and tracking methods being revealed. Secondly, al-Awlaki (as with other victims of U.S. drone strikes) was based in a country where there is no U.S. military presence or legal jurisdiction.

If there had been an attempt to capture al-Awlaki once he had been tracked to al-Jawf, a U.S. Special Forces team would have been assembled to apprehend him; however, President Obama has stated that the U.S. does not have the capacity to assemble such a team for every terrorist it wishes to target.²⁵⁴ Furthermore, in a situation where there is the possibility of an imminent terrorist attack, there may not be

²⁴⁷ ‘Authorization for Use of Military Force (Enrolled Bill)’, One Hundred Seventh Congress of the United States of America.

²⁴⁸ ‘Attorney General Eric Holder Speaks at Northwestern University School of Law’, United States Department of Justice, 5 March 2012.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.* According to *The New York Review of Books*, the Justice Department memo outlining the legality behind al-Awlaki’s death stated ‘that the “imminence” criterion could be satisfied by a finding that he was the leader of a group that sought to attack the United States whenever it could, even if he was involved in no such attacks at the time he was killed.’ See: ‘Killing Our Citizens Without Trial’, *The New York Review of Books*, 24 November 2011.

²⁵¹ ‘Attorney General Eric Holder Speaks at Northwestern University School of Law’, United States Department of Justice, 5 March 2012.

²⁵² *Ibid.*

²⁵³ ‘Remarks by the President at the National Defense University’, The White House, 23 May 2013.

²⁵⁴ *Ibid.*

time to carry out the capture of a target before the attack takes place.²⁵⁵ If, however, a team were assembled for an especially high-value target such as al-Awlaki, it would need to be a rapid process, in order to capture him before he moved location.²⁵⁶

In addition, even if a Special Forces team were dispatched in such a situation, the risk to U.S. troop lives in the operation would be exponentially higher than with a drone strike;²⁵⁷ the team could meet potential resistance from al-Qaeda terrorists, local civilians, and hostile tribesmen.

Current C.I.A. Director John Brennan has also said that the use of Special Forces on the ground would be detrimental to minimising the risk from terrorism:

[D]eploying large armies abroad won't always be our best offense. Countries typically don't want foreign soldiers in their cities and towns. In fact, large, intrusive military deployments risk playing into al-Qaida's strategy of trying to draw us into long, costly wars that drain us financially, inflame anti-American resentment, and inspire the next generation of terrorists.²⁵⁸

President Obama has outlined how foreign partners cannot be relied upon to undertake such missions, because they lack either 'the capacity or will to take action'.²⁵⁹ However, even if (for example) Yemeni partners had carried out the operation to seize al-Awlaki, no formal extradition treaty exists between the U.S. and Yemen; this would have potentially barred any transfer to the U.S. to face trial.²⁶⁰ Furthermore, the Yemenis whom the U.S. targets for drone strikes also cannot be tried in the U.S., as the Yemeni Constitution prevents its government from turning any of its citizens over to a foreign country.²⁶¹

Sovereignty issues are also relevant. Capture operations in Yemen have been described, by *Kill or Capture* author Daniel Klaidman, as 'not feasible' due to the 'political backlash' that would be caused within Yemen by the U.S. breaching that country's sovereignty.²⁶² Deploying ground forces in Yemen, for example, would also constitute a breach of sovereignty that may be deemed unacceptable by that government in a way that drones, as another example, are not.²⁶³ The same theory can be applied to Pakistani sovereignty in Pakistan. As President Obama has said, the cost of the operation against Osama bin Laden to U.S.–Pakistani relations was 'severe'. Regularly undertaking such missions could cause a major international incident; the bin Laden mission will prove a rare exception, not the rule.²⁶⁴

Al-Awlaki was a unique case, in that he was open about his role in facilitating attacks against America. Others targeted are, as scholars Daniel Byman and Benjamin Wittes have pointed out, 'propagandists, engaging in behaviour that is insidious but arguably more protected legally'.²⁶⁵ For these individuals, therefore, gaining a conviction may be difficult, for reasons Byman and Wittes have outlined:

²⁵⁵ 'Attorney General Eric Holder Speaks at Northwestern University School of Law', United States Department of Justice, 5 March 2012.

²⁵⁶ Byman and Wittes, 'Tools and Tradeoffs', The Saban Center for Middle East Policy at Brookings (June 2013), p. 34.

²⁵⁷ 'Attorney General Eric Holder Speaks at Northwestern University School of Law', United States Department of Justice, 5 March 2012. This argument is tackled with some gusto in: Coll, 'Kill or Capture', *The New Yorker*, 2 August 2012.

²⁵⁸ 'The Efficacy and Ethics of U.S. Counterterrorism Strategy', *Wilson Center*, 30 April 2012, available at: <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>.

²⁵⁹ 'Remarks by the President at the National Defense University', The White House, 23 May 2013.

²⁶⁰ Byman and Wittes, 'Tools and Tradeoffs', The Saban Center for Middle East Policy at Brookings (June 2013).

²⁶¹ 'Yemen refuses to let U.S. try cleric', *The Washington Times*, 12 May 2010, available at: <http://www.washingtontimes.com/news/2010/may/12/yemen-refuses-to-let-us-try-cleric/#ixzz2eaZPpPMD>.

²⁶² Klaidman, *Kill or Capture* (2012), p. 237.

²⁶³ Byman and Wittes, 'Tools and Tradeoffs', The Saban Center for Middle East Policy at Brookings (June 2013), p. 34.

²⁶⁴ 'Remarks by the President at the National Defense University', The White House, 23 May 2013.

²⁶⁵ Byman and Wittes, 'Tools and Tradeoffs', The Saban Center for Middle East Policy at Brookings (June 2013), p. 3.

[I]t is not enough in court for the executive branch to know that it has got the right guy. It has to have sufficient evidence to prove in court to a unanimous jury every element of a criminal offense beyond a reasonable doubt, and it has to have that evidence in a form that a court will find admissible.²⁶⁶

While such individuals may not be able to be prosecuted, the scope of the A.U.M.F. still allows for them to be targeted for military action – usually via drone strikes.

²⁶⁶ Ibid., p. 35.

CONCLUSION

In an April 2013 debate on Shaker Aamer, in the U.K. House of Commons, the M.P. for Bolton South East, Yasmin Qureshi, stated that, ‘fundamentally, this all boils down to the fact that either someone is prosecuted or they are not’.²⁶⁷

In reality, as this paper demonstrates, while prosecutions remain the ideal method for stopping mass-casualty terrorism, they are actually just one of many possible routes. Furthermore, they are not fundamental in order to prove the legitimacy of the threat. The notion that stopping terrorism will always result in prosecutions fundamentally misunderstands the difference between a preventative approach that stops mass-casualty attacks occurring, and a law-enforcement approach that seeks to punish the perpetrators of such an attack.

The Presumption of Innocence has attempted to show the significant difficulties in prosecuting suspected terrorists, and how these difficulties have been circumvented by a range of measures – including detention and drone strikes. This report, however, does not argue that one type of approach to counterterrorism and security is inherently superior to any other; rather, it makes the case that, while the criminal justice system may be the ideal or preferred method to eliminate terrorist threats, it is not always the most realistic.

While a broad series of measures are required to combat mass-casualty terrorism, that does not mean that tactics cannot be modified as the war against al-Qaeda progresses. As the collective knowledge of the U.S. and its allies about the group has increased, some tactics have now been halted (for example, waterboarding).

However, other measures that continue to exercise activists and human-rights groups are now institutionalised state responses to terrorism. Rendition, drones, detention without trial, preventative arrests, and deportations are the realities of the ongoing struggle against today’s form of terrorism; they are not going to disappear, because they have proved extremely effective. This is controversial for some, with politicians; human-rights groups; legal activists; and journalists accusing the U.S. of illegal or immoral behaviour – even with cases such as the killing of Osama bin Laden.

Yet an inability (or unwillingness) on behalf of some Western governments to engage such topics with the electorate, or to explain why some national security threats will not be tried in a criminal court, has led to a lack of public understanding of these issues.

In turn, this lack of understanding can lead to public criticism of the government. As a result, Alistair Burt, speaking as a U.K. Foreign & Commonwealth Office Minister, talks of how that ‘public pressure’ placed on the government, by those supporting Shaker Aamer, ‘adds to that sense of persuasion that the detention is not right or appropriate’.²⁶⁸

However, public pressure cannot always be a sound basis for national security policy. Furthermore, this pressure only comes about because liberal democracies are failing to address just why policies such as detention are so necessary, and because they are failing to explain that the complexities of dealing with modern-day terrorism mean that not all roads lead to a court of law.

Therefore, President Obama’s question, ‘If these people are so dangerous, why can’t we prosecute them?’, was a perfectly good one to ask. It also has a perfectly good explanation; but today’s governments are just not willing to say it.

²⁶⁷ ‘Commons Debates – House of Commons’, Hansard, 24 April 2013.

²⁶⁸ Ibid.



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