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International Society of Barristers

Volume 50 Number 4

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Michael C. Martin

THE TERROR COURTS: ROUGH JUSTICE AT GUANTANAMO BAY
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Quarterly

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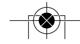

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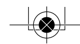

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OVERVIEW OF *UNITED STATES v. ABDULMUTALLAB*: THE PROSECUTION OF THE UNDERWEAR BOMBER[*]

Michael C. Martin[**]

ABOUT THE AUTHOR

Michael C. Martin is an Assistant United States Attorney in the Eastern District of Michigan. He is assigned to the office's National Security Unit, where he prosecutes terrorism, espionage, and other national-security crimes. He also prosecutes a variety of other types of cases, including gun and drug crimes, bank robberies, fraud, and immigration. He was one of three Assistant United States Attorneys who prosecuted the underwear bomber. For their role in that prosecution, they received the Attorney General's Award for Excellence, the highest award granted by the Department of Justice.

I
ON HUMILITY

When the Department of Justice gave the Attorney General's Award to all the members of the team that prosecuted Umar Farouk Abdulmutallab, the Department flew us to Washington, DC, for a ceremony. The Department paid for our spouses to join us, which is unheard of in government service. The award was presented by the Attorney General, Eric Holder, and the Director of the FBI, Robert Mueller.

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[*] Address delivered at the Annual Convention of the International Society of Barristers, 21 March 2017, Cancun, Mexico.

[**] Assistant United States Attorney, Detroit, Michigan.

I have to confess that when I sat down after receiving that award, I was feeling pretty proud of myself—this was quite an accomplishment.

At the end of the ceremony, the Attorney General handed out the awards to the representatives of law-enforcement officers who had died in the line of duty. Their widows and children came up on stage to receive their awards. That put into perspective my role and my award.

I always start my talks with this story. I say to you, if you happened to have been a law-enforcement officer in your previous life, or have children who are law-enforcement officers, you have my deep gratitude.

II
PREPARATIONS

On Christmas Day in 2009, Umar Farouk Abdulmutallab flew to Detroit, carrying a bomb. He was sent by Al-Qaeda to destroy the aircraft. He failed and was arrested when he landed. That touched off a massive federal investigation led by the FBI that spanned three continents—Africa, Europe, and the United States. It touched off hundreds and hundreds of witness interviews and the amassing of forensic evidence of all kinds—DNA, fingerprints, hair, bomb-making analysis, chemical analysis. It was the largest investigation I've ever been involved in. And it was certainly the most fascinating case I've ever been involved in.

What I'm not going to tell you about is the legal back and forth of the case—what motions we filed and the different charges that were brought—because although we did break some new legal ground in this case, the legal part of the case is not its enduring quality. What really made this case have a lasting impact is the people involved in the attack, the manner in which the attack was conducted, and the reason for the attack.

Umar Farouk Abdulmutallab

A little bit about the defendant. In talking about terrorism, people often say to me that their perception of a suicide bomber is somebody who is not well educated, is poor, and doesn't really know what they're doing, maybe was brainwashed into doing it. That type of description certainly does not fit Abdulmutallab, nor do I think it fits many suicide bombers; certainly the 911 attackers were not in that category.

Abdulmutallab was from one of the wealthiest families in Nigeria; his father was the chairman of the country's oldest and largest bank. On his visa application to the United Kingdom Abdulmutallab listed his father's income as £100,000 per month. This from a country, Nigeria, where the average annual income is about $900. These people were what I call Third-World Rich. They were living in a walled compound. They had drivers, servants. They were living in the lap of luxury.

Abdulmutallab was also highly educated. He went to high school overseas at a boarding school. It was not a religious school—it was a more secular school—but he got a very good high-school education. He went to college at the University College London, and he lived in a $4-million apartment in London.

When he graduated from college, Abdulmutallab was going for his master's degree in engineering from a college in the United Arab Emirates. So this was a young man who had a great deal of opportunity ahead of him.

Abdulmutallab was also very devout, and this goes back to his time in high school. Now, one of the advantages we prosecutors have is that many criminals—even today, when you'd think they'd know better—put a lot of things online or on their phones. This allows investigators to go back and reconstruct not only what they did, but their intent and what they were thinking. Abdulmutallab was the same way. When he was in high school, he posted a series of posts on a "chat," an online forum, that was a site for Muslims to discuss various

things. It wasn't related to terrorism at that point; it's purely a religious forum. One of the things he posted was how devoted he was to Islam and how he was seeking the establishment of an Islamic empire—not necessarily through violence. Abdulmutallab was not talking about violence at this point, in high school, but you can already see his devotion to the religion.

The other thing about Abdulmutallab was that he was conflicted. And this is connected to his religion. By "conflicted," I mean that he had difficulties with his sexual development and his relationship with females. His religion really restricted what he could do in terms of dating and whatnot, and this was causing a serious problem for him. In another chat, Abdulmutallab talked about a really strong desire to get married, but he's just not old enough yet.

He was also lonely, and this, I think, is important. He was not cut off socially. He said, "I interact with people, I laugh, I have a good time, but I'm missing that true Muslim friend." So he nonetheless felt very lonely and isolated. And it's this lonely and conflicted individual, this young man, who graduates high school and then goes to college in London.

It's in college that Abdulmutallab begins listening to the lectures of Anwar al-Awlaki, the other primary figure in this case. To understand Abdulmutallab's case, you have to understand Anwar al-Awlaki. So, who is he? He was a United States citizen. He was born in New Mexico to Yemeni parents; his family is from Yemen. He also was well educated. He was married. He was for many years a preacher at various mosques around the United States, and he was considered a moderate preacher of Islam, a nonviolent type of preacher.

And al-Awlaki was extremely prolific. He came up during a time, in the 1990s and 2000s, when desktop computers started to take hold; the internet started to take hold. He would create lengthy lectures on a variety of topics. For example, you could buy his boxed set of fifty-three CDs on the history of the Prophet Muhammad. You could listen to Anwar al-Awlaki sermons on topics like how to deal with problems

in your marriage, what to eat—all benign, not terrorism-related topics. After 9/11, though, he became disillusioned with the United States, and he moved to London for a period. He then took on the view that Jihad against the United States was religiously required. He then moved to Yemen, and he was killed there in a US drone strike in 2011.

I'm going to let Mr. al-Awlaki tell you directly about why he left the United States:

> I, for one, was born in the US and lived in the US for twenty-one years. America was my home. I was a preacher of Islam, involved in nonviolent Islamic activism. However, with the American invasion of Iraq and continued US aggression against Muslims, I could not reconcile between living in the US and being a Muslim. And I eventually came to the conclusion that jihad against America is binding upon myself, just as it is binding on every other able Muslim.[1]

Anwar al-Awlaki joined a group called Al-Qaeda in the Arabian Peninsula, based largely in Yemen.

1. *The Evolution of a Radical Cleric: Quotes from Anwar al-Awlaki*, NY TIMES (May 8, 2010) (citing Nov. 9, 2009, statement on al-Awlaki's now-defunct website, anwar-alawlaki.com), http://www.nytimes.com/2010/05/09/world/09quotes.html?mcubz=0.

This photograph is a typical form of Al-Qaeda propaganda.[2] You see in the upper right-hand corner some Arabic symbols—that is the insignia for the Al-Qaeda media wing. It's common in Al-Qaeda videos for the black Al-Qaeda flag to be behind the speaker, and then a weapon of some sort to be present, in this case a Yemeni dagger. (Incidentally, during the trial of Abdulmutallab, he actually asked the judge if he could wear a Yemeni dagger. The motion was denied.)

Anwar al-Awlaki's view of heaven is important, for, in his view, jihad against the United States is religiously ordained. It's a requirement of Muslims. And jihad is further explained by al-Awlaki in his teachings, including the types of benefits and rewards that will accrue to a person who engages in jihad.

Anwar al-Awlaki communicated this to people both online—in videos, for example—and in print. Al-Qaeda published a magazine called *Inspire*—the title was expressly intended to inspire other people outside of Yemen, outside of the Middle East, to conduct attacks against the west. This magazine relayed not only encouragement and religious underpinnings for those attacks, but also instruction on things like how to construct explosive devices.

One issue had an article called "How to Build a Bomb in the Kitchen of your Mom." It talked about how to communicate covertly with your coconspirators, things of that nature. One article al-Awlaki wrote for *Inspire* was called "The Prize Awaiting the *Shaheed*." *Shaheed* is a word for suicide martyr, suicide bomber. In that article he describes heaven, which is important because suicide bombers—martyrs in his view—go to the highest level of heaven; they get the biggest reward in heaven.

Later on, al-Awlaki met with Abdulmutallab. They had a long time to talk, and he educated Abdulmutallab about his view of heaven.

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2. Photo reproduced from www.nsarchive.org with the permission of the National Security Archive, http://nsarchive.gwu.edu/NSAEBB/NSAEBB529-Anwar-al-Awlaki-File/.

Here's what that view was: "Paradise, also called *Jannah*, is clean and pure, and your bodies will come in a different form. Life is infinite, and there's no time pressure whatsoever. You're free to do whatever you like whenever you like for as long as you like, and you can recline on your throne for forty years, talking to your wife." Al-Awlaki goes on to say, "There's no time pressure whatsoever." That's why a famous Islamic cleric mentions something about *Jannah*, heaven, saying that "A man would sleep with his wife for eighty years."

All of these things are available to you so long as you die as a Shaheed. Getting back to those frustrations that Abdulmutallab had—those sexual and relationship frustrations—you can start to see how this message of what heaven is like would be appealing to him. How many of you have 18-, 19-, 20-year-old children who would like to go to a place where they can do whatever they want, for however long they want, whenever they want? That can be a powerful message for a younger person. But there is more to it than just marriage and sex. I'm going to show you a couple of clips from al-Awlaki talking about other aspects of what heaven is like, in his view. I like these videos because I can almost envision Abdulmutallab sitting right across from al-Awlaki in Yemen listening to this type of sermon. You can even hear the dogs barking in the background.

> What you own in *dunya* [earth] is dirt. Land is dirt; bricks are dirt; mortar is dirt. Everything is dirt. In *Jannah*, the palace that you would own is of brick of gold and brick of silver. And there's no dirt on the ground, but there's saffron, there's musk, there's pearls; so quality is much different than what you have in dunya. And then, a small piece of land that you would own in *Jannah*—how much is it valued at? . . . The area under a whip, in *Jannah*. How big can a whip be? A foot by one inch? That area—the area of a whip, in *Jannah*—is greater than the earth and everything in it. So, such a small piece of property, such a small piece of property in Jannah is worth the earth and

> everything in it. That's how valuable property is. And remember: the lowest . . . [sic] in *Jannah* is ten times the earth. So you can imagine how much valuable property you have. Just think about how long it will take you to visit all of the land that you own in paradise. And this is not wasteland; this is land that is ready for you. The palaces, the gardens, the rivers—everything is there—food, servants. So it's beautiful wherever you go. You're a tourist in your own land.[3]

And the next clip.

> But in *dunya*, everything is contaminated; there is nothing that is 100% pure; there is no pure quality in dunya. So food—which is a form of enjoyment—is contaminated; this enjoyment is contaminated; it is not pure . . . . The food that you want to eat has to be prepared, it has to be cooked; it's a hassle. Yes, it tastes good, but there's a lot of effort that goes into making food that tastes good. And a lot of the foods that you buy are the foods that are unhealthy. You go to the doctor and he tells you to stay away from the particular things that you like. So it's a blessing, but at the same time there is some contamination. But in *Jannah*, it is pure. The food that comes in will come out of you in the form of sweat that is musk. The food you don't have to spend any time in preparation; it will be brought to you by your servants. It tastes much better than the food that's in *dunya*. There is [sic] no problems of chloresterol or diabetes or any other disease. You can have as much greasy food, sugary food, sweet food as you like.[4]

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3. https://www.kalamullah.com/your-just-reward.html.

4. *Id*.

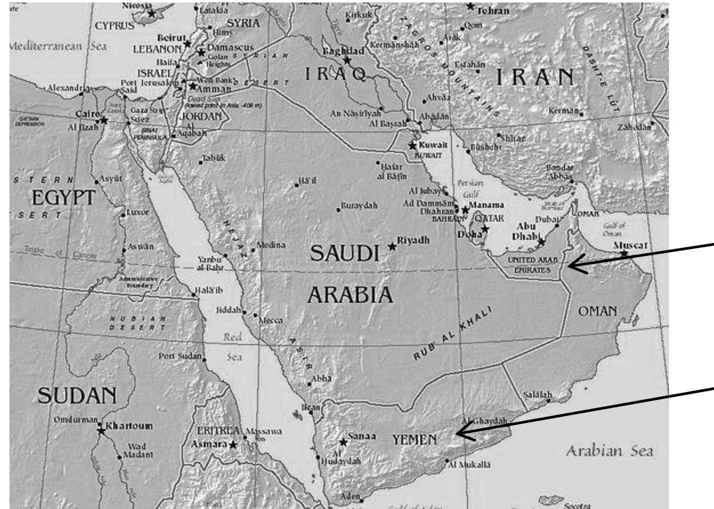
Dying as a *Shaheed* means you can do whatever you want, whenever you want; you can eat whatever you want, and you will be very rich and have palaces and servants. You can start to see how appealing heaven might be. And lots of religions, including my own, paint heaven as a paradise. That's not so much the problem; the really dangerous part of al-Awlaki's interpretation of this vision is that to get there and get these benefits, you have to die as a *Shaheed*; you have to conduct a terrorist attack and die in the process.

III
THE ATTACK

The attack had its origins when Abdulmutallab was in graduate school in the United Arab Emirates. He had been listening to these al-Awlaki sermons on-line since college. One of the problems for Abdulmutallab was that he did not read or speak Arabic. This is one of the great appeals of Anwar al-Awlaki to many people: he speaks absolutely fluent English, so he then serves as an interpreter for people who cannot read the Quran in its original form. Al-Awlaki is able to explain in English what the Quran means. Again, he had a long history of being a moderate preacher, talking about all aspects of life. People interested in the religion would naturally turn to his sermons for interpretation of the Quran. Abdulmutallab was doing that. While in graduate school, Abdumutallab on his own decided that he was going to go from the United Arab Emirates to Yemen to find Anwar al-Awlaki. That's the plan. There's really not much detail other than that.

Abdulmutallab in Yemen

Abdulmutallab enrolled in a language school in Yemen.



To orient you geographically, here is the United Arab Emirates and here is Yemen.[5] Abdulmutallab went to Yemen, which is a very, very troubled country. It's sometimes referred to as a failed state. The federal government in Sana'a does not control the entire country. Parts of the country are undergoing civil war; other parts are either controlled by Al-Qaeda or are places where Al-Qaeda is active.

So Abdulmutallab went to Sana'a, enrolled in an Arabic language school and essentially started asking people how he could contact al-Awlaki. It took some time, but Abdulmutallab eventually meets up with some people who point him in the right direction, and he eventually does make contact with al-Awlaki. Al-Qaeda vetted Abdulmutallab over the period of several weeks. Al-Qaeda eventually told him show up at an appointed place at an appointed time. When they met him, they took everything he had on him—his phone, his money—and they took him into the eastern regions of Yemen, which are controlled by Al-Qaeda. He ultimately met with al-Awlaki in

5. Source of map: Wikimedia Commons, https://commons.wikimedia.org/wiki/File:Middle_east.jpg.

September. A video of the two shows Abdulmutallab's admiration for al-Awlaki in his face.[6]

Abdulmutallab stayed in al-Awlaki's home, and that's where al-Awlaki provided him religious guidance and his interpretation of heaven. Abdulmutallab also participated in an Al-Qaeda training camp.[7] It turns out that he was not such a great soldier, though, in fact, he told us that he had gone to look for al-Awlaki with the hopes of becoming a foot soldier for Al-Qaeda.

He thought he was going to go fight in Iraq or Afghanistan or maybe Chechnya, but Al-Qaeda had other plans for him. The reason they did was that Abdulmutallab had a unique skillset. The first skill was that he spoke fluent English. If you were to see him on the street and interact with him, you might not even realize he is foreign. He was an experienced world traveler. Remember, he had gone to high school out of Nigeria and attended college in London. He also had been to the United States before, for a conference, when he was in college. He had a valid Nigerian passport, and he had a valid US visa from when he had traveled to the US. He also had $5,000 in cash that he brought with him from the United Arab Emirates. He had cleaned out his bank account and taken the cash with him, and it was this $5000 that was used to finance his attack.

The mission that Al-Qaeda developed for Abdulmutallab was that he would destroy a US airliner. That was the key: it had to be a US airliner, and it had to be over American soil. Every other detail was left to Abdulmutallab. So it was not complicated. It did not require

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6. A photograph from the video is available at *How al-Qaeda Cleric Anwar al-Awlaki Told the "Underpants Bomber" to Pray*, THE TELEGRAPH (July 21, 2017), http://www.telegraph.co.uk/news/worldnews/al-qaeda/12042126/How-al-Qaeda-cleric-Anwar-al-Awlaki-told-the-underpants-bomber-to-pray.html.

7. A photograph of Abdulmutallab holding an assault rifle is available at http://i.dailymail.co.uk/i/pix/2011/10/13/article-2048260-0E58D8DA00000578-488_634x420.jpg.

Abdulmutallab, once he set off on the mission, to communicate back for directions. So the chances of law enforcement or intelligence agencies detecting his attack en route were pretty low because the plan did not require him to communicate back.

There is a backstory to this: When Abdulmutallab left Yemen, on his own, he bought his plane tickets with that $5000, but he bought the tickets with the wrong airline. He bought a ticket on a Lufthansa flight, and had to buy a new ticket on Northwest. So planting the bomb on a US airliner was one of the few things he had to do, and he almost messed that up. But ultimately, he got it right.

So Abdulmutallab was accepted for his martyr mission. Later, he met the bomb maker, Ibrahim al-Asiri, who is a very important individual in Al-Qaeda.[8] Al-Asiri is an interesting character in his own right. He and his brother are Saudi Arabian; they fled to Yemen and joined Al-Qaeda. Saudi Arabia, as you know from 9/11, has a very serious terrorism problem. They have a program designed to repatriate and rehabilitate people who have turned to terrorism. And the crown prince of Saudi Arabia, who is first in line to the throne, was in charge of the government's department that was running this rehabilitation program. Ibrahim al-Asiri's brother went to Saudi Arabia for the purpose of rehabilitation. The crown prince agreed to meet him. Ibrahim had created a nonmetallic bomb, which was hidden in the rectum of his brother. When his brother met with the crown prince, the bomb detonated, and the brother was torn in two. The prince miraculously survived without a scratch. But this is the type of individual we're talking about here.

The bomb Ibrahim al-Asiri gave to Abdulmutallab was also nonmetallic, and it was initiated with a syringe. Abdulmutallab practiced with the syringe to make sure he knew how to detonate the bomb. This was all in Yemen.

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8. A photograph of Al-Asiri is available at http://www.bbc.com/news/world-middle-east-11662143.

Abdulmutallab Takes Off

Abdulmutallab then engaged in his travels. He flew to Ghana, back to his home country of Nigeria, where he basically stayed at the airport. He later told us that he did not want to leave the airport because he did not want anybody to recognize him. Part of the reason he did not want to be recognized was that when he had finally been selected by Al-Qaeda to go to al-Awlaki in Yemen, he sent his parents an electronic message that said, "I'm not coming back. Please forgive me for what I'm going to do." His parents spent the next several weeks on their own trying to find him, but they were unsuccessful. His father ultimately went to the United States Embassy and reported his concern that Abdulmutallab might be involved with terrorism.

One of the problems the United States government had at the time was that it was not sharing such information with intelligence agencies as it should have. Abdulmutallab was traveling on his own US visa, in his own name, this whole time, despite the fact that at this point the US government had information about his parents' concern.

Abdulmutallab then went from Nigeria to Amsterdam, and then he flew from the Netherlands to Detroit. The geography of his flight raises an important point: If you do not know your Michigan geography well, you may be surprised to learn that Detroit actually sits north of Canada. Flights coming from Europe to Detroit make their approach over Canada. So for most of Abdulmutallab's flight he was over the ocean or over Canada. The importance of this has to do with the second point of his mission, which was to detonate the bomb on a US airliner over US soil.

The Flight

There were 290 people on Northwest Flight 253, and they came from many different countries. It was a remarkable opportunity, as we were preparing for trial and interviewing witnesses, to get to meet so many of the people who had been on that flight. What a tremendous tapestry their lives represented. We had people of all ages, all races,

all ethnicities, all religions. It was really a beautiful thing to meet all those people.

The plane approached Detroit at 11:20 a.m. Remember, this is Christmas Day, so most people in Detroit are at home or going to church or whatnot, getting together with family. Abdulmutallab went to the bathroom, where he stayed for about twenty minutes. In the bathroom he engaged in a ritual cleansing. He put perfume on himself, because, as al-Awlaki said, "Heaven is clean; heaven is a pure place," and Abdulmutallab was preparing to go to heaven. He really overdosed on the perfume—in fact, many of the witnesses on the plane recalled the smell of perfume as he walked back from the bathroom.

As the flight entered US airspace. Abdulmutallab returned to his seat. He pulled a blanket up to his chin and around his head and then he went into his pants where the bomb was hidden and he depressed the plunger on the syringe, which initiated the explosion. Within a few seconds the pilots had been told that firecrackers had been set off in the plane; that's what they believed was happening. The pilots radioed for immediate assistance, and took the plane into a pretty steep dive and landed the plane just a few minutes later. The entire time they were flying the plane, the pilots had no idea of the true nature of what had happened.

Abdulmutallab was sitting against the window, right over the wing in seat 19A. For those of you who don't know about airplanes, the fuel on an airplane is stored in the wings, so he was right over the fuel. Sitting next to him was a passenger, a young man who was coming back to the United States from studying abroad. We interviewed this young man who told us that when Abdulmutallab pulled that blanket up and initiated the bomb and he saw the fire in Abdulmutallab's lap, he turned to Abdulmutallab and said, "Dude, your pants are on fire." I was driving home one day from work listening to NPR, and this young man was being interviewed. Here's what he had to say:

> *Interviewer:* I noticed something [in] talking to him: [you] kept referring to Abdulmutallab by his first name, Umar, as if [you] were friends.
>
> *Young man:* I only call him that because I don't want to call him a terrorist because he hasn't been treated as a terrorist and it wasn't a national threat, and so using Umar seems to be more human.
>
> *Interviewer:* You have an interesting perspective—that you choose not to see him as a terrorist and you don't see what he did as presenting a threat.
>
> *Young man:* Well, I mean, it was a threat, of course[.] [I]t was a threat because[,] initially, he was trying to blow up the plane but he didn't succeed. I mainly treat him this way because of how he reacted towards what he was doing. And what his actions told me on the plane was that he was in over his head, and he didn't know exactly know what he was doing would entail.[9]

Hearing that from this young man crystalized in my mind what the big threat was to this prosecution. It was not our ability to establish guilt. It was perhaps a juror holding out because they misunderstood or misinterpreted the evidence, just as this young man had.

Before I had this case, I was one of those who thought eyewitness evidence was perhaps somewhat more unreliable than other types of evidence. This case actually swung me back the other way and made me put a lot of stock in eyewitness evidence. Here's why: Look how many people were sitting there on that plane. They all witnessed an event that happened very rapidly and very

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9. *All Things Considered: Accused Christmas Bomber Listened to Music, Slept*, NATIONAL PUBLIC RADIO (Feb. 17, 2010) (transcript of interview available at https://www.npr.org/templates/story/story.php?storyId=123821351.

traumatically. Yet it was amazing how consistent the eyewitness accounts were of what had happened and what they had seen. Many of the witnesses mentioned the defendant's eyes. Many people said his eyes looked dead; there was no life in his eyes. The young man sitting next to Abdulmutallab interpreted the expression in Abdulmutallab's eyes as meaning that Abdulmutallab did not know what he was doing; other people correctly interpreted it as Abdulmutallab's already having decided to die. His life was over, as far as he was concerned. He was getting ready to go to heaven, and that's why his eyes were dead and cold.

The other passenger I wanted to talk about was Jasper Schuringa, a Dutch citizen. He was the so-called hero of flight 253. He is an interesting man. He wasted no time in cashing in on his heroic deeds. He landed in Detroit and quickly took a flight to Florida, where a friend negotiated the sale to the *New York Post* and CNN, for $15,000, of a few grainy cell-phone videos that Shuringa had taken. He returned to the Netherlands a hero. He was congratulated by the Queen of the Netherlands and was given an award by the mayor of Amsterdam. In his home country he's called the "Flying Dutchman."

Here's what he said he did. And it's accurate; this is not puffery.

> *Schuringa:* Basically, I reacted [to] the bang. There was smoke piling up in the cabin, and people were screaming, "Fire! Fire!" And the first thing we all did was check where the fire was. And then I saw the suspect and he was [inaudible] on the seat.
>
> *Interviewer:* How many rows back were you? You were behind the suspect?
>
> *Schuringa:* I was on the right side of the plane, and the suspect was on the left, so there were quite [a few] seats in between, so when saw the suspect was getting on fire, I freaked, of course, and without any hesitation I just jumped over all the seats and jumped to the

> suspect because he was, you know, trying to blow up the plane. So I was trying to search his body for any explosives, and I took some kind of object that was already melting and smoking out of him and I tried to put out the fire and then when I did that I was also restraining the suspect. And then fire started beneath his seat. So with my hands and everything—they're a little burned, eh?—I put out the fire and then other passengers helped me as well. And of course I was screaming for "Water! Water!" because a fire on a plane is not that good. But then the fire was actually getting a little worse because what I [had done] didn't extinguish the fire. So I grabbed the suspect out of his seat because if he was wearing any more explosives, it would be very dangerous because he was on fire. And when I grabbed him from his seat, the [crew] came with fire extinguishers and they . . . clear[ed] [off] the flames. And, just to be sure, I grabbed him with another attendant, and we took him to first class, and there we stripped him and contained him with handcuffs, and we made sure he had no more weapons, no more bombs on him.[10]

All of that is one hundred percent accurate. Schuringa is not a military guy; he's not in law enforcement. Just think about what he did: he climbed over all those seats, he reached into Abdulmutallab's pants and pulled out a burning bomb, which he then threw on the ground. He wrestled Abdulmutallab to the ground, helped put out the fire, stripped Abdulmutallab almost completely naked, looked for other devices, then took Abdulmutallab up to first class and handcuffed him. It is extraordinary what he did. Shuringa certainly had some help from other passengers. But he really did act extraordinarily.

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10. *Flight 253 Passenger Jasper Schuringa Speaks to CNN*, YOUTUBE (Dec. 28, 2009), https://www.youtube.com/watch?v=aU7P7nCoAvY.

You trial lawyers here will appreciate how oftentimes in cases you do not get to pick your witnesses. The bank teller who gets robbed—you're stuck with that bank teller, warts and all. Well, in this case we got to pick the best of the best. One I want to point out sat in row 17, right in front of Abdulmutallab. She was a young woman traveling back from Germany with her infant child. They were US citizens, coming home for the holidays. She was traveling by herself because her husband was in the Army and had just been deployed to Afghanistan. She was one tough lady.

A lot of the other passengers we talked to did not want to testify because they were scared. They thought Al-Qaeda would come after them. They wanted to have nothing to do with the trial. There were quite a few Dutch passengers on this plane, too, other than Jasper Schuringa, and we could not force them to come to the United States and testify. We asked them, and many of them said no. This particular woman was just the opposite; she was more than happy to testify and was not intimidated in the least.

One of the great things about this case is that I learned all about airplanes. I talked to the pilots and the flight attendants and I learned that fire is, as Schuringa said, not good on an airplane because even those large airplanes, like these international flights, have a limited number of fire extinguishers. Half of the extinguishers are water and half of are chemical. Abdulmutallab's bomb created a chemical fire. Water was not going to put it out. So automatically you go from, say, ten fire extinguishers down to five, and if those five do not work, you have a fire on board an aircraft you can't put out. The passengers moved Abdulmutallab up to business class. Along the way is seat 13, where the FBI recovered the bomb, just sitting on the floor. So Abdulmutallab had dropped it on his way up. Once handcuffed, in business class, he was seated right across from a flight attendant, who was in what they call the jump seat, which faces in reverse. She was a very experienced flight attendant. I put these people in the same category as nurses: they've seen all aspects of human behavior;

they're tough people. And she asked him, "What did you have?" He ignored her at first. You don't ignore a nurse or a flight attendant. So she said again, "No. I said to you, What did you have?" And he said, "Explosive device," which the prosecution team loved, because the federal statute that we charged him under used that exact wording: "Explosive device." That's a really nice touch for a prosecutor.

The pilot landed the plane immediately and Abdulmutallab was taken off the plane by Customs and Border Protection officers. Abdulmutallab told the CBP officers that he was with Al-Qaeda. Abdulmutallab was taken to the University of Michigan Hospital, where he received excellent medical care. At the hospital, Abdulmutallab was interviewed by FBI agents, to whom he made further incriminatory statements. He also made incriminatory statements to the doctors and nurses.

The FBI recovered components of the bomb from the airplane, and they created a model based on those components. There were three parts: one was the syringe, which was intended to mix two chemicals that start a fire. That fire then set off a small quantity of a certain explosive called TATP, which is sensitive to heat. That TATP was then going to explode, and the shock and the concussion of that explosion was intended to set off the main charge, which was an explosive called PETN.

This is the syringe that was recovered.[11] You can see that the plunger is fully depressed and that the front of the syringe is burned. It was wrapped in tape, which is how the whole bomb was held together—with plastic and tape. The two chemicals were

11. Photograph courtesy of the author.

ethylene glycol and potassium permanganate. They are both commonly available. When you mix them together, you get a fire. The FBI put together a demonstration of that, which we were going to use at trial to show the jury how mixing the two creates a fire.

This is the famous underwear.[12]

The FBI conducted an analysis of the fibers and determined that a special pocket had been added to the underwear to contain the device.

The FBI recovered 76 grams of PETN from the device, but they measured the packaging and determined that the original device had had between 200 and 300 grams of PETN. So we had them go out and detonate that quantity of PETN on a piece of aluminum that approximated the skin of an aircraft. They conducted that test, filmed it, and the film was going to be an exhibit for our trial.

At sentencing, we had one of the ejected scraps of metal from the demonstration admitted as an exhibit, and we handed it up to the judge so she could feel how stiff that metal was. The explosive power of Abdulmutallab's bomb made that metal curl just like aluminum foil.

12. Photograph courtesy of the author.

IV
TRIAL AND SENTENCING

Martyrdom

It was important for the jurors to understand why someone would try to blow up a plane of completely innocent people. The judge gave us permission to call in a criminologist who had studied suicide bombers and was an expert in this field. His name was Simon Perry; he's from Israel. He had conducted a study of thirty failed suicide bombers. They were people who had either backed out at the last minute or had been caught, or people whose devices didn't explode, like Abdulmutallab's.

Dr. Perry studied those individuals, interviewed them, and found a few commonalities. One is that in the terrorist's view, the attack is not suicide, even though they are commonly referred to as suicide bombers. The terrorist believes he or she is doing something different, namely a martyrdom mission; and martyrdom is permitted. It's analogous to the difference between murdering someone and killing someone in self-defense. If someone broke into your house and was threatening your life and you shot that person, you would not call that murder; you would call that self-defense, a justified killing.

When Abdulmutallab was in the University of Michigan hospital receiving treatment for his burns, he was interviewed by a nurse. And, again, nurses have tremendous common sense and are tough. Patients have to go through a series of questions, even suicide bombers; it's the normal protocol. One of the questions they ask any new patient is, "Have you ever thought about hurting yourself or others?" Abdulmutallab's answer to this question was, "No." The nurse responded by saying, "Well, what about on the plane today?" And Abdulmutallab said, "That was martyrdom." So he, himself, is drawing the distinction between hurting someone else and engaging in martyrdom, which is justified.

People who engage in martyrdom are not doing it necessarily as a completely selfless act. There are benefits they expect to receive, those benefits that al-Awlaki was talking about, as well as benefits here in this world. They are anticipating celebrity, to be looked up to and to be important.

After the attack, Al-Qaeda released a video of Abdulmutallab in which Al-Qaeda took credit for the attack. It certainly served Al-Qaeda's propaganda purposes on a variety of levels. Al-Qaeda talked about how the bomb had defeated western security, which is a big selling point for them; they talked about the defendant himself, lionizing him and encouraging others to be like him. Al-Qaeda released a video in which Abdulmutallab himself talks about why he would be conducting the attack:

> "O ye who believe! Take not the Jews and Christians for your allies and protectors. They are but allies and protectors to each other. And he amongst you that turns to them is of them. Verily, Allah guides not a wrongdoing people." My Muslim brothers in the Arabian Peninsula, you have to answer the call of *Jihad* because the enemy is in your land, along with their Jewish and Christian armies. Allah the most high says, "Unless you go forth, He will punish you with a grievous penalty, and put others in your place, but Him you would not harm in the least."[13]

For Abdulmutallab, the reason for the attack was that "the enemy is in your land." Al-Awlaki's reason was a little different:

> The more crimes America commits the more mujahedeen will be recuited to fight against it. The

13. Abdulmutallab video, *available at* https://www.youtube.com/watch?v= zenEMePcmko (quoting the Quranic Arabic Corpus, Verses 5:51 and 9:39, *translations available at* http://corpus.quran.com/translation.jsp? chapter=5&verse=51).

> operation of our brother Umar Farouk [Abdulmutallab] was in retaliation for American cruise missiles and cluster bombs that killed women and children in Yemen.[14]

For Osama bin Laden, who hadn't yet been killed, the plight of the Palestinians and the United States' support for Israel was the reason for the attack. As bin Laden said in a recorded statement released after the attack,

> In the name of God the most passionate the most merciful. From Osama to Obama. May peace be on those who follow the light of guidance. If our messages to you could be carried by words we wouldn't have done that by planes. The message I want to convey to you through the plane of the hero mujahid Umar Al Farouk reaffirms a previous message that the heroes of 9/11 conveyed to you and was repeated frequently. The message is that America will never dream of peace unless we live it in Palestine. It is unfair that you should [enjoy] a safe life while our brothers in Gaza . . . suffer greatly therefore with God's will our attacks on you will continue . . . .[15]

I don't think for a minute that if the United States withdrew its support for Israel that Al-Qaeda would stop, because at the root of the attack was the belief—Abdulmutallab's and others'—that this was a religious requirement. When he first went to Al-Qaeda, Abdulmutallab didn't even think he was going to be attacking the United States; he thought he would be attacking US soldiers in Iraq or in Afghanistan,

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14. John Glaser, IS 'DRONE BLOWBACK' REALLY A FALLACY? Antiwar Blog (July 12, 2012), https://www.antiwar.com/blog/2012/07/02/is-drone-blowback-really-a-fallacy/.

15. William Tucker, *An Uptick in Attempted Terror Plots,* IN HOMELAND SECURITY (Feb. 4, 2010), http://inhomelandsecurity.com/an_uptick_in_attempted_terror/.

or maybe even the Russians in Chechnya. His reason for the attack wasn't political. But Al Qaeda's reasons certainly were.

Abdulmutallab's Trial and Sentencing

The trial was very short. Abdulmutallab pled guilty on the second day. We had opening statements, we called one witness, took a break, came in the next morning, and he pled guilty. His was the most organized plea I've ever witnessed in federal court. The defendant hand-wrote, count by count, the factual basis for his guilt. I want to show you one in particular. This was count seven. This is his own written statement: "I attempted to use an explosive device, which in US law is a weapon of mass destruction, which I call a blessed weapon, to save lives of innocent Muslims for US use of weapons of mass destruction on Muslim population in Afghanistan, Iraq, Yemen, and beyond. So I am," he crossed out "plead" and wrote, "am guilty in US law of this count and innocent in Muslim law"—again getting back to that issue of martyrdom.

United States District Court Judge Nancy Edmonds, who sentenced the defendant, is a well-respected judge in our court, and is very experienced: she has presided over a number of important cases in Detroit. And at sentencing she gave a powerful statement to Abdulmutallab about his conduct:

> When he entered his plea of guilty in this case, and again today, defendant stated that he believes that "the Quran obliges every able Muslim to participate in jihad and fight in the way of Allah those who fight you and kill them wherever you find them. Some parts of the Quran say an eye for an eye, a tooth for a tooth."

She goes on to say,

> I want to comment a little bit on the need to provide just punishment for the offense. No charge in this case was a capital offense. The defendant does not face the

death penalty; he faces life in prison without parole. I want to read just a few sentences from an article that recently appeared in the *New Yorker* by a reporter named Adam Gopnik[:]

"A prison is a trap for catching time. Good reporting appears often about the inner life of the American prison, but the catch is that American prison life is mostly undramatic—the reported stories fail to grab us, because, for the most part, nothing *happens*. One day in the life of [a prisoner serving a lengthy sentence] is all [we] need to know about [that prisoner], because the idea that anyone could live for a minute in such circumstances seems impossible[.] [O]ne day in the life of an American prison means much less because the force of it is that one day typically stretches out for decades. It isn't the horror of the time at hand but the unimaginable sameness of the time ahead that makes prisons unendurable for their inmates. . . . The basic reality of American prisons is not that of the lock and key but that of the lock and clock.

"That's why no one who has been inside a prison, if only for a day, can ever forget the feeling. Time stops. A note of attenuated panic, of watchful paranoia—anxiety and boredom and fear mixed into a kind of enveloping fog. As a smart man once wrote after being locked up, the thing about jail is that there are bars on the windows and they won't let you out. This simple truth governs all the others. What prisoners try to convey to the free is how the presence of time as something being done to you, instead of something you do things with, alters the mind at every moment. Time becomes in every sense this thing you serve."[16]

16. United States v. Umar Farouk Abdumutallab, No. 10-CR-20005 (E.D. Mich. Feb. 16, 2012) (motion hearing and sentencing) (quoting Adam Gopnik, *The Caging of America*, NEW YORKER (Jan. 30, 2012), http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america).

Judge Edmonds goes on: "Mr. Abdulmutallab is twenty-three, twenty-four years old now. He has only that to look forward to as life in prison, and it seems to me that that is just punishment for what he has done."

In my view, that was an extraordinary and powerful statement.

Judge Edmonds sentenced Abdulmutallab to multiple life sentences, and he appealed. The conviction and sentence was affirmed. He is serving his sentence at the country's only federal Supermax, which is in Florence, Colorado.

V
AFTERMATH

This is a list of every major terrorist attack in the United States since Abdulmutallab.

- Faisal Shahzad, Times Square bombing (2010)
- Tsarnaev brothers, Boston Marathon bombing (2013)
- Rizwan Farook and Tashfeen Malik, San Bernardino shooting (2015)
- Elton Simpson, Muhammed cartoon attack (2015)
- Muhammed Abdulazeez, Chattanooga Recruiting Center shootings (2015)
- Abdul Artan, Ohio State University attack (2016)
- Ahmad Khan Rahimi, NY and NJ bombings (2016)
- Omar Mateen, Orlando night club shooting (2016)

For every single one of these, there was evidence that the attacker was a consumer of the teachings of Anwar al-Awlaki. His views on Islam and jihad have been adopted by the Islamic state. Sometimes you'll hear the Islamic State called ISIS or ISAL, which is engaged in a war in Iraq and in Syria today. As al-Awlaki reached the end of his life, he was heavily promoting individuals to conduct attacks in the United States on their own, inspiring them to conduct attacks that they themselves designed, supplied, equipped, et cetera. No connection with Al-Qaeda

needed to be made; the attackers would just do it on their own. ISIS has picked up on that, and they promote al-Awlaki's vision today, just as heavily as Al-Qaeda did back in 2008 and 2009. This is why all of these individuals have been—and I'm predicting most of the future attackers that we'll have will be—inspired by Anwar al-Awlaki.

A piece of ISIS propaganda released just a few weeks ago pictured Abdulmutallab and asks, "A man who is equal to an army?" It goes on to say, "Here's what Abdulmutallab achieved. He was able to "cause[] a huge loss to the American economy." "He spread fear in the airports, and the American security institutions announced to the American people that they are unable to protect them." And Abdulmutallab "sen[t] fear that . . . [the] government can't control [Al-Qaeda]." Then it says at the bottom, "Why don't you think of being the second Umar al-Farouk?"[17]

That inspirational message is one that is with us and will continue to be with us for the foreseeable future. It's a particularly pernicious problem. It's one thing for a terrorist to come in as Abdulmutallab did from overseas, because there's a much better chance that either our intelligence agencies or our partner intelligence agencies might detect that attack, although it didn't happen with Abdulmutallab. It's much, much harder when the potential attacker is a lonely, distraught young man living in his parent's basement, who has had no previous contact with law enforcement and is listening to these lectures online and decides to pick up a gun, or, in another case very close to Michigan, the Ohio State attack, simply drives a vehicle into a busy university and steps out with a knife and starts stabbing people. That is a much, much more difficult problem for the FBI to handle. And they're in a situation where even one failure is a failure for the FBI.

Terrorists are in a completely different position. They can fail ninety-nine percent of the time. Just one successful attack is a victory

17. Online source, read and transcribed by the author, is no longer available.

for them. And, as we saw with Abdulmutallab, the bomb does not even have to fully function for terrorists to consider an attack to be successful. The FBI and law enforcement are in just the opposite position, and they have a tremendously difficult job ahead of them.

THE TERROR COURTS:
ROUGH JUSTICE AT GUANTANAMO BAY*

Jess Bravin**

ABOUT THE AUTHOR

Jess Bravin is the Supreme Court reporter for the Wall Street Journal*. His work at the* Journal*, and before that at the* Los Angeles Times*, is consistently well written, fully informed, and always on point. His coverage of the Court displays a keen, analytical sense of the issues. And most impressive is the fact that he's able to do this literally within an hour or two of an opinion's being issued.*

Jess also has a well-deserved reputation for integrity, fairness, and accuracy, earned without ever compromising his ability to cover the story. It was no surprise to learn that when Justice Kennedy got in a little flair-up of criticism for having barred the press from covering his speech at a private school, he reached out to one reporter to say why he'd done that. That reporter was Jess Bravin—surely not because he thought Jess would give him a pass or go easy on him, but because he knew Jess would relay a fair and truthful, balanced, explanation.

The pace of Jess's work is impressive, no less impressive than the quality. As the year goes on, Jess may well have more than one front-page story in the Journal *on any one day, given Court's releasing so many opinions towards the end of the term. I counted one day in April*

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* Address delivered at the Annual Convention of the International Society of Barristers, Cancun, Mexico, 24 March 2017.

** Supreme Court Correspondent, *Wall Street Journal*, Washington, DC; author, *The Terror Courts: Rough Justice at Guantanamo Bay* (2013).

a couple of years ago when he had three such stories in a single edition of the Wall Street Journal*.*

What most folks may not know about Jess is that he has a wicked sense of humor, which doesn't always, if ever, come out in his writing. While at Harvard in the 1980s, his roommate was Peter Sagal, whom you may recognize as the host of Wait, Wait . . . Don't Tell *Me on NPR. In their freshman year at Harvard, they were together on the* Harvard Lampoon*, serving along with a fellow named Conan O'Brien. One of their more legendary pranks was to convince the actor, Burt Ward, to come to campus to speak as a man of letters. Some of you in the room may remember Burt as Robin on the* Batman *television show in the 1960s. They convinced Mr. Ward to come to campus without telling him that the whole thing was really a lark, just to see if the college would approve him as a speaker, as a serious academic. And they succeeded. Mr. Ward came to campus; he showed up. And I think Jess, in particular, encouraged him to please bring the costume from the television show, which he did, and he proudly displayed it, at Jess's insistence, on a mannequin next to him as he was about to deliver his remarks.*

What happened next is a legend at the Harvard Lampoon*. As Mr. Ward prepared to face his audience in a packed auditorium, a very tall, thin security guard, who looked quite a bit like Conan O'Brien, stepped up and said, "Mr. Ward I'm here to safeguard the costume." To which Mr. Ward said with appreciation, "Thank you, that's very good; it's very valuable." But then, as Mr. Ward's speech ensued, the lights suddenly went out, and some guy in a penguin costume came up and stole the costume and ran out of the room, leaving Burt Ward speechless for the biggest speech he was ever to give in his life. Over the next several days, Bravin and Sagal conducted negotiations over the phone with someone posing at the Joker in order to return the costume to Burt Ward.*

At any rate, Jess is here today to talk to us about his most recent book, The Terror Courts: Rough Justice at Guantanamo Bay*. National security reporter Charlie Savage, at The New York Times, described the*

book as a welcome addition to the history of national-security legal-policy dilemmas, valuable for its synthesizing many sources of information into an accessible history, one able to take the reader in as a participant.

~ Harry Schneider

I
PRELIMINARIES

I met Harry Schneider at Guantanamo Bay more than twelve years ago, when he was part of the defense team for Salim Hamdan, the first person who went on trial at a military commission there. And since Guantanamo, I've run into Harry largely in very tropical, pleasant locations. So thank you, Harry, for that. And his enthusiasm for me, I'm sure, has nothing to do with the very prominent mentions he has on pages 329, 331, and 343 of my book. Because of my incredible dedication to accuracy, though, which Harry mentioned, I have to say one thing: Peter and I were not actually members of the *Lampoon* when the Burt Ward incident took place. But when, subsequent to that, we applied, they very, very kindly rejected us. Other parts of that story that he told you are *almost* true, though; afterwards, I'll be happy to elaborate on how it went in the later reunion with Conan.

II
9/11 AND GUANTANAMO

Very soon after the 9/11 attacks, it was decided that Guantanamo Bay, which entered United States control in 1898, was to be a place to stow prisoners. It's interesting—a small place like that, which in terms of detainees has had fewer than 800, ever, and is about 49 square miles, about the size of San Francisco. But that small place still seems to permeate so much of our culture and our political world, as well.

At the confirmation hearings this week for Judge Neil Gorsuch for the Supreme Court vacancy, one of the issues that came up was his role in setting Guantanamo policy during approximately a year he spent in the Bush Administration Justice Department. Senator Durbin of Illinois asked him some questions about his support for lawyers' pro bono work, and Gorsuch very controversially said he's for it. And then Senator Durbin said, "Well, let me read you this email." And he brought up an email that had been released from under the Freedom of Information Act. In the email, Gorsuch was forwarding a news article about a private law firm's supplying pro bono work to Guantanamo detainees. Gorsuch was complaining about it and suggesting that we should do something to discourage it. That was one of the very few times that Gorsuch admitted any type of fallibility. He said that it had not been his finest moment and he was sorry about it and he was just blowing off steam. But it was interesting how closely the policy there, at Guantanamo, threads through so much.

One news report said that Gorsuch would be the only Supreme Court Justice who'd been to Guantanamo Bay. He did visit the base and the prison when he was principal Deputy Associate Attorney General. But, actually, it's not true that he was the only Justice to visit Guantanamo: Justice Kagan was there, also, when she was Solicitor General. So now two members of the Supreme Court have been there. I don't know if all members of the Supreme Court have been to every state in the union, but it's possible that there are more members who have been the Guantanamo than have been to every state in the United States.

And just another little point: if you saw *60 Minutes* about a week and a half ago, there was a story about Mohamedou Slahi. He was a detainee who was released just last year by the Obama Administration, and he is a central figure in the book I wrote, revealing the effects of torture not just on the person who experiences it or the person who inflicts it or the country that

authorizes or tolerates it, but also on the justice system that is forced to deal with its repercussions.

9/11

On 9/11/2001, I was in New York City. I was working for the *Wall Street Journal* then. I was a legal reporter in New York. And, actually, that day was the first day of what was supposed to be my vacation. I had a ticket to fly to Greece that day. When I got up in the morning and turned on the radio to hear the weather report, there was a news story about a fire at the World Trade Center. So I looked out the window. I could see the World Trade Center from my apartment in Brooklyn, and smoke was coming out of it. That, of course, was the start of this horrible day for everyone, but particularly for people in New York City.

I had been in Los Angeles during the LA riots, and when I realized what was going on in lower Manhattan, my instinct was to run across the street to the supermarket and buy a lot of food. It occurred to me there might be some kind of civil unrest. That's not, of course, what happened in New York.

But the next day, 9/12, was really more significant for me, because the attacks destroyed not just the World Trade Center, but also the whole area of lower Manhattan, including the newsroom of the *Wall Street Journal*. At the time, our offices were across the street from the World Trade Center in a complex called the World Financial Center. In fact, I used the World Trade Center subway stop, which was underneath the building, every day to get to work.

So our newspaper was severely affected by the attacks. It was basically wiped out. The paper was put together by some people in the back office and some very spotty telephone connections, and it managed to come out on 9/12. But it was very difficult or impossible to reach editors and figure out what to do. So reporters were pretty much on their own. What I decided to do was go see what it looked like. So I made my way to Manhattan and to Ground Zero. And it was

a striking transformation in one day: this teeming part of the city was totally empty; there was thick smoke and dust everywhere; there were no vehicles, nobody on the streets. There were road blocks, and there were some police and National Guard operations going on, but that was it. It was an incredible transformation.

When I saw the police and National Guard, I knew my job was to avoid being seen by them, because I suspected that their first job would be to prevent any coverage of what was actually happening; that would be their instinct. And that turned out to be true: they were specifically trying to prevent reporters from figuring out what was going on. As I got closer to Ground Zero, I figured they were not going to let me in if I just showed up. So I basically borrowed a trick from Laurel and Hardy. I saw a bunch of Red Cross volunteers lining up to enter Ground Zero, and I just got in line with them and walked right past the checkpoint and inside. And I spent the day—really all of 9/12—seeing this incredible devastation. The lobby of our building where our newsroom was had been set up to be a morgue with cots to put body parts and cadavers on.

There was a moment when it seemed that another building was going to collapse, and everyone started running—just this wave of hundreds of people—firefighters and police and Red Cross workers—just running and jumping in cars and gunning them to get out of the way. And I did, too. I ran and I jumped on the back of a truck as it was pulling away. And I thought—this is quite plausible—this could be it. I mean, skyscrapers falling down was no longer an abstract possibility; it was quite plausible, and it seemed like that could be it. It was, in fact, so serious a day that when I ran into a reporter from *The New York Times*, he and I both copied each other's notes because, the thought was, if one of us gets nabbed, at least the information can get out somehow. We don't usually do that in the news business; it's very competitive. But here was a situation where we thought it was essential that as much as we could figure out about what we saw would get published.

Over the next couple of weeks in New York, a lot of things changed very rapidly. One I want to call your attention to now, because it's possible something like this might happen again, was changes to immigration courts. Immigration courts are normally open to the public. I went to try to go to look at proceedings in immigration courts because there was a lot of emphasis on locating aliens in the United States right then. And I couldn't get in. They were all closed by order of the Chief Immigration Judge: no public, no press, no one could enter.[1] And I asked, Well how could you do that; where's your authority to do that? And there was essentially no answer from the government. They just did it.

Later on, the government rationalized it by saying that Supreme Court opinions involving the First Amendment rights of the public and press to access the courts referred to criminal courts, not to Administrative Hearing Office courts, which is what an immigration court is. So there's no controlling precedent on that question.[2] I'd be curious to see if immigration courts restrict access

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1. Chief Immigration Judge Michael Creppy sent an email memorandum (the "Creppy memo") to all immigration judges and court administrators, closing Immigration Court cases to the public, http://news.findlaw.com/cnn/docs/aclu/creppy092101memo.pdf.

2. In *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), the Supreme Court held that the press, as well as the public, has a First Amendment right to be present at criminal trials. The Third Circuit, accepting the government's reasoning, held that this right was restricted to criminal trials and did not apply to administrative hearings, *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (2002); the Sixth Circuit held otherwise, *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002); and the Supreme Court denied certiorari, *N. Jersey Media Group, Inc. v. Ashcroft*, *cert. denied*, 123 S. Ct. 2215 (May 27, 2003) (No. 02-1289). *See generally* Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARVARD CIVIL RIGHTS–CIVIL LIBERTIES L. REV. 95 (2004), http://www.law.harvard.edu/students/orgs/crcl/vol39_1/kitrosser.pdf.

in the future if they indeed ramp up operations, as we've heard might be planned.

Like most of you, I went to law school, but unlike you, I did not prepare for a successful professional career. I took a lot of useless classes in law school—things like a habeas corpus seminar and International Human Rights Law and the one that Scalia used to make fun of, Law and Literature—all the things that were essential preparation for being a contestant on *Jeopardy*, but not very much in demand in the legal marketplace in the late '90s. But it turned out that a lot of these courses—the legal-history courses and so forth—were exactly on point in the atmosphere after 9/11: suddenly all kinds of historical or dormant areas of law became animated, including questions of international law and the law of war as we moved toward the Iraq war. And when it came to criminal law, individual criminal law, the institution of military commissions was revived.

Military Commissions

Because I had some background in this, I was sent down to Washington after 9/11 to cover the passage of the Patriot Act, among other things. In October of 2001, I got wind of the Bush Administration plan to revive military commissions and use them to prosecute prisoners whom we expected to capture in the future. There were no prisoners at the time the plan was drawn up.

I thought this was a fascinating development because I'd thought of military commissions and tribunals as antiques, artifacts of another time, not the sort of thing that one saw in the twenty-first century. This was also an exciting time for journalism: a lot of my colleagues were raising their hands and signing up to cover the war in Afghanistan and elsewhere. I knew myself and that I'm made of softer stuff, and I was not looking to embed in the Helmand Valley. But covering a dramatic change in the legal history of the United States and the legal response to terrorism did seem to be something

I could do and something that I wanted to do. So I began to focus on this Bush Administration plan to reinstitute military commissions.

We are now in the third iteration of military commissions. But these commissions began with an order President Bush signed on November 13, 2001, which was in some ways modeled after an order that FDR signed in 1942. In other ways, it was significantly different. But in reestablishing military commissions, or an entity called the Military Commission, the government said this was a long and cherished part of American legal history.

Given this pitch, it might be worthwhile very briefly to summarize what the major experiences with military commissions had been. The one that the government liked to cite the most was the Trial of Major André during the Revolutionary War, in which President Washington convened an advisory military board to try a British spy. The actual story in that case was that André was a collaborator of Benedict Arnold, and when the Americans captured him, they wanted to trade him for Benedict Arnold. The British refused, so the Americans hanged him. But that was pretty much a one off; most of the spies and saboteurs captured during the Revolutionary War were actually tried more formally, under Articles of War the Continental Congress had passed.

Another incident of military commissions was during the Seminole Wars of 1818. When General Jackson was fighting in Florida, he had two British allies of the Seminoles executed. As it turned out, though, he executed summary justice for a number of other prisoners.[3] Congress rebuked him for having executed the two British summarily after a quick military trial, but it had no objection to hanging dozens of Indians the same way. In the Dakota War of 1862, by the last day of trials against captured Dakota, the army had tried 392 Dakota Indians; 323 had been convicted; 303 sentenced to

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3. *See* Deborah Rosen, *Wartime Prisoners and the Rule of Law: Andrew Jackson's Military Tribunals during the First Seminole War*, 28 J. EARLY REPUBLIC 559 (December 2008).

death. Their trials lasted five minutes. President Lincoln commuted all but thirty-nine of those sentences.[4]

Then there were some military commissions immediately after the Civil War. The trial of the conspirators of President Lincoln's assassination was one.

The next instance of such a trial was in 1942: eight Nazi saboteurs were captured after their landing in Florida and Long Island.[5] They were quickly captured, basically because one of them turned in the others. They were going to be tried in federal court. The guy who turned in the others wanted to be treated as a hero, but the government didn't want to let on that it wouldn't have captured him but for his turning in the others. So Roosevelt, talking to J. Edgar Hoover, decides, Okay, we're going to just have a quick secret military trial and take care of it that way. That case went quickly to the Supreme Court because the military lawyers appointed to represent the saboteurs challenged the legitimacy of the whole proceeding.[6]

But the Supreme Court upheld it. As a legal matter, they didn't give the government all it wanted, but as a practical matter, it was bad news for the saboteurs, since all but two of them went to the electric chair very soon thereafter. That precedent was the one the

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4. Carol Chomsky, *The United States–Dakota War Trials: A Study in Military Injustice*, 43 STANFORD L. REV. 13, 27–34 (Nov. 1990).

5. *See* Library of Congress, Military Legal Resources, *Nazi Saboteurs Trial*, https://www.loc.gov/rr/frd/Military_Law/nazi-saboteurs-trial.html.

6. *See* Ex Parte Quirin, 317 U.S. 1, 46 (1942), https://www.loc.gov/rr/frd/ Military_Law/pdf/Supreme-Court-1942.pdf. (The petitioners were "charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform—an offense against the law of war[,]" an act, the Court held, "which the Constitution authorizes to be tried by military commission.")

Bush Administration relied on in its decision to have a military-commission order take effect for prisoners in the war on terrorism.

Executive Orders from Roosevelt to Bush

One of the significant differences between the order that President Roosevelt signed and the one that President Bush signed was that Roosevelt's order was a one off—it applied very specifically to the defendants who had been captured, it named all the participants in the trial, and it specifically appointed the Attorney General and the Judge Advocate General of the Army as the prosecution. It named all the judges, and it was a one-time thing.

The Bush order created a free-standing, permanent institution. That was a very, very major change. Of course, there had also been military commissions held outside the United States after World War II, in Europe and Asia. Hundreds and hundreds of trials were held for enemy prisoners there, in addition to the famous Nuremberg trials. But the *Quirin* case is important in the history of the military commissions that we still have today, thanks in part to the importance of historical markers: on the wall in the Department of Justice in Washington, DC, is a small, brass plaque that commemorates the trial of the *Quirin* saboteurs in 1942. It says,

> THE MILITARY COMMISSION APPOINTED BY
> PRESIDENT ROOSEVELT CONVENED ON JULY 8, 1942,
> AND ADJOURNED AUGUST 3, 1942.
> 6 EXECUTED ON AUGUST 8, 1942.
> 1 ONE SENTENCED TO LIFE IMPRISONMENT.
> 1 SENTENCED TO 30 YEARS['] IMPRISONMENT.[7]

In the late 1980s, the Attorney General, Bill Barr, used to pass by that plaque, and it made an impression on him. During the investigation

7. JESS BRAVIN, THE TERROR COURTS: ROUGH JUSTICE AT GUANTANAMO BAY 21 (2013).

of the Lockerbie bombing over Scotland and the effort to capture the Libyan suspects, he proposed instituting a military commission, inspired by the one that had tried the Nazi saboteurs, which he had learned about from seeing that historical marker on the wall in the building in Washington. That plan didn't get off the ground, mainly because the British wouldn't agree to it, but the idea stuck in his head. And after 9/11—though I can't say he's the only person who did—he very quickly suggested it to the Bush Administration. And that's where it came from. So that historical marker is an important factor in recent history.

The Bush order came out, and it seemed like we would very quickly have trials that, if not perfect, would at least be fast. But that's not what happened. It was two years before anything really started happening with the military-commission program. Part of the reason that happened, I concluded, was that for the senior leaders of the administration, the point of the military order the President had signed was the military order itself—to simply establish the outer bounds of executive power. The President has so much power during wartime that he could actually create a court system outside the courts, answerable only to him, that could put enemy prisoners to death if it chose, and there would be no review of it.

For the lawyers who drafted that order, that was their goal. They wanted to establish his right and power to do that very thing. They had no specific problem in mind to solve, other than to establish how far presidential authority went. When they realized that they didn't need to actually charge prisoners with any crimes to hold them, the impetus to start prosecutions evaporated. The mechanism slowly came together, but it was two years before offices for defense attorneys and prosecutors were up and running in the Pentagon.

The Guantanamo Court

The court system that came out of that process is still running now; in fact, it was holding hearings this week. To my surprise, in a lot of ways, these proceedings are almost a mirror image of what we expect to see in courts, and a mirror image of the way courts and legal institutions operate.

Here are a few examples: Normally, when you have a trial, the defendant is brought to the court from a prison somewhere. But here, the court comes to the defendant. Defendants stay put in Guantanamo Bay, but the entire legal apparatus gets on a plane and flies there. It felt almost like being in a theater troupe. Everyone gathers at the airport. They're not in costume; they're just wearing their polo shirts or t-shirts or hats, with their bags and luggage and so forth. They get on the plane and fly to Guantanamo. Then they go to the courtroom and put on their suits or uniforms—their costumes—and go through this episode, these hearings. Then they go back. At the end of a week or two weeks, they get out of the costumes and get back on the plane.

That show, by the way, costs more than a quarter of a million dollars per week to do. That's the most dramatic example of how different things are. The system also starts differently than most criminal-justice systems. Normally, a crime is committed before you have a suspect. Here was a bunch of suspects who were taken to Guantanamo Bay, and the military criminal investigators said, Here are the suspects; now find out what crimes they committed. The mission here was to figure out what the prisoners had done and then to prosecute them.

Also, normally there is a criminal code. Investigators look for evidence showing violations of that code. Here, though, as the United States conceived it, all prior existing laws were set aside under the President's military order. The goal was to find out what evidence could be collected regarding the prisoners and then to draft a code

under which they could be charged. And that led to some problems because for all but a handful of the prisoners, there was no evidence linking them to specific crimes, unless being a member of Al-Qaeda or the Taliban itself was a crime. And there is a very strong predilection against making membership in an organization a crime in and of itself as sort of a status offense. So that was another unusual aspect of the Guantanamo military tribunals.

Backwards Justice

Two 9/11 cases are going on now, involving five defendants—Khalid Sheikh Mohammed and four others. They're being tried for orchestrating the 9/11 attacks. There's another case involving defendant Al-Nashiri, who is being tried for the attack on the USS Cole.

Usually in a criminal case the defendant is denying guilt and trying to avoid being punished, and the government is trying to very rapidly establish evidence of wrongdoing. Here though, the situation is reversed because the defendants, particularly the 9/11 defendants, are guilty. They've said they're guilty; they're fanatics. They are very proud of what they did; they are not trying to escape punishment. That is, they're not trying to escape responsibility or liability for what they did, so they wouldn't consider consequences of their actions "punishment."

I was there in 2008 when these defendants tried to plead guilty, but they couldn't because the code that had been set up was based on UCMJ, the Uniform Code of Military Justice, and the Manual for Courts-Martial. These are designed to deal with service members, not enemy prisoners. Parts of the code were just xeroxed from the UCMJ and Manual. These have certain procedural protections designed for service members, including barring a guilty plea for a capital charge. That provision is supposed to protect soldiers and sailors and airmen from any kind of command pressure to plead guilty. So they automatically get a not-guilty plea. That rationale

doesn't apply when dealing with terrorists, but the military judge didn't know what else to do, given the circumstances. He asked for more briefing, but several weeks later, President Obama took office and put the proceedings on hold.

So they say they're guilty. They're not saying, Oh, you got the wrong Khalid Sheikh Mohammed, that there's a case of mistaken identity. Since their guilt is pretty obvious, the question is whether there are any mitigating circumstances. But the only real *issue* in this case is how guilty is the United States, itself, and that's a very unusual situation. It really is quite literally a case where it's the United States government that's on trial for its conduct, from the detainees' capture to their interrogation to the manner of their trial.

So it's the government that's on trial here. It's the government that is responsible for most of the delays that have taken place since these men were captured more than a decade ago. It's the government that is trying to keep evidence of its own wrongdoing out of the courtroom because it doesn't want its own wrongdoing exposed. It's the government that's trying to suppress evidence and keep witnesses from coming into play. And that, too, is quite an unusual situation. It didn't occur in the Nuremberg trials. I really can't think of any analogous situation in which the only disputed legal and factual question in the case is how the prosecuting power has acted in bringing the defendants to trial—at least the only question of significance.

This is one final point about how things are backwards with justice in Guantanamo. Normally, if you're going to set up a special court system as an alternative to the courts that have existed for hundreds of years in the United States, there's a particular justification for doing it—whether it's the US tax court or the US Court of Appeals for the Federal Circuit, which deals with patent cases and some benefits cases. There's usually some very special need that requires coming up with a specialized type of tribunal. But here it's actually the other way around because these defendants are

eager to plead guilty—there's no real question about it. Had they been prosecuted in a federal criminal court, it's likely they would've been convicted years and years ago. So why are they being tried in the military commissions?

I interviewed Senator Lindsey Graham, one of the principal authors of the bill Congress passed after the Supreme Court threw out the first version of military commissions. He was actually very up front about it. He acknowledged that, yeah, the defendants would probably have been convicted very, very quickly in federal court. But, he said, if you don't prosecute these guys in a military commission, why prosecute anybody there? That is, I think, a very good question. But the question itself does show that the Guantanamo trials are being used in a sense to prop up or justify the military commission. It's not that the government decided that federal courts could somehow not handle defendants like this so it had no choice but to set up a military commission—a unique, brand new, tribunal using its own law to prosecute them.

Lindsey Graham's point was that if the United States was on a war footing, it would need to have the accoutrements of a war. Having this type of military-justice system would reflect the seriousness of the United States' challenges and its resolve. Senator Graham had reasons for proposing the bill, but they weren't based on evidentiary or procedural needs that could not be addressed by the existing court system.

Investigating Justice at Guantanamo

Initially, I wanted to interview prosecutors in this system when it was being set up in the early 2000s, but the government wouldn't let me. It eventually let me talk to some defense attorneys, including Harry Schneider's co-counsel, Charlie Swift, because the government thought that would be a happy story. I was surprised when these defense attorneys turned out to be extremely dedicated to their jobs

and insistent on challenging not just the evidence against their clients, but the legitimacy of the whole system.

I interviewed four defense attorneys other than Charlie Swift, but as luck would have it, I chose to focus on Charlie's case, and that was the one that ended up going to the Supreme Court. The Hamdan team got a lot of attention, and deserved attention, for the zealous effort they put in *not* to play by the rules the administration had assumed they were going to follow, but to zealously examine every conceivable angle to help their clients. A couple years after that, the government did allow me to interview some prosecutors, and that's what ultimately led to the key story in the book, which is about a military prosecutor named Stuart Couch.

Stuart Couch was the prosecutor in the case involving Mr. Mohamedou Slahi that was on *60 Minutes* a couple of weeks ago. Couch was in some ways a perfect literary figure for telling this kind of story. He was a career military guy from North Carolina, an evangelical Christian man of great faith, very conservative politically, someone who was overjoyed with the election of George Bush because he would bring morality back to the White House after Bill Clinton's tenure. He was a prosecutor. He'd been a local prosecutor in North Carolina and he had been a military prosecutor in the Marine Corps. He was also a pilot; he had flown cargo planes for drug operations in Latin America.

Stuart Couch was a perfect guy to prosecute the 9/11 hijacking case because of his knowledge of aviation, which was unusual for a prosecutor. And there was also this: One of his buddies from his squadron at the Cherry Point, North Carolina, Marine Corps Air Station, Michael Horrocks, became a pilot for United Airlines when he left the service. Michael Horrocks was one of the pilots on United 175, which was hijacked on 9/11 and flown into the south tower of the World Trade Center. The FBI said they thought Horrocks had had his throat slit by one of the terrorists before they took over the

controls. So Stuart Couch had a particularly personal connection to what happened on that day.

But when I met Couch, though he was allowed to talk to me, I could tell early on that something bugging him. Through a lot of conversations, those reservations and concerns came out and were extraordinary: in some ways they expressed an almost an ideal representation of the legal and ethical questions that America's response to 9/11 has raised.

Couch was the kind of prosecutor who had had several of his cases dramatized on *48 Hours: NCIS*, although they were pretty embellished. There was a case about a guy who had cut the parachute cords at one of the marine bases. In reality, he cut the parachute cords, but they caught him before anyone actually used them. In the TV version, the cords are cut, but they aren't discovered before the plane takes off, and people jump out and the parachute separates and the guy falls and hits the roof of a car where two lovers inside are making out.

One day when Couch goes to Guantanamo Bay and is being shown around, they take him to see a sort of interrogation. There's a detainee, he's eating a fish filet from McDonald's, and he's being very cooperative. It looks all very nice and regular and proper. But Couch hears really loud heavy-metal music coming from down the hall, and it's annoying him. So he walks down there to see what's going on; he thinks maybe there's some enlisted personnel having a party or something. He looks into a room where this deafeningly loud music is being played, and there's a detainee chained to the floor seemingly in agony. Couch is hearing all this music and the lighting is very harsh—a strobe light is flashing—and he's wondering, What's going on in here? Then two mysterious guys in polo shirts and sunglasses approach the doorway from the inside, block his view, and say, "Can I help you?" Couch told them to turn down the music. They shut the door. He asked his Guantanamo guide, "Did you see that? Do you

have a problem with that?" The guide said, yes, he'd seen it, but it was authorized, and takes him away.[8]

This made Couch flash on his training for SERE—Survival. Evasion, Resistance, Escape. It's training they give to pilots on what to do if they're captured by North Korea or some other enemy that doesn't obey the Geneva Conventions. The experience at Guantanamo really stuck with him and bothered him. He began wondering what was going on there.

Every one of the cases Couch was assigned turned out to have a problem. It was amazing: every one of them fizzled out for one reason or another. Some cases fizzled out because the defendants were released by the government for political or diplomatic reasons. Several initial defendants were British Muslims, who were seen as being the most culpable detainees then in the military's hands; much more serious ones were held by the CIA elsewhere. But keeping British citizens at Guantanamo and trying them before military commissions was offensive to the British public. And Tony Blair was under a lot of political pressure for having supported Bush in the Iraq War, so Blair asked Bush to release these guys and not prosecute them before military commissions because that would cause him even more backlash at home. And Bush said okay. So the White House intervened and plucked out the defendants who the prosecutors thought were the most culpable, and eventually they were all set free without charge. None of them has since been convicted of doing anything in England. So that was demoralizing to prosecutors, who felt either that the detainees were being prosecuted for nothing at Guantanamo, which does not really make them look that good, or that the detainees really were terrible guys and were released for political convenience, rather than for any legitimate reason.

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8. *Id.* at 84–85.

Another case fizzled out because it seems that it connected to the Warrantless Surveillance Program the government was conducting. There was no way to get essential evidence related to the case because the government didn't want it to come out in any way that that surveillance was going on. Other cases he had to drop because, though he was pressured to prosecute them, he didn't think there was adequate evidence to do so.

Mohamedou Slahi

But Stuart Couch's key case involved Mohamedou Slahi, a detainee who had really given up nothing. Then, suddenly, in the sanitized interrogation reports Couch received, Slahi became extraordinarily talkative. Something seemed very funny about it. This led to Couch's own off-the-books investigation to discover what was happening to this detainee. Ultimately, what he found out was that Slahi was one of two detainees for whom a special interrogation plan had been authorized by Donald Rumsfeld.

Ultimately, Couch discovered the extent of the months-long ordeal this detainee had undergone, including mock executions, a threat to have his mother taken to Guantanamo and presumably raped by the other prisoners there, and all kinds of other psychological and physical torment. When Couch finally got ahold of a report showing that the interrogation sequence was causing the detainee to hallucinate, he thought that this was a mark of Slahi's having been tortured. Even if he was guilty, which Couch believed he was, there was no way charges could be brought. He refused to bring charges, and Slahi was released last year.

QUESTIONS & ANSWERS

Q: In 1947, the United Nations enacted the Universal Declaration of Human Rights. Did any of the defense lawyers use human-rights law as a basis to challenge the detainees' being held?

A: The Universal Declaration of Human Rights, which was a product of Eleanor Roosevelt and other American delegates to the UN, may have been invoked in some incidental way because it's considered an aspirational document rather than a binding legal instrument. But other documents and treaties that are related to it were certainly cited. They include the Convention against Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment. That international convention, which I would say is carrying out the aspirations of the Universal Declaration, was principal in the legal arguments that went on at Guantanamo. Not only is it a treaty, but it is a treaty that was signed by President Reagan. It was ratified by the Senate in the early '90s, and it was implemented through legislation.

When it was adopted, there was nothing indicating that the United States was concerned about somehow violating the Convention against Torture; rather, it was seen as something to be applied against other countries. But the Convention against Torture was key in a lot of the litigation, as was the International Covenant on Civil and Political Rights, and of course the Geneva Conventions.

Q: Given the circumstances today, what do you see going forward?

A: You know, it's very interesting, what has been going on during the last eight years, during the Obama Administration. Guantanamo, broadly, and military commissions specifically were something like the legal equivalent of illegal Superfund sites. It was like a poisonous swamp of misconduct. Obama certainly didn't want to add to it. The question was, What's the best way to contain this toxic pool there? He certainly didn't add any more prisoners there or do anything to increase its use. But obviously, if closing it was a good idea, if ending this experiment in military commissions was an important thing to do, he didn't do those things.

So they're still there, and the new President has a different view. He said he wanted to bring new prisoners to Guantanamo Bay.

It hasn't happened yet, but it may happen. And that would be an interesting question because, legally, is the Authorization for Use of Military Force passed in 2001, several days after 9/11, elastic enough to cover enemy prisoners captured through the current conflict against ISIS, say? I assume that there will certainly be lawyers—maybe even someone in this room—who will argue that it doesn't and bring a habeas claim to the federal court in Washington. The Supreme Court has said those prisoners have habeas rights, and that is the Court where it would go.

So if they do bring new prisoners there, I think we're going to see a test of how elastic that 2001 authorization is and whether Congress is willing to pass a new or amended authorization for prisoners in the current conflict. As far as military commissions go, I haven't heard much about what the new administration is going to do about them. The nominee for general counsel at the Pentagon who oversees them recently got a new job; he's going to be nominated for Deputy Secretary of State. So the official who'd be in charge of military commissions isn't in place, and we don't really know if they're really going to try to hold more trials for newly captured prisoners there.

Q: What I understand you as saying is that the authority for the Bush Administration exists now in perpetuity until changed by another President. Does Congress have any ability to limit the President in that regard to bring this to an end so that this doesn't sit there, festering indefinitely?

A: Well, Congress does have that authority, but I don't know that they're going to use it in the way you suggest. The Supreme Court struck down the unilateral presidential order in 2006 in an opinion by Justice Stevens, which interestingly enough recounts, maybe was inspired by, some of the dissents that he helped Justice Rutledge write in the 1940s about executive military powers. But when the Supreme Court threw out the President's unilateral order,

Congress passed a Military Commissions Act, which attempted to address the concerns the Court raised.

When Obama came in, he had a review done, and he decided that military commissions could stay; they'd be good enough with changes regarding hearsay rules and a few other things. So the Congress then passed a second Military Commissions Act of 2009, and that is what exists now. So the military tribunals are authorized by statute; the authority to have them will continue until that Act is repealed. Obama did not want to have more military-commission trials, but President Trump might have a whole new idea about the Guantanamo justice system, from what I hear.

Q: Can you talk at all about this past week and what that was like?

A: Sure. Well, as you know, the Supreme Court has had trouble filling a vacancy for a while. We've heard judicial salaries are so low, so we're seeing they just haven't been able to get someone to take the job. But now it looks like we will have a ninth justice; Judge Neil Gorsuch was one of the twenty-one people on a list that President Trump said he would select from. I'm sure you probably followed a good deal of it. The hearings were, I'd have to say, very predictable and much less intensely followed than the prior four confirmation hearings I covered.

For the Sotomayor and Roberts hearings, there were long lines of people waiting to get in. During much of the Gorsuch hearings, though, pretty much anyone could get a seat. At times, there were empty seats in the public gallery. The hearings went pretty much as expected; Republicans tried to just run out the clock. They had questions like, "Have you ever seen the movie *Jeremiah Johnson*?" And, "Can you tell me some good fishing streams in Colorado?" Those were the questions from the Republican side. And from the Democratic side, it was more like, "Why do you hate handicapped children?" "Why do you believe that truck drivers should freeze to

death rather than leave their posts?" There were not a lot of surprises. We have a nominee who is very smart and very well educated and has a very conservative view of the law. We didn't learn much from him about it.

But there were a few clues. Maybe some other reporters who didn't pay attention to the unimportant parts of law school didn't notice, but when Gorsuch was talking about his approach to judging, he kept saying—he said this at least four times during the hearing—"I'm not going to be issuing rulings based on what I had for breakfast." I think people took that as just some sort of platitude. But I remembered from law school during a discussion of legal realism that that remark was attributed to Judge Jerome Frank. Jerome Frank wrote the book *Law and the Modern Mind* in the 1920s, suggesting that the law was not really a science like physics or astronomy—not discoverable that way—but something created by psychological, sociological, and economic forces. These are what shape how individuals who make legal decisions reach their conclusions.

Neil Gorsuch was in a way rejecting that view. And his doing so was consistent with the fact that he studied contemporary natural-law philosophy at Oxford, which takes the view that there are certain moral truths about human nature that law must reflect in order to have the highest degree of legitimacy.

The *Journal* gave me 2000 words to talk about that, as opposed to talking about his views on abortion. I mean, politically, he is a very conservative judge. He's an affable person who I've never heard anyone say was unpleasant or uncivil or rude or disrespectful of people who take different positions. But I don't think there will be a lot of surprises in how he votes. And that is why the reaction to him is so positive on the right and so hostile on the left.

THE MODERN DEPOSITION*

Anthony J. Bocchino & David A. Sonenshein II†**

Depositions were introduced to general civil-litigation practice in the United States in 1938, and evolved over the years, reaching a plateau of general agreement on the necessary skillset in the 1980s. In those three decades, litigation practice has changed dramatically. The practice seems busier, and more driven by the profit motive with lawyers and clients looking for economies; it is less personal, more competitive—even partisan—sometimes even angry; and

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* A book with this title that comprehensively deals with deposition practice in modern litigation was published in 2017 by Professors Bocchino and Sonnenshein and is available on Amazon.

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computer technology is available, everpresent, and an efficient and effective tool in navigating a law suit. As a result, we suggest, the skills and tactics so painstakingly developed since before the Second World War are now in many cases outdated and most certainly incomplete. A new paradigm of the "modern" deposition is necessary, including a need to describe, construct, and implement that paradigm as part of today's litigation, and the skills and tactics that paradigm requires.

A new paradigm for depositions is mandated by several overarching factors, including, first, the times and the circumstances of the current practice of civil litigation. These factors have changed the practice in its entirety, but particularly the more efficient, more focused use of depositions in procedures other than the jury trial.

The Vanishing Civil Jury Trial

The starkest and most important change in the practice of civil litigation from the 1930s to the present is that a jury trial in a civil case is now an extraordinary event. According to the Administrative Office of the U.S. Courts, the percentage of civil filings resolved by trial in all of the United States District Courts in 2015 was 1.1%.[1] Although a full explanation of the demise of the civil jury trial and the reasons therefore are beyond the scope of this essay, we offer the following as context:

To begin, it's a matter of numbers. The courts are not staffed at a level sufficient to handle modern civil litigation through the trial process. More and more modern, technology-enabled courtrooms

1. U.S. Courts, U.S. District Courts—Statistics & Reports, Table 4.10 (U.S. District Courts, Cases Terminated, by Action Taken During the 12-Month Period Ending September 30, 2015), http://www.uscourts.gov/sites/default/files/table4.10_0.pdf.

are needed. And there aren't enough judges.[2] Yet there *are* more people, and more people means more lawsuits.

But the real increased demands on the judiciary come from litigation about an increasingly technical and regulated world. Two aspects of that world, in particular, increase the demands on the judicial system. First, complex and technical systems are often difficult to explain and understand, requiring, as a result, more witnesses (especially expert witnesses and expert testimony) who must be heard from and understood in a trial. And these experts and their testimony (with attendant expense) must be scrutinized by the courts to assure sufficient reliability for jury consideration and consumption.[3]

Second, our complex and technical world has the ability and the inclination to create records of various sorts (mainly digital)[4] that increase the workload of the courts in discovery proceedings, and raise the specter of hours of trial time to present those records. The cost of discovery and presentation of such a massive number of records can be overwhelming.

Apart from the technological drain on judicial resources, the demise of the jury trial might be explained by issues of jury reliability, by the expenses that trials and their participants entail, and by the logistics of getting those participants where they need to be, when, with a minimum of wasted time.

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2. The political process exacerbates this shortfall, and the number of open judicial positions unfilled for some reason other than merit are huge. There remain over 100 unfilled district-court judge positions. http://www.uscourts.gov/judges-judgeships/judicial-vacancies.

3. Daubert hearings are so commonplace that many pretrial orders provide for them in the sequence of litigation leading to case disposal.

4. It seems that for every action, decision, conversation, and even thought, there is a record someplace in an email, text, or on Facebook or other form of our burgeoning "social media."

The claim is made that juries are unreliable.[5] It has been made so frequently that many people believe it to be true. There is of course no empirical evidence of this so-called unreliability. The argument derives in part from the fact that, as is often the case in modern litigation, jurors are often called upon to make decisions about technical topics that are beyond the ken of the average juror.[6] The unreliability argument also reflects the specter of the runaway jury, which exists predominantly in the minds of lawyers, frequent litigants (predominantly institutions and the companies that insure them), the entertainment media, and politicians desirous of a civil-litigation system that protects their benefactors by making verdicts predictable.[7] When jurors, inexperienced in litigation but hopefully otherwise in touch with the real world, can be removed from decisionmaking by risk-averse parties, the hoped-for result is lower damage awards and punitives. As one might surmise, this belief in the unpredictability of juries, whether or not grounded in reality, has

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5. *See, e.g.,* Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 849 (1998) ("Over more than two decades, so many writings, both scholarly and journalistic, have been devoted to criticizing the institution of the civil jury that it becomes boring to recite the claims. Juries have been said, variously, to be incompetent, capricious, unreliable, biased, sympathy-prone, confused, hostile to corporate defendants and doctors, gullible, excessively generous in awarding compensatory damages, and out of control when awarding punitive damages.") (internal citation omitted).

6. This argument is frivolous. The ken of jurors in a trial is limited only to the skill of the trial lawyer in translating and teaching the technical subject matter (through expert witnesses, computer-generated exhibits, plain speaking, etc). Every day jurors decide medical, legal, and economic matters both in determining professional liability and in evaluating the costs and value of damages.

7. Predictable, perhaps, for their campaign contributors.

dramatically increased the number of cases resolved by means other than trial by jury.[8]

And jury trials are expensive: they cost money and they drain resources. A lawyer in her office can change her focus from one matter to another; when tasks are finished on case A, the lawyer's attention and time is easily transferred to case B. When a lawyer is at trial, the down time (recesses sometimes lasting for hours, lunch breaks, overnights during which witness and other preparation for the next day must be accomplished) are all focused on the one case, and the one matter then at trial. For the hourly lawyer, much of this down time can and should be billed to the matter on trial.[9] But some of it cannot, and certainly the necessary activities and emergencies, or even thinking about other cases, fall to junior lawyers or to requests for extension of time. For contingent-fee lawyers, time in the courtroom has the same impact on the lawyer's focus; but, in addition, time spent in the courtroom is time unavailable for interviewing and engaging other clients.

In addition, there are the resource demands the logistics of trial may involve. It may be (and usually is) necessary to have at least a paralegal if not a junior lawyer available in the courtroom whose time may or may not be billable. Most modern trials involve the use of some sort of computer-generated persuasive evidence. Most lawyers need someone to operate that technology, and that operation must be orchestrated and rehearsed, much like a play, which requires the time and related expense of both the lawyer and the technician to ready the performance.

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8. It is common in commercial and employment agreements that the jury trial (and even traditional civil litigation) is excluded as a means of dispute resolution by requiring arbitration or some other form of ADR as the sole acceptable resolution methodology. You need to look no farther than the typical landlord-tenant lease, which with virtual uniformity provides for arbitration as the method for deciding landlord-tenant disputes.

9. But not without considerable client pushback.

Finally, on the issue of cost, there are the experts. Most trial lawyers agree that although an expert witness can be examined in a video-recorded format for presentation or trial, those "head and shoulders" presentations, without the opportunity to follow up or clarify information, pale in persuasiveness to live testimony. Expert witnesses, however, are on the clock—many of them portal to portal at a significant hourly rate, but all of them usually on a per diem basis for courtroom time. Courtroom time includes not only time in the witness chair providing testimony, but the time sitting in the hallway waiting while a judge conducts a sentencing hearing or considers an emergency motion in another case.

At bottom, proceeding to and through a trial by jury is viewed as risky and is, for sure, expensive. Thus, the argument goes, pretrial dispositions and alternative dispute resolution (ADR) are a "better" way to resolve disputes. Here (the argument goes) is why:

Resolving Disputes without the Jury

Trained mediators and arbitrators[10] can become expert in the technical and scientific topics of litigation, making them more "reliable" because of that knowledge. They are also less likely (or so the argument goes) to be affected by emotional responses to matters raised by lawsuits (e.g., bias for or prejudice against any party); the "runaway arbitrator" is not a suspect phenomenon. It is also argued that arbitration is more efficient. Providers of ADR services typically come from one of two backgrounds—the retired judiciary or experienced litigators, though such experience may work for good or ill. ADR-provider companies are a cottage industry: even though they're not cheap, ADR systems are more economical than full-blown

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10. By "mediation" we mean the process of guided negotiation wherein the ADR professional assists the parties to reach an agreement on resolution of their dispute. By "arbitration" we mean a variety of processes whereby the parties submit their claims for decisionmaking to a third party (the arbitrator).

jury trials. Live witness participation is limited. Much can be communicated in writing or other pre-arbitration submissions, including settlement notebooks, both in print and by use of video recording, and particular decisionmakers with expertise in the matters for decisionmaking can be chosen in any given lawsuit. And because the decisionmakers are experienced in decisionmaking, they are less likely to be swayed by the unique nature of every lawsuit,[11] resulting in more-predictable and consistent resolution of law suits.

ADR aside, case-dispositive motion practice has become a more frequent resolution of civil litigation than the full-blown jury trial. Motions disposing of a case—most notably, summary judgment—include, as well, motions *in limine* regarding the admissibility of a key pieces of evidence, frequently the admissibility of an expert opinion. Cases such as these need be litigated only to the extent necessary to determine the legal issue that shows the existence or nonexistence of a matter worthy of a trial, or, less frequently, whether the facts support a new or novel approach to a legitimate claim. And once the summary judgment or other case-dispositive motion is decided, the parties either negotiate a settlement or use ADR services to reach the appropriate amount of damages in the case. As a result, the scope of discovery can be more

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11. For the experienced ADR mediator or arbitrator, cases fall into neat categories. As a result, these decisionmakers may fail to appreciate the nuance of any case (instead grouping it into "another one of them," conflating one truck collision in bad weather with others previously experienced as a judge, lawyer or ADR practitioner). Some detractors of ADR have described it as one-size-fits-all decisionmaking, whereas jurors provide more individualized results. Detractors also argue that removal of the jury from civil cases is a fundamental and fundamentally destructive change in the civil-litigation system of justice (a topic beyond the scope of this essay). Finally, because ADR providers are businesses, they work, as does every business, on a profit motive. Some detractors argue that the constant supply of profitable work from frequent institutional litigants and their insurers either consciously or unconsciously skews arbitration results.

limited, restricted to material facts, legitimate legal theories, and admissible critical evidence.

The advent and ubiquity of computers has resulted in two phenomena that affect both ADR and pretrial-motions practice: First, computers provide access to the internet, which supplies much of what was before the turn of the century knowable only from questioning witnesses directly and actually conducting an investigation. The identity and demographics of witnesses, the history of people and entities, a record of litigation and other transactions relevant to potential litigation and its outcome are now available before the lawsuit begins and without the knowledge of all parties. That information, of course, limits the necessity of some depositions in their entirety and portions of virtually every other one.

Second, computers can and do contain a mountain of digital evidence in the form of correspondence, records of virtually any activity undertaken for the purpose of making money or providing services, emails, text messages, Facebook, Twitter, and more. And all of this information, albeit through an often long and involved litigation process, is discoverable. This digital evidence contains much, if not all of what a witness might say about relevant events. And if there is conflict between testimony provided based on memory (which we argue is actually "reconstruction" by the witness) and something in writing, in the world of valuing evidence, the writing, digital or otherwise, wins.

All this information must be tested and confirmed as reliable, but much of what, before computers, could be discovered only through deposition questions is now available online. The job of discovery is certainly enhanced, and the nature of our deposition can be changed to meet the task.

Apart from the information available via the internet, computers make the use of digital technology both accessible and affordable. Depositions are routinely digitally recorded, with video

recording and real-time transcription, making their search, accessibility and use in case disposition a relatively easy and efficient task. Their content by reference or hyperlink in motions, briefs, memoranda and persuasive writings for courts and ADR decision-makers is just a keystroke away.

This digital transcription also applies to depositions recorded by use of digital video technology. The video deposition, formerly reserved for those *de bene esse* depositions taken for preservation of trial testimony, are now used for more and more witnesses. The video deposition that records not only the content of testimony but the demeanor of the witness and the dynamic questioning at the deposition has become more the norm for recording the deposition. Lawyers have always known that the use of a video deposition was more persuasive than reading deposition transcript, but in some significant part, the use of video transcription was limited as a matter of cost. In the modern deposition, because digital recording, with readily available real-time transcription, is already occurring, the only extra cost is for the videographer.[12]

Indeed, where the amount in controversy supports their cost, the depositions of at least the most important witnesses will be video recorded. Once recorded, the video is available in every stage of litigation. For example, in a motion for summary judgment, where judges are deciding whether there exist material facts for further litigation, the video deposition can be linked to the supporting and opposing memoranda so the judge can appreciate the source of the information on which that issue is based. And though judges are not supposed to apply credibility considerations, they *are* human, and if

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12. Costs vary depending on the jurisdiction, but videographers usually charge no more that $100 per hour for their services.

the demeanor displayed by a witness is telling, it is there to be appreciated.[13]

The video deposition also brings life and context to settlement submissions that depend in the main on factual predicates. Video testimony is at the same time interesting and persuasive. And if the matter proceeds to ADR, the facilitators in mediation and the decisionmakers in arbitration can appreciate not only the facts but their source. Where there is disagreement about a fact, surely the demonstrated credibility of the witnesses for each party is important, if not controlling.

Because the nature of law practice has changed to accommodate fewer jury trials and more-facile internet research, so has the necessary skill set of the civil "litigator." There is no longer any real argument that there is a difference between a "litigator" and a "trial lawyer."[14] There are, of course, "trial lawyers" who are well versed in electronic discovery and other modern discovery skills, and "litigators" who can deliver jury speeches and examine and cross-examine witnesses for jury consumption, but the number of crossover lawyers has diminished. With respect to the "litigator's" lack of "trial skills," the case seems simple and at the same time creates a self-fulfilling prophesy. Because there are so few civil trials, there are very few opportunities for a litigator to learn the skills of the trial lawyer. When there is a civil jury trial, clients want

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13. The argument about whether judges are affected by the credibility of witnesses is beyond the scope of this essay, but at least when a judge considering a motion for summary judgment must determine whether a party with the burden of proof can meet his burden, credibility is assuredly a factor.

14. In earlier days we could draw an analogy between the typical litigator- and trial-lawyer skill sets and those of the English barrister and solicitor. But in fact, with the burgeoning of the rights of audience for solicitors (and the importing of instructors and programs conducted by American lawyers and law professors on the skills of trial advocacy) in the later 1980s and beyond, those distinctions have blurred.

experienced trial lawyers arguing their cause. And we suggest the obvious: that because litigators are not experienced in trials, they are less likely to suggest the jury trial as the best way of disposing of a case.

The Modern Deposition

Not everything about a "modern" deposition is new. Much of the "modern" deposition assumes those skills of the "classic" deposition already in the litigator's arsenal. What we were taught in the 1970s and 1980s and have practiced and taught for many years still undergirds conducting an effective deposition.

But the modern deposition is also different: because of the very factors that have changed the picture for civil jury trials, the "modern" deposition will typically be shorter and more focused. It will be shorter because of the ready availability of information from other sources, including the internet and increased documentation. It will be more focused, especially where the objective of litigation is not a jury trial, but a case-dispositive motion, and it will be more focused in all cases because clients want to minimize expense. Because there will be no trial, the deposition will likely be the only time that parties and witnesses have the opportunity to most effectively present facts favorable to the client's position and to persuade the ultimate decisionmaker. The deposition will be video-recorded and available for use by parties in case evaluation, by courts in their decisionmaking and case disposition, and, eventually, likely in some form of ADR, in persuading a mediator or arbitrator or even a negotiating party.

These factors all necessitate "modern" deposition strategies and skills. The paradigm has changed, based most fundamentally on the reality that there will be no trial. And the paradigm change necessitates a change in tactics. Stated generally, depositions should

and will become persuasive vehicles in modern litigation in these ways:[15]

- Depositions will be taken via digital video—the witness must look persuasive (or not, depending on the position of the client).
- Witnesses should be prepared to provide all information helpful to the party on whose behalf the deponent provides information, including thorough questioning by the defending counsel.
- The form of the questions and answers should be appropriate to their intended purpose. For example, facts that show the existence of a material fact should be amalgamated for ease of reference and imported into the court papers opposing summary judgment.
- Defending counsel should prepare the deponent to volunteer helpful information and to be asked by "defending" counsel about information not discovered by the opponent in a coherent and persuasive way. Favorable facts should be elicited through "direct examination–type" questions.
- Opposing witnesses should be examined regarding matters that impeach their credibility, as on cross examination, both to put the facts before the likely decisionmakers and to show, via video, their reaction to the attack.
- Witnesses with favorable information but not deposed by the opponent should be subpoenaed to preserve that information for decisionmakers. (Remember: there will be no trial and no one to surprise).

15. Detailing an across-the-board impact of the "modern deposition" on skills, tactics, and strategies is beyond the scope of this essay. The authors analyze, discuss, and demonstrate how to implement these in their book, Bocchino & Sonenshein, *The Modern Deposition* (2017).

Finally, a word of confession. For many readers, none of this is news. Much, if not all, of what we suggest here and in our book is already in practice in civil litigation, including by our own firms. But in a time-honored, trial-lawyer tradition, we admit to "borrowing" thoughts, observations and inspiration from many practicing lawyers and have passed them on here in the interests of furthering comment, refinement, and implementing best practices. If feathers are ruffled by some of what we say, we have accomplished our purpose. For those who read our book, we look forward to comment and critique of our analysis, and the sharing of tactics, and description and examples of the "modern" skillset that litigators are utilizing to meet the challenge of a world where, to the detriment of the civil-justice system, jury trials and all that they guarantee are a diminishing breed.

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