

How Not to Process Stateless Enemies: A Review of Andrew McCarthy's *Willful Blindness: A Memoir of the Jihad*

Timothy P. Connors*

Over eight years after the September 11th attacks, Al Qaeda remains a viable enemy intent on attacking the United States. As the Obama Administration's Director of National Intelligence, Admiral Dennis C. Blair, testified before the Senate in February 2009,

Under the strategic direction of Usama Bin Ladin and his deputy, Ayman al-Zawahiri, al-Qa'ida remains intent on attacking US interests worldwide, including the US Homeland. . . . Al-Qa'ida leaders still use the [Pakistan] tribal areas as a base from which they can avoid capture, produce propaganda, communicate with operational cells abroad, and provide training and indoctrination to new terrorist operatives.¹

Admiral Blair and others have characterized al Qaeda as a stateless enemy, which consists of loosely affiliated networks, operates from remote areas, and achieves global reach through the tools of the Information Age.² It is a threat that is unique to the 21st century, and therefore does not fit neatly into the systems we have constructed to deal with the threats of the last

* Timothy Connors is a partner at PJ Sage, Inc., a security firm that advises clients on 21st century threats. He is a graduate of Notre Dame Law School and a member of the New York State Bar.

1. S. SELECT COMM. ON INTELLIGENCE, 111TH CONG., ANNUAL THREAT ASSESSMENT OF THE INTELLIGENCE COMMUNITY 6 (Feb. 12, 2009) (statement for the record of Admiral Dennis C. Blair), *available at* http://www.dni.gov/testimonies/20090212_testimony.pdf.

2. *See, e.g., id.* at 38-41.

century (e.g., the Geneva Conventions and the U.S. criminal justice system). What, for example, do we do with individual members of al Qaeda who we detain on a global battlefield? Each of the models built in the 20th century—criminal trials and military tribunals—has its share of deficiencies, which are evident in the raucous political discourse surrounding Guantanamo Bay.

That debate has become even more heated, as the Obama Administration moved to bring 9-11 mastermind Khalid Shaikh Mohammed (“KSM”) to New York City for trial.³ In announcing the decision, Attorney General Eric Holder cited a need to bring Guantanamo detainees to justice and expressed confidence in the U.S. criminal justice system’s ability to handle these trials.⁴ New York Congressman Jerrold Nadler echoed this reasoning, calling “[a]ny suggestion that our prosecutors and our law enforcement personnel are not up to the task of safely holding and successfully prosecuting terrorists on American soil . . . insulting and untrue.”⁵ If only the issues surrounding this decision were that simple. In fact, it is a testament to the complexity of the problem that the Administration also decided to both use military tribunals in some cases and to detain enemy combatants indefinitely.⁶ And despite continuing these long-held policy decisions of the Bush Administration, as well as disparaging that Administration’s policies for many years, the Attorney General was unable to articulate with confidence what some of the second and third order implications of the KSM decision would be.⁷

Holder’s decision, and apparent unwillingness to consider the downside of that decision, should come as no surprise from an Administration that has expressed a near absolute

3. Charlie Savage, *U.S. to try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. TIMES, Nov. 14, 2009, at A1.

4. *Id.*

5. *Id.*

6. *Id.*

7. Posting of Frank James to The Two Way: NPR’s News Blog, *Would U.S. Need To Read Bin Laden His Miranda Rights?*, http://www.npr.org/blogs/thetwo-way/2009/11/would_us_need_to_read_bin_lade.html (Nov. 18, 2009 14:26 EST) (describing Senator Lindsey Graham’s questioning of the Attorney General during Congressional hearings regarding his decision to try KSM in New York).

preference for criminal trials of terrorists in civilian courts. In a speech on national security delivered last May, President Obama clearly expressed such policy guidance. While it is inconclusive how he might handle future detainees, President Obama indicated a strong preference for using our federal criminal justice system as the primary option:

First, whenever feasible, we will try those who have violated American criminal laws in federal courts—courts provided for by the United States Constitution. Some have derided our federal courts as incapable of handling the trials of terrorists. They are wrong. Our courts and our juries, our citizens, are tough enough to convict terrorists.⁸

Andrew McCarthy disagrees with the President's assertion in his book *Willful Blindness: A Memoir of the Jihad*,⁹ which describes McCarthy's experience prosecuting the terrorists behind the Landmarks Plot.¹⁰ He bears listening to, as there are few prosecutors with the same extensive experience, which he has earned while in the arena of a courtroom prosecuting hardened terrorists. McCarthy pulls no punches in criticizing the practice of treating "alien security threats as if they were legal issues to be spotted and adjudicated rather than enemies to be smoked out and defeated before they can kill."¹¹ In making his case, McCarthy exhibits a healthy disrespect for the use of courts and lawyers as the best instruments for resolving all of life's problems.

The terrorists he confronted certainly hardened his convictions as to the best way for dealing with them. The Blind

8. President Barack Obama, Remarks by the President on National Security, (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

9. ANDREW MCCARTHY, *WILLFUL BLINDNESS: A MEMOIR OF THE JIHAD* (2008).

10. *See id.* at 231-44, 255-64 (describing the planning and investigation of the Landmarks Plot, a failed terrorist attack on landmarks across New York City).

11. *Id.* at 12.

Sheikh, Omar Abdel Rahman, was the spiritual leader of the cell responsible for the Landmarks Plot.¹² Originally from Egypt, he was educated at al-Azhar University in Cairo, where he earned a doctorate in Qur'anic studies.¹³ He was a true believer and crafty promoter of the ideology behind al Qaeda: "Freedom" from what holds Muslims back can only be achieved through submission to Allah and his religion, and Muslims have an individual duty to impose Islam through violent jihad.¹⁴

The Blind Sheikh gathered a following of foot soldiers and more able jihadists in New York City circa 1990.¹⁵ Inspired by Rahman, and plugged into a nascent global network spawned in Afghanistan, this cell turned its attention toward attacking the "head of the snake" in the United States.¹⁶ In 1993, they successfully detonated a truck bomb in the parking garage at the World Trade Center.¹⁷ This event was entirely preventable, but for the risk averse culture in the FBI, which had parted ways with Emad Salem, an informant inside the cell, a few months before the attack.¹⁸ What is more, after arresting and convicting Sayyid Nosair, a leading member of the cell, for the 1990 murder of Meir Kahane in New York City, the FBI seized a treasure trove of evidence it did nothing to exploit.¹⁹

Ultimately, the cell survived the trials for the murder of Kahane and the 1993 bombing, and it continued to plot grand plans of attacking multiple New York landmarks. This time, the FBI and the prosecutors were able to prevent an attack and put the offenders behind bars.²⁰ While this was certainly a triumph of the American criminal justice system (something the President and all Americans are rightfully proud of), the arduous, drawn-out process carried with it many negative implications. First and foremost, the system was strained to

12. *Id.* at 231-44.

13. *Id.* at 241.

14. *Id.* at 36-37.

15. *Id.* at 9.

16. *Id.* at 77.

17. *Id.* at 189.

18. *Id.* at 169-75.

19. *Id.* at 130-33.

20. *Id.* at 294.

the maximum in dealing with approximately one dozen members of this one cell in New York. As McCarthy points out,

[e]ven with the highest conceivable conviction rate of 100 percent, less than three dozen terrorists were neutralized [during the eight years between the bombing and the destruction of the Twin Towers]—at a cost that was staggering and that continues to be paid, as several of these cases remain, all these years later, in appellate or habeas-corpus litigation.²¹

The limitation signaled in these results is not comforting given the global scope of al Qaeda and its allies.

Another negative aspect of the system according to McCarthy is that it is risk averse. Not only did law enforcement investigators dismiss a valuable confidential informant before the 1993 bombings and ignore evidence from the Nosair case, truth be told, the FBI was monitoring this cell in the late 1980s.²² Yet, when the budding jihadists discovered that the FBI was conducting surveillance on them as they trained with automatic weapons, they raised a claim of religious persecution.²³ It was enough to cause the FBI, concerned with accusations that it was violating a person's civil rights, to end the surveillance.²⁴

To be sure, law enforcement is not the only risk averse element of the criminal justice system. Judges, afraid of reversals, tend to deliver rulings that they are confident will not be overturned.²⁵ For example, when ruling on discovery motions, judges naturally tend to favor disclosure of information to the defense.²⁶ Prosecutors also tend to disclose more materials to defense attorneys than is required in order to avoid reversal and retrial in the future.²⁷ The reams of

21. *Id.* at 310 (emphasis omitted).

22. *Id.* at 87.

23. *Id.* at 89-90.

24. *Id.* at 90.

25. *Id.* at 311.

26. *Id.*

27. *Id.* at 310-11.

information that become public during the course of a terrorism trial should give pause for concern. McCarthy points out, for example, that Ali Mohammed, an associate of Osama bin Laden, obtained a list of names of about 200 unindicted co-conspirators of the Landmarks Plot case and faxed it to bin Laden in Sudan.²⁸ Not only can our own intelligence sources and methods be compromised during the disclosure process in a criminal trial, but those of our allies as well. This presents a serious obstacle to the international information sharing that helps keep Americans safe at home.²⁹

The choice between proceeding with a prosecution and revealing state secrets in a criminal trial is a difficult one. McCarthy finds it troubling to cede such choices on a wholesale basis to lawyers and judges, as opposed to executive branch officials charged with keeping the public safe from harm.³⁰

Sometimes, [the criminal justice process is] an illusion. Sometimes there is a bigger picture that is obscured. The legal system's job is not to produce the definitive version of history. It is to produce a judgment about the provenance of facts the government chooses to put in dispute by leveling accusations.³¹

As such, the criminal justice system is limited in scope in a way that often makes it deficient in fighting terrorism.

Criminal process, organizational cultures, and intelligence disclosures aside, perhaps what McCarthy finds the most troubling is that, in his view, the jihadists he prosecuted were emboldened by the process. There was a sense that the American criminal justice system was feckless, which encouraged many terrorists to believe that Allah favored their endeavors with His protection. For example, McCarthy cites the joyous courtroom celebration when a jury acquitted Sayyid Nosair of Kahane's murder. In a war, it borders on

28. *Id.* at 305.

29. *Id.* at 312-13.

30. *Id.* at 311.

31. *Id.* at 23.

recklessness to embolden one's enemies. Yet, McCarthy argues, even in a successful trial where a conviction is achieved and sustained, that is exactly what occurs.³²

McCarthy also spares no punches for the radical belief system that he sees as a robust minority within Islam. He argues, "Islam is a dangerous creed. It rejects core aspects of Western liberalism: self-determination, freedom of choice, freedom of conscience, equality under the law."³³ He cites numerous examples where Islamic authorities promote views that are hateful and run counter to establishing peaceful relations with non-Muslims.³⁴ He also rails against Western apologists who are blinded to, or rationalize away, these realities.³⁵ He argues that "[i]t is simply delusional to think that there is no correlation between what a person believes and how he is likely to act—as delusional as it is to think there is no correlation between Islam's doctrinal summons to violence and Islamic terrorism."³⁶

This second part of McCarthy's thesis in *Willful Blindness* fails to address the tension policymakers face between rejecting ideas that encourage violence and not being perceived by the broader mass of Muslims as attacking their religion. There are good reasons for policymakers to be cautious when talking about religious concepts, reasons which do not necessarily make them apologists. The ultimate objective should be to isolate the extremists (whether that is a mere handful or, as McCarthy argues, a much larger minority) within their own religion. That is a heavy, and perhaps impossible, lift for a Western policymaker. Rather, it may be wiser to follow General David Petraeus' rule in fighting the counterinsurgency

32. *Id.* at 154-56. Although Nosair was acquitted on the murder charge, he was convicted on charges of gun possession, assault, and coercion. The trial judge believed that the jury's decision to acquit Nosair of murder "was against the overwhelming weight of the evidence and was devoid of common sense and logic," and he ultimately sentenced Nosair to the maximum term for each conviction. Ronald Sullivan, *Judge Gives Maximum Term in Kahane Case*, N.Y. TIMES, Jan. 30, 1992, at A1 (quoting New York State Supreme Court Justice Alvin Schlesinger).

33. MCCARTHY, *supra* note 9, at 316.

34. *Id.* at 316-17.

35. *See, e.g., id.* at 28-34 (McCarthy's rebuttal of terrorism expert Dr. Marc Sageman).

36. *Id.* at 178.

in Iraq: Do no harm.³⁷

McCarthy comes to his conclusions about Islam honestly. During the trial, he saw many Muslim witnesses demure to the Blind Sheikh when matters of religious doctrine were introduced. According to McCarthy,

[t]his made not a bit of difference to the trial—Abdel Rahman had incontestably called for brutal strikes so many times that it was irrelevant whether these apparently nice people had gotten the word. What was jarring, however, was that they were nice people and yet they were ready to defer, on matters of importance in their faith, to the homicidal maniac sitting in the corner of our courtroom.³⁸

In the grand scheme, it is worth remembering that keeping those nice people nice may often dictate how, or whether, government officials confront the rhetoric of the Blind Sheikhs of the world—perhaps a hard reality to accept for a battle-scarred prosecutor.

Willful Blindness is a well-written and entertaining criticism of the criminal justice model of fighting a global terrorist organization. As we continue to debate policy on Guantanamo detainees, we should be mindful of how we deal with other 21st century threats. For example, on our southern border, a future conflict with drug cartels is brewing. These stateless actors do not shy away from extreme violence, and it is not inconceivable that the problems that they will create will grow beyond the managing capacity of our criminal justice system. In considering how we will deal with the al Qaedas of the world, policymakers will do well to consider the lessons that McCarthy learned. He was there at the beginning.

37. See, e.g., Cullen Nutt, Opinion, *Petraeus' "Big Tent"*, STAR LEDGER, Mar. 2, 2008, available at 2008 WLNR 4162911 (WestLaw).

38. MCCARTHY, *supra* note 9, at 316.