
REMARKS UPON ACCEPTING THE 2011 JAMES MADISON AWARD

By Michael B. Mukasey*

Many thanks to my good friend Andy McCarthy for those kind remarks—and it is obvious from those remarks that he is a good friend. Actually, there is no one I can think of who is better suited to present an award named after Jimmy Madison than Andy McCarthy. Those of you who have read his works and read his columns and posts regularly know what I mean. Those of you who haven't, should, and I envy you in advance for what you are about to experience.

And of course, thanks as well to the New York Chapter of the Federalist Society for this singular honor. When I think about the others who have received this award, I think they are possibly the only people who would be more surprised than I am to see my name join the list.

Before I get any further in these remarks, I should thank as well the people who have made possible this and everything else worthwhile I have done in the last few decades—my wife, Susan, who has put up not only with me but also with the rigors that go with an occasionally public life, and of course my children, who had the experience of putting up with the reduced circumstances that go with public life while they were still under our roof, only to see the circumstances—and the size of the roof—increase when I returned to private life after they went out on their own—what a bummer for them.

The French philosopher Pascal wrote that the first rule of morality is to think clearly, and I believe there is no more fitting way for me to try to thank the Federalist Society at the source, James Madison as the namesake and Andy McCarthy as the presenter of this award, than to try to do some clear thinking about the smog that now passes for our politics, in particular when it comes to the subject of how a country that has dealt successfully in the last century with Fascism and with Communism is now going about trying to deal with the “ism” of the current century—Islamism—both at home and abroad.

Actually, as a matter of history, Islamism, insofar as it holds this country in a weird combination of awe and contempt, has been incubating for about as long as we have known about the other two “isms” that we successfully conquered in the last century.

As a movement distinct from the religion of Islam itself, Islamism traces back to Egypt in the 1920s when the loosely organized Muslim Brotherhood was established by a man named Hassan al-Banna, a primary school teacher. Al-Banna founded the Muslim Brotherhood as a reaction to the modernizing influence of Kemal Ataturk, who dismantled the shell of what

was left of the Muslim caliphate in Turkey, banned fez's and headscarves, and dragged his country by the lapels—and it had to be lapels because he wanted men wearing suits not robes—into the 20th century.

Al-Banna's principal disciple was also an educator—a bureaucrat in the education department of the Egyptian government named Sayyid Qutb, who caused enough trouble in Egypt to get himself awarded a traveling fellowship in 1948, the year al-Banna was killed in violence generated by the Muslim Brotherhood. That fellowship was intended to have the benign effect of getting him out of the country.

Regrettably for us, he chose to travel to the United States, and in particular to Greeley, Colorado. Now I think it would be hard to imagine a more inoffensive place than post-World-War-II Greeley Colorado, but for a prudish man like Sayyid Qutb it was Sodom and Gomorrah. He hated everything he saw—American haircuts, enthusiasm for sports, jazz, what he called the “animal-like mixing of the sexes” even in church. His conclusion was that Americans were, as he put it, “numb to faith in art, faith in religion, and faith in spiritual values altogether,” and that Muslims must regard, as he put it, “the white man, whether European or American . . . [as] our first enemy.” He said Muslims must make this “the cornerstone of our foreign policy and national education.”

Qutb went back to Egypt, quit the civil service, and joined Hassan al-Banna's Muslim Brotherhood.

Qutb and the Muslim Brotherhood continued to agitate for a return to fundamentalist Islam. They welcomed Gamal Abdel Nasser's coup against the corrupt monarchy in 1952, but then became disillusioned with Nasser when he failed to institute Sharia law or even ban alcohol. Qutb opposed Nasser, and was arrested and tortured. However, he continued to write and agitate for Islam and against Western civilization, particularly against Jews, who he blamed for atheistic materialism and said were to be considered the worst enemies of Muslims. He was released for a time, but eventually was re-arrested, tried for conspiracy against the government, and hanged in 1966.

Many members of the Brotherhood fled to Saudi Arabia, where they found refuge and ideological sustenance. Qutb's brother was among those who fled and taught the doctrine in Saudi Arabia. Among his students were Ayman al-Zawahiri, an Egyptian who would become a leading Al Qaeda ideologist, and a then-obscure Osama Bin Laden, the pampered child of one of the richest construction families in the country. And the rest, as they say is history.

That history did not come to these shores on September 11, 2001, or even on February 26, 1993, when a truck bomb went off in the basement of the World Trade Center, killing six, wounding hundreds, and causing millions of dollars in damage in what would eventually come to be known as the first World Trade Center bombing. Rather, it came at the latest in the 1980s, when a couple of FBI agents spotted a group of men taking what looked like particularly aggressive target

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Mr. Mukasey made these remarks at the New York City Lawyers Chapter's 25th Anniversary Dinner on April 25, 2011 upon receiving the 2011 James Madison Award. He was introduced by Andrew C. McCarthy, Co-Chair of the Center for Law and Counterterrorism and the Foundation for Defense of Democracies. Mr. McCarthy's introductory remarks are available here: <http://www.fed-soc.org/publications/detail/2011-james-madison-award-presentation-prepared-remarks>.

practice at a shooting range in Calverton, Long Island. When they approached they were accused of what we now call racial profiling and backed off. In November 1990, one of those men, El-Sayid Nosair, would assassinate a right-wing Israeli politician named Meir Kahane, in the ballroom of a Manhattan hotel. The case was treated by the Manhattan DA Robert Morgenthau as the lone act of a lone gunman.

When the 1993 World Trade Center bombers demanded freeing Nosair from jail, it became apparent that the Kahane assassination was not the lone act of a lone gunman. Authorities reviewed the amateur video of Kahane's speech the night he was killed and discovered that one of those 1993 bombers had been in the hall when Kahane was shot in 1990, and further investigation disclosed that another was driving what was supposed to be Nosair's get-away vehicle.

The man who served as the spiritual advisor to Nosair and the 1993 trade center bombers, Omar Abdel Rahman, the so-called Blind Sheikh, along with Nosair and several others, were tried before me and convicted for participating in a conspiracy to conduct a war of urban terror against this country that included the Kahane murder, the first trade center bombing, and a plot to blow up other landmarks around New York, and to assassinate Hosni Mubarak when he visited the United Nations. The list of unindicted co-conspirators in that case included Osama Bin Laden, the pampered rich kid who had studied at the knee of Sayid Qutb's brother in Saudi Arabia.

At the time, all of this was treated as a series of crimes—unconventional crimes, maybe, but merely crimes. In 1996 and again in 1998, Osama Bin Laden declared that he and his cohorts were at war with the United States, a declaration that got little serious attention.

In 1998, our embassies in Nairobi, Kenya, and Dar Es Salaam, Tanzania, were almost simultaneously bombed, and again the criminal law was invoked with the usual mantra of “bring them to justice,” this time in an indictment that named Bin Laden as a defendant.

Apparently he was unimpressed, or at least undeterred, because in 2000 his group, Al Qaeda, bombed the USS Cole in Aden, Yemen, killing sixteen U.S. sailors, and would have carried out the bombing of another naval vessel, the USS The Sullivans, but for the fact that the barge carrying the explosives was over-loaded and sank.

And then of course came September 11, 2001, and to the call “bring them to justice” was added the call “bring justice to them,” and we were told that we were at war, which was more than fifty years after Sayyid Qutb determined that Islamists would have to make war on us, about fifteen years after Islamists had made it clear that they were training for war with us, and five years after Osama Bin Laden made it official with a declaration of war.

And yet, here we are, going on ten years after September 11, 2001, which I think was felt at the time to be at least a moment of singular national clarity, thrashing around like someone lost in heavy underbrush, seeking a way out and straying from the way, tearing the thorns and being torn by them, still struggling with such basic questions as who is our enemy, what kind of conflict are we in, what do we do with

the people we capture who are fighting us, what does winning mean?

How come all of this still seems so much up for grabs?

Well, for one thing, we are handicapped in no small measure by the apparent religious motivation underlying the essentially political goals of our opponents. Those goals involve the recreation of the Islamic caliphate and the imposition of Sharia law over as broad a swath of the world as possible. This is a profoundly anti-democratic movement at its core, regarding the whole idea of man-made law as anathema.

As a nation we are historically uncomfortable with drawing religious distinctions among ourselves, and between ourselves and others. Even before the nation was established our colonies were settled by people fleeing religious persecution. The tendency toward not asking questions about people's religion during debate on public issues runs historically deep. I don't mean to presume to channel James Madison, but I think he would be familiar with that discomfort.

Add to that the experience we had relatively recently during World War II when we interned thousands of Japanese under circumstances that I think are pretty well accepted now as a national shame. That is something we have been careful not to repeat.

And so if FDR had stood before Congress on December 8, 1941, and said that the peaceful Shinto religion had been kidnapped by extremists, he likely would have been hooted off the podium, but President Bush could and did say that about Islam repeatedly in the days following 9/11. He could tell it to Congress with an Imam in camera range and have what he was saying taken as accepted wisdom.

When we want to avoid something uncomfortable, and candor apparently won't do, our language gives us away. And so even after 9/11 although we say we are at war, it is a war on terror, or terrorism, which gives rise to quibbles to this very day from people who argue that terror is a state of mind, and terrorism is a means, and you can't have a war on a state of mind or a means.

Of course, everyone with a pulse understands at least in general terms what is going on, but we leave the discussion open to people who wish to quibble about what it is we are at war with, and so the discussion at times drifts off into absurdity. If such people were entirely at the periphery, then I suppose it would not matter much, but right now I must tell you that such people are right at the core of where there should be clarity. One of them in fact is the President's assistant for national security, who actually got up before an audience at the Center for Strategic Studies—this is one of our officially designated deep thinkers talking to other deep thinkers—and ridiculed the idea of a war on terrorism or on terror, saying that you can't have a war on a means or a state of mind.

This called to my mind a zany British revue that ran on Broadway before many of you were born called *Beyond the Fringe*, and in particular one sketch from that review involving an official police spokesman trying to explain to the press why Scotland Yard had not yet solved the Great Train Robbery of 1963. He said that they had at first been confused by the name “Great Train Robbery,” but after investigation they had found

that trains were quite large, nearly impossible to conceal, that they ran on rails, and generally were hard to make off with. “So you see,” he said, “Great Train Robbery is a misnomer; there is no question here of a missing train; we have the train; it’s the contents of the train that are missing.” Now, that review was a farce, but John Brennan, the President’s national security expert, did not consider his remarks to the Center for Strategic Studies a farce.

To our historical aversion to subjects religious, and our aversion to repeating the World War II experience with the Japanese, we must add the political delicacy of the times we live in. So it is now I think an accepted theorem that no good can be accomplished by force. It was not always so. And so not only did FDR not get up before Congress and say that the peaceful Shinto religion had been kidnapped by extremists, but when the war was over, during the occupation, General Douglas MacArthur, on orders from President Truman—and this was one time when MacArthur had no difficulty following President Truman’s orders—made the Japanese change the way the Shinto religion was practiced, and MacArthur, to his great credit, made the medicine go down relatively easily. But make no mistake; it was accomplished by force.

Lest anyone think that I hold the current Administration alone responsible for the inability to express simple clarity, I should mention the contribution to the English language made by the Administration that I served in, when effective interrogation procedures developed by the CIA and duly submitted for approval to the Justice Department were analyzed by lawyers in the department’s Office of Legal Counsel down to a mosquito’s eyelash; that program was referred to—in one of the most absurd marketing campaigns since New Coke—as “enhanced interrogation techniques.”

As those of you who have read the memos of the Office of Legal Counsel analyzing that program are aware, or read about them, those interrogation techniques were harsh; they were coercive. I can tell you also that using them required approval at the highest levels of the CIA, and that they were rarely used—the most coercive of them, waterboarding, was used on three people. Those techniques were enormously effective. There are many people alive today who would not be alive if they had not been used.

And yes, they were, in the estimation of the lawyers in the Office of Legal Counsel, and also in my estimation after I reviewed the then-classified memos and related material, perfectly lawful under the standards that applied from 2001 to 2003, after which they were no longer used. But when you come up with a term like “enhanced interrogation techniques,” to try to make it sound like you are talking about something innocuous, something that sounds like an improved toothpaste or Wash Day product, the unmistakable impression is that you must be covering up something too horrible to describe, or at the very least that you are trying to sanitize something that cannot be cleansed, that you are covering up your true meaning—to bring it up to date, sort of like saying you are running a temporary kinetic exercise, or a foreign contingency operation.

And what are we to do with the folks we capture, who have taken up arms against us. We still struggle and strain with

what to call them. In 1943, two groups of German would-be saboteurs landed off Long Island and Florida, and were rounded up, tried before a military commission sitting in Washington, and executed—all within three months, and with no right of appeal, although the procedure itself was reviewed by the Supreme Court and found lawful in an opinion issued after they were already dead.

They were called unlawful enemy combatants because that was the term attached to people who fought out of uniform, or targeted civilians, or failed to carry their arms openly, or did not follow a recognized chain of command. They gave up the protection due soldiers under international law by taking off their uniforms. In fact, it is obvious that they knew very well what wearing a uniform versus not wearing one meant because they landed in uniform and then changed on the beach. The only explanation for that hazardous procedure is that if they were caught during the landing, which is the most vulnerable part of the operation, they could have claimed the protection due prisoners of war because they hadn’t yet acted against any civilian target. But they gave up that protection, and as a consequence were called unlawful enemy combatants.

Fast forward to 2001, and we started referring to the terrorists who violate all the rules by not wearing uniforms, not following a regular chain of command, not carrying their arms openly, and targeting civilians—we referred to them as unlawful enemy combatants, a designation well-recognized under the law but which meant that they did not have the rights of prisoners of war, and certainly did not have the rights of ordinary criminal defendants.

Yet now, because we shrink in public discourse from any harsh imagery, even that has been softened to unprivileged belligerents, although what privileges are in fact going to be withheld remains a mystery.

What unlawful combatant status might have meant at another time is that some dangerous people would simply be locked up, and others who had committed war crimes would get the benefit of a trial in which the underlying facts would be reviewed—fairly but without such niceties as the hearsay rule—and a judgment rendered.

That I think was the loosely formulated plan of the Bush Administration at the outset. I say loosely formulated because however detailed were the plans that were eventually drawn for military commissions, first by presidential decree and then, when the Supreme Court ruled that out even though the German saboteurs had been tried on that basis, by act of Congress, the plans were drawn without much clear and explicit thought as to why we have trials in the first place.

At the close of World War II, the allies convened a military tribunal at Nuremberg, and another in Tokyo, at least in part to create a record of what the Germans and the Japanese had done so that there could be no future denial. There is hardly a need to create such a record today, when the underlying deeds are well-documented. And so to the extent that we occasionally hear parallels drawn between our own current situation and the Nuremberg tribunals, I think those parallels are seriously misplaced.

There are other ingredients that make up the haze surrounding the subject of what we do with the folks we catch.

catering to the perceived desires of the families of the victims. One need only look at those statements to realize that reality and law as it exists in the real world were not at the top of the list of considerations on either occasion.

For starters, administering a legal system is not an exercise in self-fulfillment, and courts are not anybody's tool, because if they are, what they produce isn't justice. So far as whether federal courts have an honorable history and can in fact administer justice—and administer it good and hard when necessary—and whether federal prisons can hold those convicted, those matters were never in doubt before or after either of these announcements was made. It may make us look good and feel good to defend what is not in doubt, and to attack what is not at issue, but it hardly contributes clarity to the discussion.

And so far as victims' families are concerned, they have some rights guaranteed by federal law, including the right to be heard at sentence in connection with cases tried in federal court, and there is no reason why they could not be similarly heard at the analogous time before a military commission. But we have a legal system in which all of us, including victims and their families, give the government a monopoly on the use of force, and give up the right to determine what happens to an accused, in return for the government's guarantee to use that force to protect us. That is called the social contract. There are countries where that is not entirely true, where the victim's family is given the right to determine whether there will be punishment, and indeed to administer the punishment themselves. This country is not among them.

And what about the question of what victory will look like? We are told repeatedly that this will not end with a signing ceremony on the deck of the Battleship Missouri. Well, that's a valuable insight, but it has absolutely no implications for how strongly we defend ourselves and our way of life; it is not an excuse to throw up our hands.

In a target-rich political environment like the one we live in, it doesn't take much in the way of courage to stand up here and skip rocks off several of those targets. But how does one really bring clarity to the discussion?

I suggest we start by identifying Islamism as our adversary, and then try to understand it, and by understand it I mean not only its manifestation as terrorism, but its entire anti-Western and anti-democratic agenda. That will allow us at least not to empower it. I do not suggest that we can bring about the kind of change in the Islamist point of view that Douglas MacArthur brought about in the practice of the Shinto religion; that kind of change in fact will have to come from reformist elements within Islam, and they exist. I recognize, particularly receiving an award named after James Madison, that if the Establishment Clause of the First Amendment to our Constitution means anything, it means that our government cannot go around picking winners and losers in theological debates.

But we can certainly defend ourselves, and when fundraising for Muslim charity, a religious duty called *zakat*, becomes fundraising for organizations that support terrorism, that behavior should be prosecuted under statutes that criminalize material support for terrorism, rather than encouraged in the guise of facilitating charity. We should not

have prosecutors being told, as they are, not to bring such cases for fear of giving offense to people who are bent on our destruction. We must realize that cultivating them not only endangers us, but also endangers and silences people in the Muslim community with moderate views.

When our government does outreach to the Muslim community, as it does constantly, there is no reason why that outreach cannot go to reformers, and why we cannot avoid going to organizations that are affiliated, whether directly or indirectly, with the Muslim Brotherhood, the organization founded by Hasan al Banna in Egypt in the 1920s, whose representatives were invited to attend President Obama's speech at Al Azhar University in 2009, and an organization that continues to this day to function actively in Egypt and through affiliates in this country, including such organizations as ISNA—the Islamic Society of North America, which was proved during the terrorist funding trial of an organization called the Holy Land Foundation to be involved in funding Hamas—and others that have been the objects of outreach by the government.

We can ask Congress to face the fact that we have to detain people, and pass a statute that defines who is subject to detention, and with what safeguards, and make intelligence gathering a principal and not a secondary goal following capture. I don't know whether it will come as a surprise to you that the only authority the government relies on now is the Authorization for Use of Military Force passed by Congress in September 2001, and that does not even mention the word detention.

And it may well be that if detainees must be charged with war crimes on an ongoing basis—and we don't have a large number of them in custody now, but that could change—in that event, it may well be that what is called for is a national security court to replace military tribunals, presided over by Article III judges but staffed perhaps from the military. Many people, including Andy McCarthy, have written extensively about what such a court might look like.

Some of these steps need to be taken immediately—recognizing the danger and prosecuting material support cases instead of worrying about the sensibilities of people who mean to destroy us are at the top of that list. Serious efforts at intelligence gathering from all terrorism detainees are a close second.

I think it would be helpful at least to start the discussion about a viable detention statute. We are holding people in custody now at Guantanamo who are not charged with war crimes and will not be so charged, but are deemed too dangerous to release or cannot be released to any jurisdiction where they will be safe. There are about 100 such people, and the Supreme Court in the *Boumediene* case said that they had to be able to file habeas corpus petitions, but left it to individual judges to devise the rules for conducting such cases. Those cases are being filed in the District of Columbia where the judges, being human, are coming up with different standards and differing results in factually similar cases.

It may be that all of this will sort itself out in the usual mess of appeals and remands and so forth, but if the numbers of prisoners for some reason goes up sharply, or if there is pressure

for uniformity because divergent results that were only a mild irritant until now come to be regarded as intolerable, then at least such a discussion will have generated proposals, and we will have something at hand.

A national security court is even further on the horizon, and so perhaps we don't have to start actively talking about that yet.

Procrastination is generally regarded as a bad thing, but when it comes to answering the questions we have refused to face in the last ten years, a bit of triage is in order. We can't take on all the questions at once; triage means dealing with what you have to deal with first.

And so far as the ultimate one is concerned, what will winning look like, I would prefer to worry about that when there are more Islamists who are concerned about their movement giving up the goal of imposing Sharia on the West than there are Islamists who dream of achieving that goal. I don't think we are quite there yet.

Thank you very much for the honor of this award and for the even greater honor of speaking to you. Good night.

