

COMMENCEMENT ADDRESS—MAY 10, 2009*

MICHAEL B. MUKASEY**

As a former Attorney General, but even more as a former judge, it is a special privilege to be invited to speak at a law school that has trained so many members of both the state and federal judiciary, which speaks volumes about the quality and concern for public service that are as characteristic of this university as Carolina blue—which, by the way, never looked as beautiful as it did against Michigan State. This university, and this law school, have a history of inviting speakers who reflect diverse views on important legal and public policy issues, even when those speakers and views may present matters of controversy. That history is consistent with what elevates American legal education, and in particular the legal education provided here, above mere indoctrination and makes it worthy of being regarded not simply as career training but as education, and indeed higher education.

Commencement speakers traditionally are expected to offer bits of wisdom and guidance to the graduates, but I think that the usual wisdom and guidance are something one should not presume to offer others generally, and particularly not law school graduates, as you are. Your skills and training not only equip you, but in a sense obligate you, to find your own way of being true to yourselves and your profession. All one can ask is that lawyers, as we are, recognize that since law *is* a profession, it has to profess something. And one important thing it professes is that lawyers are obligated to learn enough about the hardest subjects and questions so as to confront them as honestly and intelligently as they can when they must provide answers or advice. The way I plan to put a little flesh on that rather bare-bones observation is by referring to the subject that—oddly—I found most surprising and challenging about being Attorney General: the nature and scope of the terrorist threat we confront. As a federal district judge I had presided over several terrorism-related matters, and so I thought I knew something about that subject before I went to Washington. But as Attorney General, every morning I received a

* © 2009 Michael B. Mukasey.

** Mr. Mukasey served from 1988 to 2006 as a United States District Judge for the Southern District of New York, the last six years as Chief Judge. He served from 2007 to 2009 as Attorney General of the United States.

classified briefing on the various threats our nation and others faced; up to my last day in office those briefings were simultaneously sobering and alarming. The enemies we faced, and still face, have a presence literally in every part of the globe. Yet in many places they are virtually undetectable, and the plots that were the subject of those briefings were both creative and deadly.

I say this not because I think I am standing before people who do not know the gravity of the terrorist threat, but rather to underscore that because this is not a conventional struggle against a conventional enemy with an identifiable location, on a particular and identified battlefield, the main weapon we have in this war is intelligence. As will become apparent later in these remarks, gathering information for intelligence purposes is a lot different from gathering information for purposes of presenting evidence at a trial, and in that difference lies a great deal of the controversy we are witnessing and participating in today.

The topic is of particular relevance, and I hope interest, to you as graduating lawyers, presenting as it does the most significant challenge to our legal system in our times. It is no surprise that questions about how to confront that challenge have generated vigorous debates, presenting, as they do, questions that are among the most difficult a democratic government can face: how we as a nation should seek to protect ourselves; whether the steps we take are proportional to the threat and consistent with our history and principles; where the legal lines are drawn in this new kind of conflict; and, as a matter of policy, how close to those legal lines we should go, and whether the lines themselves can be or should be redrawn.

Over the last three years, you have studied legal and policy issues in part by considering cases that present those issues, whether hypotheticals or real cases. At the risk of intruding on the day that is supposed to represent the *end* of law school, I would like to consider with you a case that illustrates several legal issues we now face. It is the case of a man named Jose Padilla, who, as it happens, is an alumnus of my courtroom, among others.¹ After the 9/11 attacks,

1. Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y.), *aff'd in part, rev'd in part sub nom.* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004). Other motions made in the Southern District of New York include Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (denying the government's motion to dismiss for lack of standing and finding that Secretary of Defense Rumsfeld was the proper respondent rather than the President); Padilla *ex rel.* Newman v. Rumsfeld, 256 F. Supp. 2d 218 (S.D.N.Y. 2003) (granting government's motion to certify interlocutory appeal). For South Carolina and Fourth Circuit cases, see Padilla v. Hanft, 389 F. Supp. 2d 678 (D.S.C.), *rev'd*, Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 547 U.S.

Osama bin Laden and his al Qaeda network set about planning new waves of attacks. Jose Padilla was supposed to be one of the participants in those planned attacks. Mr. Padilla, as it happens, was an American citizen and a convicted felon who—after he served his jail sentence—journeyed abroad, where he acquired several aliases and a new career: he enrolled in al Qaeda training.

Now I could spend a good deal of time on his itinerary, the details of the training he received, and what BlackBerry users might describe as the contact list he acquired on the way, but I will simply summarize, not only for the sake of time but also because some of the details of his exploits and those of his cohorts frankly are not in the spirit of the day, and in any event are not crucial to this discussion. After Padilla was recruited, he was trained in 2000 and 2001 in Afghanistan and Pakistan, in various subjects, including how to blow up apartments and the buildings containing them in a particular way. He also developed a fascination for the idea of an improvised nuclear weapon, later toned down to a relatively primitive device using uranium wrapped in conventional explosives to create a so-called dirty bomb, which creates not much in the way of explosion, but a great deal in the way of radiation.

By April of 2002 he was ready to travel to the United States. On this odyssey, he had met and won the confidence of a virtual dream team of world-class terrorists. One member of that team was Abu Zubaydah, a close associate of Khalid Sheikh Mohammed, sometimes known by his initials KSM, the mastermind of the 9/11 attacks and the man who murdered Wall Street Journal reporter Daniel Pearl. Padilla was eventually matched up with a would-be accomplice, who never made it to the United States, a man named Binyam Mohammed. We'll get back to him in a few minutes.

But first, let's continue to follow Mr. Padilla's journey, picking up with the eve of his departure to the United States, when he was hosted at a dinner attended by a man I mentioned a moment ago, Khalid Sheikh Mohammed, or KSM, another man who acted as personnel organizer for the 9/11 attacks, and yet another individual who acted as KSM's right-hand man. These three men provided

1062 (2006). Related Fourth Circuit and Supreme Court motions include *Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005) (denying government's motion to transfer and to vacate); *Hanft v. Padilla*, 546 U.S. 1084 (2006) (granting government's application respecting the custody and transfer of Jose Padilla). For Florida and Eleventh Circuit cases, see *United States v. Padilla*, No. 04-CR-60001, 2006 WL 2415946 (S.D. Fla. Aug. 18, 2006), *rev'd sub nom.* *United States v. Hassoun*, 476 F.3d 1181 (11th Cir. 2007).

Padilla with U.S. currency, a cell phone, and travel documents. And, of course, dinner.

Padilla arrived at Chicago's O'Hare Airport on May 8, 2002. He was carrying much of the cash his dinner hosts had provided, the cell phone they also provided, and the names and telephone numbers of his al Qaeda recruiter and sponsor. Padilla was arrested when he landed on a warrant I had issued in New York, based on information contained in an affidavit. That information came in part from the harsh interrogation of Abu Zubaydah, one of the high-ranking al Qaeda members I mentioned a moment ago. The warrant I issued for Padilla was what is called a material witness warrant, which you may have learned in criminal procedure, and which I pointed out specifically to the prosecutor, can be used only to detain someone until he can provide testimony before a grand jury or a trial jury, and may not be used simply as a substitute for indefinite detention.²

When it was clear Padilla would not testify against his cohorts, he was transferred on order of the President to military custody as an unlawful enemy combatant, which was a designation that was not invented in 2001 but was a designation that had long applied to anyone who did not fight in uniform, participate in a recognized chain of command, carry weapons openly, and refrain from targeting civilians. Oddly, many in government no longer refer to such people as unlawful enemy combatants, but instead as "individuals captured or apprehended in connection with armed conflicts and counterterrorism operations."³ Whether this adds clarity to the discussion or not I leave it to you to decide, but the term "unlawful enemy combatants" was the same one that had been applied to Nazi saboteurs who landed during World War II off the coasts of Florida and New York—one of whom claimed to be and was assumed by the Supreme Court to be an American citizen, like Padilla. They were rounded up, tried by a military tribunal in Washington on direct order of President Franklin Roosevelt (even though the civilian courts were open and functioning), convicted, and executed—a process that was upheld by the Supreme Court in a case called *Ex parte Quirin*.⁴

Padilla challenged his detention; I upheld it based largely on the *Quirin* precedent. One court of appeals disagreed with me, the Supreme Court held that Padilla had filed his habeas petition in the wrong court, and another court of appeals eventually found he was

2. 18 U.S.C. § 3144 (2006).

3. See, e.g., Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 27, 2009).

4. 317 U.S. 1 (1942).

properly detained—kind of a mixed bag. Eventually, Padilla was transferred back to civilian custody and charged in an indictment with the plot to blow up apartment buildings, convicted, and sentenced to more than seventeen years in prison. He was never tried in connection with the so-called dirty bomb plot.

As law students, you were probably told that spotting issues is the main skill you have to show on final exams, so let's review this brief and somewhat sanitized history and spot some issues—constitutional law, evidence, criminal procedure, the limits of executive power, to name only a few legal issues. And there are policy issues as well, related but quite distinct from the legal issues.

Issue one, of course, is presented by the harsh interrogation methods used on some of al Qaeda's captured leaders. I say "harsh" advisedly, not "enhanced" or some other term that represents a verbal flinch from reality. I do not intend to get into any debate about that or any related issue here. But I should simply point out to you that when you have custody of someone you have every reason to believe has more information than he has disclosed using conventional interrogation methods—information that can be used to save lives—then unless you think Khalid Sheikh Mohammed had the intention of retiring after 9/11 and his other achievements to deliver after-dinner speeches, the questions of what you may lawfully do and should do to elicit information from such a person, and what you may not do under any circumstances regardless of who you are dealing with, are not easy ones. And they are not made easier by using language that either conceals or exaggerates what is at stake. How far you may go in any case, and what you may not do in any case, are both legal issues that are at least susceptible of an answer based on a statute, even though that answer may be debated. How far you should go, even as to conduct that may be legally permissible, is a matter of policy, often less susceptible of a firmly rooted answer. What should provoke no debate, however, is that, as I mentioned before, intelligence gathering for national security purposes is very different from evidence gathering for trial purposes.

That raises a second issue: how would you go about proving facts in a courtroom? You can't do it based on what was discovered only from intelligence gathering, and not simply because of objections to interrogation methods, but rather because such evidence is not admissible against any person questioned who has not knowingly given up his Fifth Amendment rights, and generally is not admissible against anyone else because hearsay is not admissible. In any event,

every defendant has the right under the Sixth Amendment to confront the witnesses against him.

There are also practical reasons—and these are policy reasons—why you can't in an ordinary courtroom use proof from other intelligence sources because it can't be disclosed, whether because doing so would endanger a person's life, or would reveal a clandestine method of intelligence gathering, or would give up information received from a foreign country's intelligence agency that turned the information over only on the express understanding that the source would never be disclosed. Again, the rules of evidence, which bar hearsay, and the Sixth Amendment, which requires that a defendant be permitted to confront the witnesses against him, would prevent the use of a great deal of intelligence information, and did in Padilla's case. He was convicted of the exploding apartments plot based on evidence independent of classified intelligence information.

The third issue is broader than the second: what kinds of proceedings can be held in such cases? Padilla eventually was tried in a public Article III courtroom based on proof that could pass the rigorous test of the rules of evidence, but only for the plot to blow up apartment buildings, not for the dirty bomb plot. That one couldn't be proved in a conventional trial where a defendant has access under conventional discovery rules not only to what evidence the government has but also how it is gathered. That can be very costly to national security even from information that is quite conventional. In a terrorist conspiracy case I tried in 1995, the government was required to turn over to the defendants, as it is in all conspiracy cases, a list of unindicted co-conspirators. That list included one name that few people recognized in 1995: Osama bin Laden. It was later learned that, shortly after the government turned over that list, it made its way to Khartoum, where bin Laden then lived. Our rules of criminal procedure, which we all had to and did follow, allowed bin Laden to learn not only that his identity was known but also which of his colleagues' identities were known.

It was partially for that and similar reasons that both houses of Congress and the President approved a system of military tribunals—courts not covered by the rigors of Article III.⁵ Such tribunals are now suspended, perhaps to be abandoned in favor of civilian courts, or some hybrid tribunal of a kind proposed by some scholars, but perhaps not. According to press reports, that is still being debated. What rules of evidence and procedure will apply in such courts? If

5. Military Commissions Act of 2006, Pub. L. No 109-366, 120 Stat. 2600.

such courts are not subject to the rigors of Article III, that would appear to be a policy question. If it is an Article III court, the Sixth Amendment, which guarantees defendants the right to confront the witnesses against them, will apply, which would mean that unless the soldier who captured a detainee could be summoned from the battlefield to testify to the capture, the case might be thrown out. And also under the Sixth Amendment, not only would the accused be guaranteed the right to counsel, but he would also be guaranteed the right to represent himself if he chooses. That would mean that accused terrorists would have the right of access to all the discovery that the government must provide in such a case. There is perhaps a realistic danger that some detainee might decide to represent himself, get access to discovery, and then try to share it with others, whether in or out of custody. Is that a risk we should take? Would we prefer to dismiss charges and release people rather than let that happen? And where would we release them? Those last three are policy questions.

Next issue: I mentioned at the beginning of these remarks that Mr. Padilla had an accomplice, an accomplice who received the same extensive training Padilla did, was financed by al Qaeda just as Padilla was, and who was dispatched to the United States just as Padilla was. But there were some important differences between the two. The accomplice was not a U.S. citizen; he was an Ethiopian who had lived for several years in Great Britain. And he never made it to the United States. He was captured in Pakistan and eventually transferred to the naval facility at Guantanamo Bay, where he was detained for about six years. The accomplice was charged with war crimes and would have been tried by a military tribunal if his case had continued in the course set out in legislation.

But it did not, and thus there is another crucial difference between that accomplice and Jose Padilla. While Padilla is serving a lengthy sentence, his would-be accomplice, unlike Jose Padilla, is a free man. He was never tried by a military commission and was never transferred to the civilian courts. Although his detention simply as an unlawful enemy combatant was entirely proper under the law and supported by strong evidence, he was freed due to international complaints relating to his allegations of abuse that were not alleged to have occurred at Guantanamo. He is now living in Britain, reportedly on public assistance. Regardless of whether those complaints and similar ones are valid, they are real. The struggle against terrorism is global, which means that if our allies have concerns, they have to be taken seriously. And so, whether you agree with it or not, a policy choice was made to release him.

And, of course, the next issue: where would we try detainees, if we did try them at all, and perhaps release them, if their cases are turned over to civilian courts? Recall that those in custody are, in general, aliens who have no right to enter this country, and until a case called *Boumediene*, had virtually no rights under domestic law if they were held abroad, and indeed, if they were enemy combatants, even if they were held here. Recall also that under existing immigration laws, any person shown to have trained in terrorist training camps is barred from entering this country for that reason alone, regardless of whether or not their training was targeted specifically at this country.⁶ Does it uphold the rule of law to bring such people to this country and release them? Certainly, it does not uphold the immigration laws.⁷

Recall as well that in our history we have fought wars and held for detention until the conclusion of hostilities literally millions of war prisoners, some of them here, and until *Boumediene* there was no suggestion that habeas corpus rights, or rights indistinguishable from habeas rights, applied to such detainees.⁸ Those were, and still are, legal questions.

Of course, there are those who dispute whether we are indeed in a war, in part because although we have always fought wars that at some point were of indefinite duration, they always had at least a clear ending scenario, with the capture of enemy territory, or a ceremonial surrender. But this war offers only the prospect of ongoing resistance and vigilance until the opposition loses its taste for the struggle. Some will not refer to a war at all, but instead call it a military contingency operation, and will not refer to terrorism but rather only to “man-caused disasters.”

We could at any time declare that we are not in a war. That would not change the view of our adversaries, who declared themselves to be at war with us in the 1990s, and proved it, with the first World Trade Center attack in 1993, with the bombing of Americans at Khobar Towers in Saudi Arabia, with the attack on the USS *Cole* and the attempted attack on another destroyer, with the attacks on our embassies in Kenya and Tanzania, and so on. We responded to each of those with conventional criminal prosecutions, and then, of course, came the September 11, 2001 attacks.

6. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

7. Real ID Act of 2005, Pub. L. No. 109-13, § 103, 119 Stat. 302, 306–09.

8. *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763 (1950).

You who aspire to be judges, defense lawyers, members of the executive or legislative branch, prosecutors, lawyers of any kind, may wish to ponder the question raised earlier, whether or not we need a different system of courts for such a conflict, and if so, how would it differ from a conventional Article III court. If necessary, how can we create it? This involves both legal and policy choices. All of these legal questions must be resolved in ways that are consistent with our Constitution and other laws, and the policy questions in ways that are also consistent with our values and interests.

Throughout these remarks I have tried to separate out legal and policy issues, and I think for good reason. Any good lawyer who understands that the decisions he or she makes may be scrutinized in the future will understand that, as to legal questions, that lawyer has no alternative except to do law. Hard though it may be, a good lawyer must be indifferent to the fact that the lawyer may well be criticized whatever the decision. It is the task of the good lawyer to tune out all this noise, to give the best reading within the lawyer's ability of what the law is, and not to confuse what the law is with what that lawyer, or someone else, thinks the law ought to be. If the lawyer's best reading of the law permits some policy, there is a professional obligation to say that it would be lawful, even if the lawyer personally disagrees with it, or recognizes that it may one day prove controversial. Just as important—perhaps more important—if the lawyer believes that some policy would be unlawful, there is a professional obligation to say “no,” even if some people think the policy is desirable or even critical. The rule of law, and the oath every public servant takes to support and defend the Constitution, depend on it. And law, it must be remembered, is not simply an empty vessel into which a lawyer pours his or her opinions on matters of policy.

Although only some of you are likely to become public servants, and some lesser number to deal directly with these precise dilemmas, the responsibility to do law will apply to each of you. The lawyer in private practice must not confuse the client's interest with the law; if “no” is the right answer the obligation is to say no, even if the client doesn't want to hear it. The lawyer pursuing the public interest must not confuse the lawyer's own views of what the law ought to be with what the law is. And the lawyer in robes—as I once used to be, as many graduates of this fine school are, and as some of you no doubt will be—like the image of justice blindfolded, must decide cases, as the federally prescribed judicial oath says, “without respect to persons,” an interesting formulation. That is, without regard to who the parties are or what outcome might be well received in some

quarters, but based on the judge's best reading of what the law requires.

I have not here suggested answers to any of these questions, although obviously I have views on some of them, some such views already expressed and others not. Today I have simply done what each of you graduating today has been asked to do on final exams over the course of your law school careers: I have spotted some issues. A few are straightforward legal issues, and can be resolved by consulting the law; others are policy issues which should not be confused with or dressed up as legal issues. You, and other graduates across the nation, will help resolve those issues, and hopefully keep separate the legal issues and the policy issues.

On a final exam, spotting issues alone can get you a high grade. But in the real world, it can't. Difficult issues have to be resolved, and your training over the last three years—in recognizing and drawing distinctions between law and policy, in separating real differences from bogus ones, in understanding legal principles and the enduring values and practical ends they are supposed to serve—will be absolutely essential if we are to resolve these issues in a way we can all live with. I mean that in all senses of that phrase, including being able to abide the result as moral beings, and being able to keep ourselves and our neighbors safe. Here it is useful to bear in mind the lesson taught by a French philosopher named Pascal, who said that the first rule of morality is to think clearly, and also the further lesson taught by many others that in order to think clearly you must also write and speak clearly.

That is why we will have need of your skills in the years ahead, regardless of whether or not you pursue a career in government, in the private sector, or in some combination of private and public work. I don't for a moment pretend that there aren't many issues and questions, or that the answers are easy. Indeed, one of my partners, Mary Jo White, who served as U.S. Attorney for the district where I sat as a judge, delivered a speech on some of the issues presented in these cases, and she called it "Terrorism and Civil Liberties: The Questions Are Many and the Answers Are Hard."

But your participation, and the participation of others like you, in the national debate on these and other issues will help assure that we arrive at conclusions that, as I said, we can all live with. I wish all of you and each of you the greatest of success in your careers and in your personal lives, and I thank you again for the opportunity and the privilege of addressing you today.