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Responses to the Ten Questions

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RESPONSES TO THE TEN QUESTIONS

Tung Yin[†]

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2. HOW SHOULD AMERICA ADDRESS THE THREAT OF HOMEGROWN TERRORISTS?

I started sketching my answer to this question after the National Security Retreat in September but before Thanksgiving, and I was going to respond generally that the United States seemed to have experienced less virulent radicalization than had some European countries. I was going to point out that the vast majority of American citizens or residents accused of post-9/11 terrorism had been accused of providing material support, whether to al Qaeda,¹ or simply in support of terrorist plots.²

The most serious plots—in the sense of potential or actual carnage to Americans—to date have been those involving Najibullah Zazi (the New York subway bomber),³ Faisal Shahzad

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1. See Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1 (2005) (highlighting the problem of individuals in the United States who are sworn supporters of al Qaeda but have not committed a crime).

2. See Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425 (2007) (discussing the increased use of 18 U.S.C. § 2339A).

3. Attorney-General Holder described Zazi’s plot as “one of the most serious

(the Times Square bomber), and Nidal Malik Hasan (the Fort Hood shooter). Zazi, an Afghan citizen, did not arrive in the United States until he was a teenager. Shahzad, who was born in Pakistan, did not come to the United States until he was 18; he later acquired U.S. citizenship through marriage to an American woman. By contrast, the London bombings were carried out by three native born British citizens (Mohammad Sidique Khan, Shehzad Tanweer, and Hasib Hussain) and one naturalized citizen who came to the United Kingdom as a child (Germaine Lindsay). Similarly, the 2006 transatlantic airline bombing plot—which targeted London-to-U.S. flights for in-flight explosive attacks—was planned by about twenty or so Britons, almost all of whom were native born. I was going to highlight this distinction and suggest that, while there were no doubt steps that the United States could take to further reduce the risk of radicalization, our more lenient naturalization laws and our greater tolerance for religion and religious diversity were probably helping to socialize native-born or childhood immigrant Muslims.

However, the post-Thanksgiving arrests of Mohamed Osman Mohamud in Portland, Oregon, and Antonio Martinez in Baltimore, Maryland, for attempted use of weapons of mass destruction in violation of 18 U.S.C. § 2332a cast some doubt on that conclusion. To be sure, we should be careful about drawing definitive conclusions from only two examples. Furthermore, I don't mean to suggest that the United States is likely to face a wave of domestic terrorism attacks from homegrown terrorists or sleeper cells, only that the difference in threats that we face versus what the western Europeans face may be a matter of degree, not kind. Still, both Mohamud and Martinez—along with Oklahoma City bomber Timothy McVeigh and Unabomber Ted Kaczynski—refute the notion that socialization as an American is a vaccination from susceptibility to violent terrorism.

One can draw sobering lessons from the horrific incidents involving Major Hasan, as well as Jared Loughner, whose January 2011 shooting spree in a Tucson supermarket killed a federal judge

terrorist threats to our nation since September 11th, 2001” See Press Release, Dep’t of Justice, Najibullah Zazi Pleads Guilty to Conspiracy to Use Explosives Against Persons or Property in U.S., Conspiracy to Murder Abroad, and Providing Material Support to al Qaeda, (Feb. 22, 2010), *available at* <http://newyork.fbi.gov/dojpressrel/pressrel10/nyfo022210.htm>.

and five other civilians and wounded thirteen, including Congresswoman Gabrielle Giffords, who was shot in the head. In both instances, there were warning signs about the potential dangerousness of the individuals,⁴ but the state and federal governments took essentially no steps to protect the local community. In part, that's because the Constitution generally does not permit the government to lock people up merely due to their perceived dangerousness.

Yet doing nothing in those incidents had tragic consequences. Similarly, while Mohamed Mohamud apparently never would have been able to build a bomb on his own without the help of the undercover FBI agents, he could very easily have bought a bunch of guns and opened fire on the Pioneer Square crowd in downtown Portland. The death toll would not have been nearly as bad as that inflicted by a car bomb, but it still could have been dozens of dead or wounded Oregonians—just imagine the Fort Hood shootings, but in a much more densely packed crowd.

A sting operation has the virtue of providing a quick opportunity for the target to demonstrate that he or she is not a terrorist, by declining to proceed with plans for any violent actions. For example, the FBI affidavit in the Mohamud case indicates that, at the first meeting between Mohamud and the undercover operatives, the agents told Mohamud that he could help “the cause” in a number of ways, ranging from being a good Muslim by praying five times a day to completing his college degree to “going operational” to becoming a martyr.⁵ Assuming that the affidavit accurately describes the encounter and that the government agents did not entrap him, Mohamud—were he not inclined toward violence—could have opted for some choice other than “going

4. See JOSEPH I. LIEBERMAN & SUSAN M. COLLINS, U.S. Senate Committee on Homeland Security and Governmental Affairs, Special Report, *A Ticking Time Bomb: Counterterrorism Lessons from the U.S. Government's Failure to Prevent the Fort Hood Attack*, Feb. 3, 2011, at 27 (“[Major Hasan's] public displays of radicalization toward violent Islamist extremism during his medical residency and post-residency fellowship were clear.”); Robert Anglen, *Jared Lee Loughner, suspect in Gabrielle Giffords shooting, had college run-ins*, ARIZ. REPUBLIC, Jan. 9, 2011, at A8 (noting that Loughner was suspended from Pima Community College for mental health reasons and that he could not return to the school until he could show that he was not a danger to himself or others).

5. See Arrest Warrant at 13, ¶ 35, *United States v. Mohamud*, (Or. D. Ct. Nov. 26, 2010), available at http://media.oregonlive.com/portland_impact/other/USAFFIDAVIT.pdf.

operational” (or becoming a martyr).

Yet, the use of the sting operation in this case has seemingly polarized the Portland community, with a good portion of it outraged at federal officials. A good deal of that outrage stems from the perception that the FBI entrapped Mohamud by supplying him with the money for the bomb parts and constructing the bomb with the parts he acquired.⁶ But some of the outrage seems to have been driven by disagreement with the sting tactic itself. This should be of not inconsiderable concern to government officials, since the FBI and U.S. Attorney’s Office fired an effective opening salvo in the public relations battle by making the arrest warrant and accompanying affidavit available to the press right after arresting Mohamud. Since then, Attorney General Eric Holder made numerous statements defending the government’s handling of the case—indeed, so many, and with such vigor, that Mohamud’s lawyers eventually filed a motion for a gag order directed against Holder.⁷

In my view, undercover sting operations of the sort carried out against Mohamud are a necessary law enforcement tool against the threat of domestic terrorism. But identifying those persons who warrant being targeted in a sting operation will often require tips and support from the local community. Mohamud, after all, came to the FBI’s attention in the first place because his father alerted the government to his son’s apparent radicalization. To the extent that a significant portion of the community—Portland, in this case—questions the use of an undercover sting operation, it suggests that one of the primary challenges that the government faces in addressing the threat of domestic terrorism is successfully persuading the public more effectively about the need for such counterterrorism actions. If the public perceives the use of sting operations as oppressive, discriminatory, or unreasonably intrusive,

6. Published letters to the editor in the *Oregonian* in the days after Mohamud’s arrest split about evenly between those who applauded the FBI and those who mocked it for foiling its own plot. A detailed discussion of the entrapment issues is beyond the scope of this short essay. A brief primer on entrapment as it applies to this case can be found in Bryan Denson, *Portland Bomb Plot Case Likely to Serve as Primer on Entrapment, FBI Sting Issues*, THE OREGONIAN, Dec. 4, 2010, at A1.

7. See Motion for Order Directing the Government to Cease and Desist from Inappropriate Pretrial Comment, *United States v. Mohamud*, No. CR 10-475-KI, Dec. 20, 2010 (copy on file with author).

then the government may be scoring a Pyrrhic victory: short-term gain in the form of immediate prosecutions of potential terrorists, but long-term loss as local community distrust results in drying up of tips and support. I don't pretend to have any easy answers as to how to manage this balancing act, but to the extent domestic terrorism is perceived as a more likely source of mass violence than international terrorism, it is something that the government should be figuring out.

5. HAS OBAMA IMPROVED BUSH'S NATIONAL SECURITY POLICIES?

The first thing to acknowledge is that when it comes to the most criticized counterterrorism policies, President Bush improved on his own between, roughly speaking, his first and second terms in the White House.⁸ By his second term, waterboarding and coercive interrogations were no longer in use, the only detainees being transferred to Guantanamo were essentially the high-level captives who had been held in secret prisons, and administrative hearings continued to repatriate Guantanamo detainees to their home countries. One might characterize the efforts as grudging, some having been forced by the Supreme Court in a series of cases starting with *Rasul v. Bush*⁹ and *Hamdi v. Rumsfeld*,¹⁰ or one might attribute the change to the rising influence of some government lawyers, like James Comey and Jack Goldsmith,¹¹ or both. If you compare President Obama's national security policies to President Bush's, the contrast will appear stark if you're looking at first-term Bush policies, but mild if you're looking at second-term Bush policies.

That's not to say that there haven't been any changes. The Obama administration tried to prosecute accused 9/11 mastermind Khalid Sheikh Mohammed (KSM) in federal court rather than a military commission, but that effort has stalled and appears fruitless at this point. President Obama issued an executive order blocking the use of torture or coercion in interrogations. At the same time,

8. See, e.g., Peter Bozzo & Henry Shull, *Obama's Blank Check*, HARV. POLITICAL REV., Dec. 5, 2010, at 12, available at <http://hpronline.org/americas-foreign-policy/obama%E2%80%99s-blank-check/>.

9. 542 U.S. 466 (2004).

10. 542 U.S. 507 (2004).

11. See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

there are still close to 200 detainees at Guantanamo, and a presidential task force has recommended indefinite detention for about fifty of those detainees. Furthermore, the White House has dramatically stepped up its use of unmanned aerial vehicles to target al Qaeda members and militants for targeted killing.

Whether one thinks that President Obama has improved President Bush's national security policies, therefore, should be largely (but not totally) a reflection of whether one approved of the latter's policies in the first place. Not surprisingly, then, some Bush administration critics, like Glenn Greenwald, have criticized President Obama quite harshly.¹² On the other hand, Georgetown law professor David Cole, also a Bush critic, has defended the President, arguing that the President's record has been mixed but nevertheless a marked improvement over his predecessor's.¹³

In my view, the major improvement that President Obama has made has been to gain greater acceptance of the underlying framework for current U.S. counterterrorism actions—which is to say, use of military force as well as criminal prosecutions. Although there remains some vocal opposition to the targeted-killing program and to the continuing indefinite detention of suspected al Qaeda and Taliban fighters at Guantanamo, the intensity of such opposition has weakened. By banning the most egregious aspects of his predecessor's policies, President Obama took much of the wind from the sails of many critics. Of course, one might argue that it was easier for the President to take such steps because by the time he took office in January 2009, KSM had been in U.S. custody for almost six years—long enough that it was unlikely he would have any timely information at that point. Waterboarding him to extract any undisclosed information would be largely punitive in nature, without any instrumental gain. To be sure, I'm not arguing that exigent circumstances or perceived necessity can legally justify (or excuse) waterboarding or other coercion or torture. All I am saying is that President Obama didn't have to do the right thing (ban waterboarding) in the face of pressure for extraction of immediate information. Perhaps President Obama would have

12. Glenn Greenwald, *The Death of Dawn Johnsen's Nomination*, SALON (Apr. 9, 2010), http://www.salon.com/news/opinion/glenn_greenwald/2010/04/09/johnsen.

13. David Cole, *Breaking Away: Obama's War on Terror is not "Bush Lite,"* THE NEW REPUBLIC, Dec. 30, 2010, at 17.

fallen prey to the same desire for expediency that the Bush administration did. Nevertheless, even if President Obama benefitted from the circumstances (as well perhaps from simply not being George W. Bush), it is under his watch that national and international attitudes toward our armed conflict against al Qaeda have improved.

6. SHOULD KHALID SHEIKH MOHAMMED EVER BE BROUGHT TO TRIAL?

It appears that the Obama administration has come to the conclusion that the answer is “no.”¹⁴ This conclusion followed about a year of political impotency where the president found himself thwarted and opposed by Republicans in Congress as well as New York Democratic politicians.

If we put aside the politics of trying KSM in a civilian court, we can answer whether he should be tried by asking, what do we hope to achieve through criminal prosecution? One answer might be that a criminal trial would demonstrate KSM’s guilt and culpability conclusively to the world—particularly, the Arab Middle East. Another answer might be conviction in a trial would allow the imposition of punishment, which is traditionally based on notions of retribution, incapacitation, deterrence, and rehabilitation.

On balance, I am not persuaded that these are good enough reasons to push for criminal prosecution. The argument for trying KSM in a federal court rather than a military commission is that the former offers greater procedural protections, whereas the latter might be dismissed as kangaroo courts,¹⁵ notwithstanding the 2009 revisions and amendments that President Obama signed into law. A conviction of KSM in a military commission might be dismissed as a foreordained result. Conviction in a federal court, on the

14. See Peter Finn & Anne E. Kornblut, *Opposition to U.S. Trial Likely to Keep Mastermind of 9/11 Attacks in Detention*, WASH. POST, Nov. 13, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/12/AR2010111207508.html> (“Khalid Sheik Mohammed, the self-proclaimed mastermind of the Sept. 11, 2001, attacks, will probably remain in military detention without trial for the foreseeable future, according to Obama administration officials.”).

15. See, e.g., David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003) (discussing the history and modern legal developments related to military commissions).

other hand, would probably be seen by our European allies as more legitimate than a conviction in a military tribunal. As former Attorney General Alberto Gonzales has noted, one of the primary reasons that the Bush administration prosecuted shoe bomber Richard Reid in federal court instead of a military tribunal was that Great Britain would have balked at having its citizen tried in the latter forum.¹⁶

However, it is far from clear that other parts of the world, such as the Middle East, would similarly view a federal court conviction as legitimate. Consider one 2008 survey of world opinions that asked, “Who do you think was behind the 9/11 attacks?” with possible responses of “al Qaeda,” “US govt,” “Israel,” “other,” and “don’t know.” For all countries, the averages were al Qaeda (46 percent), U.S. Government (15 percent), Israel (7 percent), other (7 percent), and don’t know (25 percent).¹⁷ In itself, it is stunning that more than half of those surveyed did not believe that al Qaeda was behind the 9/11 attacks. Even more disturbing is the fact that in Turkey, almost as many people believe that the U.S. Government (36 percent) was responsible as believe that al Qaeda was (39 percent); or that in Egypt, only 16 percent believe al Qaeda was responsible, but 43 percent believe that Israel was; or that in Jordan, only 11 percent believe al Qaeda was responsible, but 17 percent believe the U.S. Government was responsible, and 31 percent believe Israel was responsible. This is a survey that was conducted in the summer of 2008, long after the exhaustive 9/11 Commission published its report cataloguing the evidence against al Qaeda, and after numerous videos and statements in which Osama bin Laden admitted or claimed credit for the 9/11 attacks.¹⁸

16. Alberto R. Gonzales, *Waging War Within the Constitution*, 42 TEX. TECH L. REV. 843, 867 (2010) (“The British Attorney General expressed concerns to me directly and other Administration lawyers about prosecuting British citizens in U.S. military commissions.”).

17. See World Public Opinion, *International Poll: No Consensus On Who Was Behind 9/11* (Sept. 10, 2008), http://www.worldpublicopinion.org/pipa/articles/international_security_bt/535.php?nid=&cid=&pnt=535.

18. See Transcript of Usama bin Laden Video Tape, U.S. DEP’T OF DEFENSE (Dec. 13, 2001), <http://www.defense.gov/news/Dec2001/d20011213ubl.pdf>; *Full text: bin Laden’s “letter to America,”* THE GUARDIAN (UK) (Nov. 24, 2002), <http://www.guardian.co.uk/world/2002/nov/24/theobserver>; *Full transcript of bin Laden’s speech*, AL JAZEERA (Nov. 1, 2004), <http://english.aljazeera.net/archive/2004/11/200849163336457223.html>; *Transcript of the Alleged Bin Laden Tape*, ABC NEWS (May 23, 2006), <http://abcnews.go.com/International/Terrorism/story?id=1995630&page=1>.

Arguably, a trial that resulted in a conviction would amass proof beyond a reasonable doubt, but wouldn't change opinions in those parts of the world where more people believe that the United States or Israel were behind the 9/11 attacks.¹⁹

As for punishment, at the risk of being glib, I do not think that we are interested in attempting to rehabilitate KSM. And as long as one accepts the legality of military detention, we can incapacitate KSM by holding him indefinitely at Guantanamo Bay (or whatever other long-term detention facility we shift remaining detainees to if Camp Delta were to be closed). And if we are interested in inflicting punishment—specifically, the death penalty—that could be achieved in a military commission as easily as in federal court.

Weighed against the seemingly minimal benefits of prosecuting KSM in federal court are the potential downsides of doing so. Consider the recently concluded trial of Ahmed Ghailani, who was indicted for his role in the 1998 bombings of U.S. embassies in Kenya and Tanzania. The district court correctly excluded key government witness on the grounds that the government had learned of his identity only through coercive interrogation of Ghailani; that is, the witness was derivative evidence to be excluded as fruit of the poisonous tree.²⁰ Without that witness, the government's case seemingly took a severe body blow, as the jury convicted Ghailani of only one count, conspiracy, and acquitted him of 273 counts of murder and eleven other charges. True, the one count of conviction resulted in a life sentence, but if that one conviction is reversed on appeal, then Ghailani could be retried only on the one count—and perhaps not even that, if the reason for reversal were for insufficiency of the evidence, or if the acquittals were to collaterally estop the government from relitigating key facts underlying the conspiracy charge.²¹

Prosecuting KSM involves similar evidentiary challenges. Because he was waterboarded over 100 times, his initial confessions—made during his captivity in a secret CIA prison—

19. See Michael Slackman, *9/11 Rumors That Harden Into Conventional Wisdom*, N.Y. TIMES, Sept. 9, 2008, at A16 (discussing anecdotal evidence of how opinions in Egypt have hardened on the issue of who carried out the 9/11 attacks).

20. *United States v. Ghailani*, 743 F. Supp. 2d 261, 286 (S.D.N.Y. 2010) (order granting defendant's motion to exclude the prosecution's witness).

21. The seminal case on collateral estoppel's effects of acquittals on subsequent trials is *Ashe v. Swenson*, 397 U.S. 436 (1970).

would be clearly inadmissible. His subsequent confession, which took place during his detention at Guantanamo Bay and was not induced by coercion or torture, might still be inadmissible.²² The problem is that the government might well believe that it can get the second confession into evidence, but it won't know that for certain until after beginning proceedings in federal court. No doubt the prosecutors in the *Ghailani* case felt they could get their key witness to the court, too, and they were unhappily surprised.

And what if KSM were acquitted in federal court? Presumably, we would simply continue to detain him indefinitely as an enemy combatant, but if the whole point of the exercise was to earn legitimacy in the eyes of the world, that would be a giant step backwards. I think Jack Goldsmith and Ben Wittes have it right: the government should abandon plans to try KSM in federal court or a military commission, and just detain him.²³

22. *Missouri v. Siebert*, 542 U.S. 600 (2004), is not directly controlling but it could be read to bar the subsequent confession. In *Siebert*, a police detective conducted a custodial interrogation without *Miranda* warnings and obtained a confession from the defendant. *Id.* The detective then read the *Miranda* warnings and re-interrogated the defendant to elicit the same confession. *Id.* The Court held that the second confession had to be suppressed. *Id.* at 617. True, *Siebert* did emphasize the closeness in time of the two confessions, and so the fact that months, if not years, passed between KSM's confessions might distinguish *Siebert*. On the other hand, *Siebert* noted the following relevant factors in determining whether the taint of the first invalid confession had been dissipated: "[T]he completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id.* at 615.

23. Benjamin Wittes & Jack L. Goldsmith, *The Best Trial Option for KSM: Nothing*, WASH. POST, Mar. 19, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031702844.html> (noting the "great energy [expended] on a battle over the proper forum for an unnecessary trial" and arguing that leaving KSM in indefinite detention is a better solution).