NEVER FORGET … THAT KHALID SHEIKH MOHAMMED HAS NOT FACED JUSTICE YET

The people who like to use 9/11 to sow fear are pushing the hashtag #NeverForget this morning, as if anyone is about to forget the event that led our country to sacrifice its values and exacerbate the threat from terrorism, as if we haven't already killed far more innocent people in claimed retaliation than al Qaeda killed that day.

Me, I think the anniversary of the attack is a good day to reflect on the fact that Khalid Sheikh Mohammed still has not been tried and convicted for his crimes. The reasons, of course, have to do with the kangaroo court the Bush Administration invented to emphasize how different these crimes were, the torture KSM and his fellow defendants underwent and — more directly — the fact that the FBI thought it appropriate to infiltrate his defense team (for what!?!?!), which has led to a lengthy investigation to assess the conflicts created.

Since 9/11, of course, DOJ has tried and convicted around 500 terrorists and aspiring terrorists, including Dzhokhar Tsarnaev, just two years after his attack on the Boston Marathon. We have the ability to try terrorists, we simply haven't chosen to exercise that ability in KSM's case.

The 9/11 victims deserve a trial. Just as importantly, the US deserves its old system of justice back.

PAKISTAN'S NATIONAL ASSEMBLY, SENATE PASS BILLS ESTABLISHING MILITARY COURTS

On Sunday, Dawn's editors knew that Pakistan's lawmakers would enact the bills needed to establish military courts and published a stern condemnation of the move in an editorial with the telling title "A Sad Day":

> In the end, our political leadership proved unable to defend the constitutional and democratic roots of the system or resist the generals' demands.
>
> Pakistan is to have military courts once again. To establish them the politicians have agreed to distort the principle of separation of powers, smash the edifice of rights upon which the Constitution is built and essentially give up on fixing decrepit state institutions.

The editors pointed out how the efforts to establish the military courts could have been put to better use:

> Had the same time and effort spent on winning consensus for military courts gone into urgent reforms and administrative steps to fix the criminal justice structure, the existing system could have been brought into some semblance of shape to deal with terrorism.
>
> Sadly, the political leadership has abdicated its democratic responsibilities. Surrender perhaps comes easily.

For a country that has been beset by repeated military coups, the Dawn editors rightly note the risk in granting more powers to the military.

The votes on the bills were unanimous among those present and voting today, but Imran Khan's PTI party and religious parties abstained:

> The National Assembly and Senate on Tuesday passed the 21st Constitutional Amendment Bill 2015 and Pakistan Army Act 1952 (Amendment) Bill 2015.
>
> The Constitutional Amendment Bill was passed with 247 votes – 14 more than the required two-third majority in the NA, and 78 votes out of 104 were passed in the Senate.
>
> The amendment – aimed to set up special courts to try militants – was not opposed by any member present inside the house. Lawmakers from Pakistan Tehreek-e-Insaf, Jamaat-e-Islami, Jamiat Ulema-e-Islam-Fazl and Sheikh Rasheed abstained from voting – in both the NA and the Senate.
>
> Each clause of the bill was voted for separately. The bill is now expected to be signed into law by the president this week.

This move by Pakistan, coming in the wake of the devastating Taliban attack on a military school in Peshawar, is drawing obvious comparisons to US moves to establish military commissions at Guantanamo for trying terrorism suspects. Sadly, Pakistan has been just as reckless in making the move as the US was. Had they taken the time for a review of the outcome of US military commissions, they would have found (pdf) that while about 500 suspects in terrorism trials have been convicted in US federal criminal courts, the vaunted military commissions have yielded only 8 convictions since 9/11. On the occasion of the conviction in federal court last

year of Osama bin Laden's son in law, Lyle Denniston had this to say:

> As long ago as 1866, just after the Civil War, the Constitution stood for the principle that, if the civilian courts were open and functioning during wartime, trials of civilians charged with crimes of war should be tried in those courts, not in military tribunals. That was the Supreme Court's decision in the case of *Ex parte Milligan*.
>
> The Court's lead opinion back then said: "No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false."

[*We can separately note that Denniston's quote from Ex parte Milligan seems to apply just as well to the excuses brought forth in favor of torture as they do for the establishment of military commissions.*]

Perhaps the only good aspect of Pakistan's move to establish military courts is that the bills carry a two year sunset provision. Sadly, though, given the current cowardly status of Pakistan's lawmakers, it would not be surprising for regular two year "extensions" of the laws to continue in perpetuity. Just like our endless extensions of unconstitutional wiretapping under FISA.

GITMO: BROKEN MINDS, BROKEN JUSTICE

The WaPo reports that Judge James Pohl has just severed Ramzi Bin al-Shibh from 9/11 trial, creating two 9/11 trials. He did so for two reasons: because he could not quickly resolve whether the FBI investigation into defense attorneys has compromised his representation, and because the court has not yet determined whether he is competent to stand trial.

> Army Col. James L. Pohl said the court needs to resolve whether Binalshibh has the mental capacity to participate in a trial and whether he needs another lawyer because of a potential conflict of interest after theFBI questioned members of his defense team.
>
> These issues "are not expected to be completed in the near term," Pohl said in his order.

While both issues are emblematic of the clusterfuck that is Gitmo, I'm particularly struck by the uncertainty whether bin al-Shibh is competent.

> Earlier this year, prosecutors asked the judge to evaluate Binalshibh after he repeatedly interrupted court proceedings and had to be removed because he ignored warnings to stop the disruptions. However, neither the government nor Binalshibh's lawyer argue that he is mentally incompetent.
>
> "The judge's decision today seems to indicate that the issue of competency is still open," [bin al-Shibh lawyer James] Harrington said. "We have to clarify that with him."

After all, the entire point of the torture program was to break these men. They succeeded

in doing so with bin al-Shibh (that is confirmed by other sources). But now they can't try him — it sounds like this severance is probably a tacit admission he can never stand trial, for a variety of reasons.

I would much prefer civilian justice, and have said so numerous times. But this Kangaroo Court in Gitmo has sure succeeded in demonstrating all the problems with the US counterterrorism approach.

AQAP DRONE STRIKES OBAMA'S AWLAKI DRONE STORY

Two days before the Administration was due to release a memo laying out its rationale for drone-killing American citizen Anwar al-Awlaki, AQAP released a video that challenges the narrative the Administration has used for doing so.

As Gregory Johnsen reports, the memo shows (see correction below) ~~former Gitmo detainee Said al-Shihri~~ embracing Umar Farouk Abdulmutallab, then whispering in his ear.

In the video, Shihri says he was the head of external operations — the title the US always used to describe Anwar al-Awlaki.

> The video says that it was Shihri — not Awlaki — who was "responsible for external operations against America."

> For years, the Obama administration has argued the opposite, claiming that Awlaki was directing AQAP's efforts against the U.S., including the failed underwear bomb on an airliner over Detroit on Christmas Day 2009.
>
> On the day Awlaki was killed, Obama called him "the leader of external operations for al-Qaeda in the Arabian Peninsula" and said he "directed" the 2009 attack. The video appears to refute both claims, giving credit to Shihri, the former Guantanamo Bay detainee.
>
> Halfway through the video there is a clip of Shihri embracing Umar Farouk Abdulmutallab, the underwear bomber in the Christmas Day attack, and whispering in his ear as a narrator reads that the attack was conducted "under the direct supervision of (Shihri) and a number of his brothers in the section in charge of external operations."

While there may be some disagreement about how best to translate Shihri's role — "directed" or "supervised" — this video clearly says that Shirhi was in charge, directly to the contrary to the narrative DOJ released purportedly summarizing Abulmutallab's confession (the one that conflicted in key ways with his two other confessions).

What Johnsen doesn't say — but is clear from comparison — is that that embrace took place while Abdulmutallab was dressed to make his martyrdom video.

Compare this frame, which appears just after the embrace in the new video (at 21:54),

With this one from Abdulmutallab's martyrdom video (at 0:52).

That's important because arranging to make the martyrdom video is one of the tasks DOJ's narrative says Awlaki did.

> Awlaki told defendant that he would create a martyrdom video that would be used after the defendant's attack. Awlaki arranged for a professional film crew to film the video. Awlaki assisted defendant in writing his martyrdom statement, and it was filmed over a period of two to three days. The full video was approximately five minutes in length.

~~Shihri's presence at the making of Abdulmutallab's martyrdom video doesn't refute~~ the claim that Awlaki had a role in making it (though none of the experts I have asked has ever given a remotely credible explanation why AQAP's greatest English-language propagandist and someone formally schooled in English would make a martyrdom video in Arabic). But it does place him there, suggesting Awlaki was not the only one directing the production of the video, if he had a role at all.

This video definitely doesn't prove that Awlaki didn't have an operational role in the UndieBomb attack. But it shows that the narrative the government released — which Abdulmutallab's lawyer said had been made in the context of a plea deal never finalized and which the government agreed not to rely on at the trial, where it could have been challenged — neglects not just the role of Fahd al-Quso, but also Said al-Shihri. It is, at the very least, incomplete in some important ways.

And yet that is the only public "proof" the government has ever released that justified their execution of Anwar al-Awlaki.

Update: Apparently al-Shihri isn't the one portrayed in this video, Nasir al-Wuhayshi is. In which case this connection is not meaningful.

SOUTHCOM COMMANDER CALLS GITMO HUNGER STRIKES "A JOKE"

The government has made 10 of the videos showing the force-feeding of Abu Wa'el Dhiab available to his lawyers. They are reportedly watching the video this weekend.

In a piece seemingly meant to diminish concerns about the claims the government tortured detainees, in the guise of force-feeding them, to break up a large hunger strike last year — and to pre-empt whatever claims his attorneys will make after viewing the videos — Southern Command Commander Marine Gen. John F. Kelly gave an interview to the AP. In it, he made the absurd claim that Gitmo does not force feed anyone.

> Military officials, who call the hunger strike a propaganda stunt, reject the phrase “force-feeding.” They say the video will show nothing more than guards and medical personnel doing their jobs in a difficult situation.
>
> “We don’t force feed anyone,” said Marine Gen. John F. Kelly, who oversees the prison as commander of U.S. Southern Command.

Worse, in an apparently effort to redefine hunger strike as he also redefined force feed, Kelly called hunger striking “a joke.”

> “The whole hunger strike thing was kind of a joke anyway before. Now it’s based on nutrition and a medical exam as opposed to missing meals,” he said.
>
> The general said “very few” detainees now qualify for the feeding procedure and he believes none are truly on hunger strike – “if the definition of a hunger striker is someone who is no-kidding attempting to hurt themselves by starvation.”

Of course, the hunger strikes aren’t about “attempting to hurt themselves by starvation.” They are attempts to regain some sort of autonomy and dignity and – yes – to call attention to the injustice of detaining men who could be released for over a decade.

Whether a judge will ultimately rule that force feeding, as done to the men most committed to hunger striking, amounts to the water torture or not, Kelly’s disdain for the hunger strikers lays bare the coercion involved.

INTELLIGENCE RESPONSE TO KSM'S CLAIM INTELLIGENCE SUPERSEDES JUSTICE HOLDS UP HIS OWN TRIAL

Matt Apuzzo collects the thoughts of a number of people who are getting frustrated with the way the CIA and FBI (though I suspect it might be CIA and CIA) keep holding up the Gitmo show trials.

Most damning of them is this quote from top military justice lawyer professor, Eugene Fidell.

> "It's a courtroom with three benches," said Eugene R. Fidell, who teaches military justice at Yale Law School. "There's one person pretending to be the judge, and two other agencies behind the scenes exerting at least as much influence."

That assessment is not all that far from the claim Khalid Sheikh Mohammed made in the propaganda tract behind this latest delay.

> Every democratic country in the west has a constitution, an executive branch, a judicial branch, and a legislative branch. They also have a big black box above and beyond these branches that implements all that it sees as being in the interest of the country or ruling party without consideration for any constitution, morality, religion, or principle. This black box is called Intelligence and its authority supersedes all other considerations.

The Kangaroo Court trying KSM is proving him right. That's not a good thing.

DANGEROUS CENSORED DOCUMENTS, IN SOVIET RUSSIA AND WAR ON TERROR AMERICA

Yesterday, in announcing the public release of documents relating to CIA's publication of a Russian edition of Dr. Zhivago, the CIA bragged (justifiably) about its Cold War success in making books Warsaw Pact governments had banned available within those countries.

> In a memo dated April 24, 1958 a senior CIA officer wrote: "We have the opportunity to make Soviet citizens wonder what is wrong with their government when a fine literary work by the man acknowledged to be the greatest living Russian writer is not even available in his own country [and] in his own language for his people to read."
>
> [snip]
>
> Obtaining, publishing, and distributing banned books like *Doctor Zhivago* was an important Cold War-era success story for the CIA.

Even as CIA was declassifying the documents underlying Peter Finn's book on this topic, the 9/11 Gitmo trial was being stalled, once again, by issues arising from the Court's fragile Constitutional foundation.

The issue, this time, makes for ironic comparison with CIA's boasts of making banned

texts available to societies where the government was too fragile to release such texts.

On Monday, the 9/11 defense lawyers revealed that their Defense Security Officer had been recruited as an informant by the FBI as part of an investigation into how an unclassified 36-page tract written by Khalid Sheikh Mohammed became available to the HuffPo.

The Gitmo prosecutors claim to have no knowledge of the FBI investigation.

> At Monday's hearing, the judge pointedly asked the prosecutor, Army Brig. Gen. Mark Martins, if his prosecution team was "aware of this visit" by two agents to the bin al Shibh team member's house on Sunday, April 6, to question him after church. At issue, in part, was how the Huffington Post and Britain's Channel 4 television got a copy of the Mohammed commentary.
>
> "No, we were not," Martins replied — even before the judge had finished his question.
>
> [snip]
>
> At the prison, spokesman Navy Cmdr. John Filostrat on Monday night replied to a question of whether the prison staff asked the FBI to investigate the document this way: "I am unaware of any investigation and won't get into ongoing legal proceedings, anyway."
>
> Tuesday, a Pentagon spokesman said that while Martins did give the FBI the copy of the Mohammed document neither the chief prosecutor "nor the prosecution team had any idea that an investigation was launched."
>
> "He gave it to the FBI to maintain as evidence in event that there could at some point be an investigation," said

> Army Lt. Col. Todd Breasseale, “and in the event that it is determined that releasing [Mohammed’s 36-page commentary] was unlawful.”

Nevertheless, it appears someone requested an investigation into the disclosure. And DOJ’s part of the prosecution team suggests the judge would infringe on Executive Branch privileges if he investigates the FBI investigation.

> Separately, a lead case prosecutor, Ed Ryan of the Justice Department warned the judge against asking to question the FBI agents who visited a defense team member.
>
> “Your Honor is suggesting that you want to investigate an ongoing investigation. There are numerous government privileges that would be at stake,” Ryan said at the hearing. “I think the commission would be greatly mistaken to go down a road of trying to look inside an ongoing investigation being conducted by the Federal Bureau of Investigation if, in fact, one exists.”

Defense Attorneys also complained that a (perhaps now former) member of the Prosecution team is the Chief of Staff to FBI Deputy Director Mark Giuliano.

> And then finally, there’s a member of the trial team, Ms. Baltes, who is also – who also serves as the Chief of Staff to the Deputy Director of the FBI. And I appreciate counsel’s unequivocal statement that the prosecution was not aware of this investigation, did not know – did not know that an investigation was taking place and did not direct FBI agents to go and try to penetrate Mr. Harrington’s team, but somebody did, and somebody at the FBI did. And I don’t think it’s too much of

> a leap to imagine that when a member of the trial team has a dual role as the Chief of Staff to the Deputy Director of the FBI, that there could be an interface there, and I think it would be appropriate to examine Ms. Baltes as well.

Joanna Baltes happens to have been the lawyer who, in January, refused to admit in public that the CIA had installed a means to censor Gitmo proceedings, unbeknownst to the Judge. Is she, once again, answering to the CIA above and beyond her obligations to a court purportedly delivering independent justice?

So our attempt to hold the perpetrators for 9/11 responsible for their crimes has once again ground to a halt as the Judge investigates whether and why (and at whose behest) the FBI is investigating the release of KSM's unclassified writings.

Americans might ask, like Russians before them, "wonder what is wrong with their government" that we must delay justice in the 9/11 attack because someone made a shitty tract from KSM publicly available.

Don't get me wrong. Unlike Boris Pasternak's novel, KSM's tract is not literature, not even close. I doubt it is even effective propaganda (though I'm not his audience, which would be a religious but discontented person; its message and messaging feels similar to me as that used in the Creation Museum).

Nevertheless, clearly our government must believe it is dangerous, to have thus raised its value by turning it into a criminal case.

Perhaps the most inflammatory part of KSM's tract is that he is not — or at least claims not to be — broken.

> With my current condition, I live in solitary confinement, but I am very happy in my cell because my spirit is

> free even while my body is being held captive.
>
> [snip]
>
> Perhaps a poor detainee may be happy while being water-boarded or tortured or even in solitary confinement where he can't see the sun or the moon.

Particularly as attention turns back to CIA's false claims about torture, especially KSM's torture, the claim that it not only didn't produce intelligence, but didn't succeed in instilling the learned helplessness the torturers promised they could scientifically impose may well seriously damage the government. What does it mean that KSM portrays his own faith as so powerful that not even the CIA's brutish abuse can break him? What if Americans were to take this seriously, that KSM's faith could withstand all the force the CIA threw at him?

In any case, with its effort to criminalize the dissemination of this crappy tract, the government seems to be proving true one claim KSM made, about our and other democratic states' Deep States.

> Every democratic country in the west has a constitution, an executive branch, a judicial branch, and a legislative branch. They also have a big black box above and beyond these branches that implements all that it sees as being in the interest of the country or ruling party without consideration for any constitution, morality, religion, or principle. This black box is called Intelligence and its authority supersedes all other considerations.

The government believes these claims — and pages of tedious theological arguments — must be met by criminal investigation and perhaps punishment.

What is wrong with our government that punishment for the release of tedious propaganda must take precedence over a feeble attempt to deliver justice?

THE CIA'S EXCUSE: HIDING THE DOUBLE AGENTS

Adam Goldman and Greg Miller offer the CIA's excuse for removing documents from the SCIF where they had been made available to Senate Intelligence Committee staffers: they had to hide their double agents.

> After the CIA provided a massive cache of documents in 2009 to Senate staffers investigating the agency's detention and interrogation program, the agency realized it might have a problem.
>
> Within those documents, agency employees feared, were details that could lead to the exposure of CIA sources, former U.S intelligence officials said. Among them were top assets who had been recruited while being held at a secret CIA facility on Guantanamo Bay called "Penny Lane," according to one of the officials.
>
> So great was the concern that the sources' identity would be disclosed that the CIA withdrew some of the documents from a special facility that had been set up for members of the Senate Select Committee on Intelligence.
>
> [snip]
>
> Two employees of the CIA's Counterterrorism Center and a lawyer

> were assigned to scrub the documents for sensitive sources, including the asset who agreed to work for the CIA after his capture and transfer to Guantanamo, the official said.
>
> The assets went through a recruitment program at Guantanamo that began in early 2003 and ended several years later. Some of those who took part in the program have provided key information to the CIA, helping the agency kill a number of top terrorists.

Let's take the CIA at its word for a minute and consider the implications of this from the standpoint of oversight.

By removing the names of those the CIA had flipped while at Gitmo, the CIA permitted politically motivated people — including the guy who had a key role in "releasing" them — to call those detainees "recidivists." While it might be great cover to have Dick Cheney screaming about what dangerous people these people were, it was lethal for Obama's effort to close Gitmo.

By hiding the names of the double agents, the CIA also hid the true details about the actions those double agents would go on to commit. Which may have permitted CIA to use those double agents in ways that weren't just intelligence gathering.

Hiding double agents also hid how corrupt the entire military commission program was, because it hid the degree to which detainees had been implicated — and were still being held years after their capture — solely through the testimony of informants.

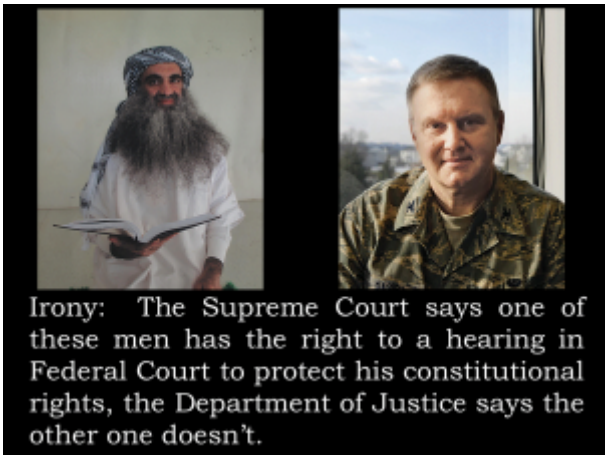
I wonder. Has CIA yet given its oversight committees a full list of all those CIA believes to have flipped? For a number of reasons, I doubt they have.

Removing details on the effort to flip detainees also hides evidence about the purpose of

torture, which wasn't really to obtain intelligence, but to exploit detainees, whether that involved propaganda (such as eliciting the justification for the Iraq War) or developing assets. Until we understand that that was one of the reasons we embraced torture and other kinds of humiliation, we won't be able to account for the full human waste of it all.

One more detail: by claiming it took back evidence of flipping detainees, CIA can obscure what happened with Hassan Ghul, whose cooperation with the US Miller first broke. If this report ever comes out in any halfway revelatory form, Ghul's treatment may well be one of the most unjustifiable (particularly since he had already given up Osama bin Laden by the time we started torturing him). How convenient, then, that CIA is prepping to claim SSCI doesn't know everything about Ghul's treatment.

1ST AMENDMENT JUSTICE DELAYED IS JUSTICE DENIED FOR COL. MORRIS DAVIS



Col. Morris Davis is, at least for my money, an American hero. He served and fought not only for his country, but

for the Constitution he swore to protect. The subject of what happened to him at the hands of the very government he defended deserves a much longer, and deeper, dive than I have time for in this post. We will likely come back for that at a later date as it seems as if the legal case Col. Davis brought to correct the wrongs done to him will likely go on forever.

And the going on forever part is the subject of this post. Col. Davis was scheduled to have a hearing in United States District Court in Washington DC tomorrow in front of Judge Reggie Walton. But the hearing was postponed. And that is the problem, this is the FOURTEENTH (14th) TIME hearing on Col. Davis' case has been delayed. One delay was due to a conflict on Judge Walton's part, and one because the offices of Davis' attorneys at the ACLU in New York were substantially damaged by Hurricane Sandy. Other than that, the delay has been at the hands of an intransigent and obstreperous DOJ. If the actions of the DOJ in relation to Col. Davis are not "bad faith", it is hard to imagine what the term stands for.

Now, to be fair, it appears the latest delay was at the unilateral hand of the court, as yesterday's minute entry order reads:

> In light of the fact that potentially dispositive motions remain pending, it is hereby ORDERED that the status hearing currently scheduled for Friday, February 21, at 9:15 a.m. is CONTINUED to a date and time to be determined by the Clerk.

The problem with that is that the "dispositive motions" the court speaks of as being "pending" have been "pending" for a VERY long time, since July of last year. And the case itself has been going on since the complaint was filed on January 8, 2010.

Why is it taking so long you ask? Because of the aforementioned bad faith and obstreperousness of

the Department of Justice, that's why. To get an idea of just what is going on here, a little background is in order. Peter Van Buren gives a good, and relatively brief synopsis:

> Morris Davis is not some dour civil servant, and for most of his career, unlikely to have been a guest at the Playboy Mansion. Prior to joining the Library of Congress, he spent more than 25 years as an Air Force colonel. He was, in fact, the chief military prosecutor at Guantánamo and showed enormous courage in October 2007 when he resigned from that position and left the Air Force. Davis stated he would not use evidence obtained through torture. When a torture advocate was named his boss, Davis quit rather than face the inevitable order to reverse his position.
>
> Morris Davis then got fired from his research job at the Library of Congress for writing an article in the Wall Street Journal about the evils of justice perverted at Guantanamo, and a similar letter to the editor of the Washington Post. (The irony of being fired for exercising free speech while employed at Thomas Jefferson's library evidently escaped his bosses.) With the help of the ACLU, Davis demanded his job back. On January 8, 2010, the ACLU filed a lawsuit against the Library of Congress on his behalf. In March 2011 a federal court ruled against the Obama Administration's objections that the suit could go forward (You can read more about Davis' struggle.)
>
> Moving "forward" is however a somewhat awkward term to use in regards to this case. In the past two years, forward has meant very little in terms of actual justice done.

Yes, you read that right. Col. Davis was fired from the job he truly loved at the Congressional Research Service because he, on his own time as a private citizen, exercised his First Amendment right to speak. As one of Davis' pleadings puts it:

> Col. Davis was unconstitutionally removed from his position at the Library of Congress' Congressional Research Service for writing opinion pieces in the Wall Street Journal and the Washington Post expressing his nonpartisan, personal views on the failures of the American military commissions established to try detainees at Guantánamo Bay, Cuba. His speech lies at the very core of the First Amendment and exemplifies the kind of speech that federal courts have been most vigilant in protecting from government retaliation.

The full pleading that quote came from, Col. Davis' response to the government's motion for summary judgment (one of the "pending dispositive motions") can be found here and is a good read if you are interested in more background.

That is exactly what happened and what is at stake. And you do not have to take my word for it, Judge Walton thinks it is a solid and valid claim too. Here is language from Judge Walton in an order in late January 2010, not long after the case was filed:

> The Court is satisfied that the plaintiff has established, at least based on the record before the Court at this time, that the likelihood of success on the merits and public policy prongs of the preliminary injunction standard weigh in his favor. Essentially, the record before the Court suggests that the plaintiff was terminated immediately after two

> specific opinion editorials he authored were published in national newspapers. Regardless of the defendants' contention to the contrary, it appears that the content of the plaintiff's published opinions was one of the reasons, if not the primary reason, he was fired, i.e., because the plaintiff took a position on the prosecution of detainees being housed at the United States military's Guantánamo Bay facility which the Congressional Research Service felt would call into question its impartially as to any policy recommendation it would make and any research it would conduct on that issue. This conclusion is supported by the fact that the opinion articles were specifically referenced in the plaintiff's termination letter, and also the timing of the letter, which was issued only several days after his writings were published. The plaintiff's likelihood of success position therefore is well-founded, at least with respect to the record the Court now has before it. And as to the public interest prong, it cannot be questioned that government employees retain First Amendment rights. (citations omitted)

So, there is really no question but that protected First amendment rights were involved, and that Col. Davis was wrongfully fired for exercising them. Makes you wonder why the DOJ would string him out and fight so hard in a case that is only about the rights and not even about the money damages he suffered as a result (that would have to be litigated in a separate action).

As the graphic at the top questions, why is the DOJ willing to give free speech rights to a terrorist at Guantanamo and not to Col. Morris Davis? Bad faith is the answer. Complete, scandalous, bad faith.

EXPLOITATION: "IN MY EARS AND IN MY EYES"

Goldman and Apuzzo, perhaps as a swan song before the former heads off to WaPo, break the story of Penny Lane — the story of the Gitmo camp where recruited double agents stayed until they were sent off to spy for the CIA.

They focus primarily on the series of perks detainees got both while at Gitmo and once they had agreed to spy.

> By early 2003, Penny Lane was open for business.
>
> Candidates were ushered from the confines of prison to Penny Lane's relative hominess, officials said. The cottages had private kitchens, showers and televisions. Each had a small patio.
>
> Some prisoners asked for and received pornography. One official said the biggest luxury in each cottage was the bed — not a military-issued cot but a real bed with a mattress.
>
> The cottages were designed to feel more like hotel rooms than prison cells, and some CIA officials jokingly referred to them collectively as the Marriott.
>
> Current and former officials said dozens of prisoners were evaluated but only a handful, from a variety of countries, were turned into spies who signed agreements to work for the CIA.
>
> [snip]
>
> Prisoners agreed to cooperate for a variety of reasons, officials said. Some received assurances that the U.S. would resettle their families. Another thought

> al-Qaida had perverted Islam and believed it was his duty as a Muslim to help the CIA destroy it. One detainee agreed to cooperate after the CIA insinuated it would harm his children, a former official said, similar to the threats interrogators had made to admitted 9/11 mastermind Khalid Sheikh Mohammed.
>
> All were promised money. Exactly how much each was paid remains unclear. But altogether, the government paid millions of dollars for their services, officials said. The money came from a secret CIA account, codenamed Pledge, that's used to pay informants, officials said.

But there are a few details they either barely hint at or profess ignorance to.

First, that mention of threatening a detainee with harming his children? Obviously, that's coercion, not persuasion. Jason Leopold and Jeff Kaye have long focused on how our torture program aims to exploit prisoners, including "recruiting" them to be double agents, in part, by torturing them. (And this was one key purposes of torture at Abu Ghraib, too.)

The process by which we recruited detainees to turn informant was by no means solely about real mattresses.

Goldman and Apuzzo profess ignorance about whether these double agents showed up in lists of "Gitmo recidivists." They did. Remember: several Gitmo "recidivists" then "flipped back" to Saudi control and provided key information on AQAP structure and plots. Though it appears to have even taken several years before they explained to Congress that some of these recidivists were actually not — or at least were not supposed to be. So not only did these detainees serve as double agents against al Qaeda, but the existence of them as "recidivists" fed the fears about closing Gitmo.

And there are at least textual hints of whom they did flip (or think they had flipped), though I won't lay out the several places where I've seen those hints in case these men are still out there.

Finally, Goldman and Apuzzo note this program ended in 2006, as the number of new detainees dropped (and, I might add, as the government tried to get out of the torture business).

But make no mistake. The government still aims to exploit the people it captures for counterterrorism purposes, whether in some forgotten cell in Afghanistan or on a ship. If we were only in the interrogation business, it could all take place in a traditional jail with legal representation.