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Judgment Days

Justice and the Enemy: Nuremberg, 9/11, and the Trial of Khalid Sheikh Mohammed

By William Shawcross

(PublicAffairs 256pp £17.99)

As Barack Obama advanced towards the presidency during 2008, one of his campaign themes resonated with some force. Seven years after President Bush had called for Osama bin Laden's capture, 'dead or alive', Obama promised a return to legal orthodoxies. Whereas Bush had interned alleged terrorists at Guantanamo Bay and other prisons, claiming novel powers to authorise military trials and 'enhanced interrogation techniques' (such as waterboarding), Obama would have no truck with such exigencies. 'I have said repeatedly that I intend to close Guantanamo,' he told a journalist on 16 November 2008, 'and I will follow through on that.'

He hasn't. Despite a review of all Guantanamo detainees and an undertaking to shut the camp within a year, its cells remain home to 171 people. And although Obama has ended the violent humiliation and interrogation of suspected terrorists, ordinary judicial service has not been resumed. The Justice Department has abandoned initial plans to prosecute al-Qaeda luminaries such as Khalid Sheikh Mohammed before a New York jury, and political pressures led Obama to sign a 2009 statute that remodelled Bush's military commissions – which are now due to host capital trials against Mohammed and four other Guantanamo detainees. Suspects who remain at large face a fate even less legalistic. Obama has approved a dramatic escalation in the use of drones to kill America's presumed enemies, targeting US citizens as well as foreigners, and his attitude towards lethal force has sounded at times almost Bush-like. Never was that truer than at the time of Osama bin Laden's death. Speaking of an unarmed man gunned down, he did not characterise the homicide as a regrettable necessity. 'Justice', he claimed instead, 'has been done.'

William Shawcross is surely right to observe that the zig-zagging reflects po-

litical calculations. Even if he is being mischievous to suggest that Obama is clumsily learning lessons that came naturally to Bush, it is also fair to wonder what the current president's pragmatism says about his supposed principles. But Shawcross goes further. His own father was Britain's chief prosecutor at Nuremberg in 1945, and the Allied experience of tackling Nazism at that trial has been obscured, he believes, by the confused response of liberals towards Islamist 'forces of darkness'. Nuremberg's judges, he points out, did not preside over regular proceedings – their court was effectively a military tribunal – and his father's generation would have given short shrift to claims that alleged al-Qaeda terrorists deserve the same rights as anyone else. Such evildoers, he implies, are lucky to be given a trial at all; and those left-wing lawyers who nowadays defend their interests are betraying a once-noble calling. Instead of building on their predecessors' 'great victories', they are engaged in 'lawfare', deploying legal skills against the US government 'as an asymmetrical weapon of war'.

Shawcross's perspective – and his belief that traditional rules of war and due process need thorough renovation – is the product of a long political journey. Although famous when young for *Sideshow* (1979), a revelatory critique of US carpet-bombing in Cambodia, he now celebrates the US military as 'the greatest defender of human rights that the world has ever seen'; and the erstwhile gadfly is astonished that a reporter today can win plaudits for challenging the official account of three apparent suicides at Guantanamo. Unsparring though he is of left-wing hyperbole and hypocrisy, he strains to explain the invasion of Iraq and to clarify obfuscations such as 'enhanced interrogation techniques'. Perhaps most disappointingly, he often caricatures the argument that he purports to confront.

Domestic critics of the US executive's creeping national security claims are rarely motivated by a hatred of America or an urge to protect terrorists, as he suggests; their primary concern is that the state is normalising the employment of secret criteria to identify people for detention, intimidation and elimination.

But even if Shawcross sacrifices balance in the interests of polemic, *Justice and the Enemy* constitutes a timely reminder of one of 9/11's most bitter legacies. The United States remains riven over how to accommodate the risk of future atrocities – torn between differing interpretations of its legal traditions and treaty obligations – and Obama, for all his trimming, lacks the capacity to resolve the arguments. Congress has denied him funds to detain and try inmates outside Guantanamo, and the violent questioning of twenty-eight detainees during the Bush presidency has made it all but impossible to stage ordinary trials, even if prosecutors wanted to. Not only would compelled confessions be inadmissible at such trials, but judges would also have to take seriously defence applications for access to the statements of a fellow inmate. The real choice for the administration is consequently whether to release its captives – many of whom are *personae non gratae* in their home countries – or to skew the rules to facilitate their conviction. And barring a politically suicidal decision to resettle prisoners on the American mainland, that means revamped military tribunals.

The upshot is that the War on Terror is destined to contaminate the US body politic for years to come. But whereas many people regard the toxicity as a shame, Shawcross sees no reason to limit the reach of military commissions to Guantanamo detainees. Quite who else they should try is not spelled out – inflammatory preachers and people who give money to terrorist charities are two of Shawcross's tentative suggestions – but the talk of 'forces of darkness' suggests an expansive jurisdiction. Not all the arguments he marshals to back that view are legally sound. He contends that Supreme Court supervision renders objections to the commissions' unfairness 'almost meaningless', apparently assuming – wrongly – that a

flawed procedure's reviewability necessitates its correction. It is also unclear why he is so keen on militarising American justice in the first place, given that about 90 per cent of federal terrorism prosecutions have ended in convictions. But there

is no accounting for punitive taste. And whatever one's political outlook, *Justice and the Enemy* presents its provocative case with some flair. William Shawcross is an eloquent champion of expediency in the name of virtue. With this book, the

prisoner abuse, legal legerdemain and secrecy-shrouded terminations of recent years have found as persuasive a defender as they merit.

To order this book for £14.39, see the *Literary Review* bookshop on page 39

DOUGLAS MURRAY

Votes of Confidence

Of the People, By the People: A New History of Democracy

By Roger Osborne

(The Bodley Head 330pp £20)

Roger Osborne opens his enjoyable and pacy work by saying, 'Let's be clear from the beginning: democracy is humanity's finest achievement ... the avenue by which modern humans can fulfil their need to construct lives of real meaning.' It is a relief not to find another 'rise and fall', 'life and death' or, worst, 'end of' democracy book. Osborne is an admirer of democracy and recognises throughout that whatever its imperfections it remains the only system of governance which allows individuals to 'flourish ... while existing as part of a community.'

The story starts, naturally, in Athens, with a fine, brief summary of the evolution of a system that, though very different from contemporary suffrage, started the process off and provided what remain its core texts. He notes the paradoxes the Greeks recognised from the start, such as that, as Cleisthenes acknowledged, if things are to remain the same, things have to change.

Nevertheless it is striking to be reminded of the differences, not least the discipline the Athenians showed. When in 480 BC, ten years after the previous confrontation, the Persian fleet headed to Athens, the population, by unanimous agreement, abandoned the city and retreated to Salamis. Their city was destroyed, but the Athenian fleet lured Xerxes's ships to the straits of Salamis and destroyed them, at which point the Athenians returned to their city and rebuilt it. You won't find discipline like that in the age of Twitter.

Medieval Scandinavia saw the emer-

gence of 'things', or 'dings', or 'tings', which we can identify as precursors of modern parliaments. But Osborne avoids Whiggish interpretations: 'we should not brush aside too easily the crucial divide between those who were represented and those who were not. It is too easy to assume a beneficial progression that begins with medieval representation and ends with modern democracy.' In medieval Europe only the higher echelons of society qualified to vote; as Osborne points out, 'representation, which ought to be a development towards democracy, can turn out to be a substitute, a halfway measure that is used to prevent the further involvement of the population'.

Through medieval Europe's towns and city republics, the burgher-citizens and developments in the Alps, Osborne moves towards the English Revolution. He offers a slick chapter each on the growth of democracy in America and the revolutions in France. Considering the ease with which people talk of the

transitions of democracies today, it is always worth being reminded of how many attempts it took, and at what costs, for the French to arrive at a solution to their problems that did not involve lynching.

The narrative really picks up when he gets to the twentieth century. For it was at the moment when the advance of democracy seemed almost inevitable that the system encountered its most serious challenges. As Osborne soberly reminds us, around the period of the Weimar collapse, democracy survived 'only in Ireland, Britain, Finland (intermittently), Sweden and Switzerland, while in the Americas only the United States, Canada, Costa Rica, Colombia and Uruguay continued as functioning democracies'.

Yet having provided a hitherto enviably unarguable account, Osborne suddenly stumbles over a major issue. Good on the threat to democracy from fascism, he appears curiously underwhelmed by that posed by communism. For instance, referring to the post-Second World War era he writes: 'Western European communist parties generally claimed to be in favour of democracy, but despite this the advance of communism was seen by the US and Britain as a major threat.' Really?

Elsewhere American governments are themselves blamed for regarding Cold War communism as a threat. We are told that the survival of fascist rule in Spain and Portugal decades into the Cold War 'was undoubtedly helped by the tolerance of the United States, which was more interested in combating communism than promoting democracy'. But surely it is possible to see that the survival in power of Franco in Spain and Salazar in Portugal may – for the most part – have had nothing to do with the United States and, furthermore, that the destruction of communism was not only a desirable but a necessary priority for the world's democratic superpower? Osborne appears to

