

THE OBAMA ADMINISTRATION AND THE WAR ON TERROR

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Last year I expressed the hope that the incoming Obama Administration would take a good look at what the Bush Administration had done in good faith to keep the United States safe.¹ My hope was that the Obama Administration would find those measures both lawful and effective and would, by and large, keep in place the programs and policies that had succeeded in protecting this country since the September 11 attacks. I now seek to examine a few of those programs, policies, and issues to see to what extent the hope that I expressed last year was realized.

The first category of policies has to do with intelligence-gathering. Although there was recently an incipient move in Congress to repeal the authorities granted under the Foreign Intelligence Surveillance Act (FISA) amendments passed in 2008, that effort appears to have been beaten back.² Intelligence-gathering authorities have remained in place. I cannot speak to the implementation of these authorities because I am no longer privy to that information, and even if I were, considerations of security would not permit me to discuss such issues publicly.

Based on a first-hand report, however, foreign security officials, after meeting with an American counterterrorism official,

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1. Michael B. Mukasey, *National Security and the Rule of Law*, 32 HARV. J.L. & PUB. POL'Y 831 (2009).

2. See Charlie Savage, *Battle Looms Over the Patriot Act*, N.Y. TIMES, Sept. 20, 2009, at A21 (discussing efforts by Senators Russ Feingold and Richard Durbin, among others, to repeal various provisions of the FISA). A bill to repeal certain FISA provisions is currently still in committee. See FISA Amendments Act of 2009, H.R. 3846, 111th Cong. (2009). The status of the bill is available at Govtrack.us, H.R. 3846: FISA Amendments Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=h111-3846> (last visited Apr. 5, 2010).

described the Swift System—the current procedure for tracing international money transfers—as the same as the system that had been in place under the previous Administration.³ The U.S. official who was present agreed and remarked that “this is *continuity* you can believe in.”⁴

The same appears to be true, at least for the moment, for procedures that the Department of Justice put in place to allow FBI intelligence-gathering to continue and to be subsumed into its existing crime-solving functions. We put those procedures into effect in December 2008,⁵ after well over a year of consideration and review. Despite pressures to roll back those procedures, the Department of Justice has, at least for the moment, indicated that it intends to allow them to remain for a reasonable time before making any changes.⁶ All in all, this result is encouraging, if not surprising.

Finally, the Obama Administration has said that it will continue to recognize the state secrets privilege when litigation threatens to disclose national security information, and that it will bring such litigation to an end even when the government is not a party to it.⁷ The Administration professes to have a somewhat narrower view of that privilege than we did,⁸ but nonetheless at least recognizes it.

In contrast, the record is less encouraging when it comes to dealing with detainees and with those in the government who have been involved in intelligence-gathering. The Obama Administration has made many changes with respect to policies

3. See C. Boyden Gray, *Comparing U.S. and EU policy in the Obama age*, WASH. TIMES, Oct. 15, 2009, at A4 (recounting a meeting between American and EU counterterrorism officials); Sheryl Gay Stolberg & Eric Lichtblau, *Cheney Assails Press on Report on Bank Data*, N.Y. TIMES, June 24, 2006, at A1 (former Vice President Dick Cheney describing the Swift System as “absolutely essential”).

4. Gray, *supra* note 3 (emphasis added) (quoting the American official).

5. Press Release, Dep’t of Justice, Fact Sheet: Attorney General Consolidated Guidelines for FBI Domestic Operations (Oct. 3, 2008), available at <http://www.justice.gov/opa/pr/2008/October/08-ag-889.html>.

6. See Nat Hentoff, Op-Ed., *Bill of Rights: Mark it uncollectable? Obama administration continues Bush marginalizing of Constitution*, WASH. TIMES, Feb. 23, 2009, at A23.

7. See Editorial, *An Incomplete State Secrets Fix*, N.Y. TIMES, Sept. 29, 2009, at A38 (noting that the Obama Administration had “essentially embraced the Bush approach” to the state secrets privilege).

8. See Adam Liptak, *Obama Administration Weighs In on State Secrets, Raising Concern on the Left*, N.Y. TIMES, Aug. 4, 2009, at A11; John Schwartz, *Obama Backs Off A Reversal On Secrets*, N.Y. TIMES, Feb. 10, 2009, at A12.

regarding the detention and apprehension of prisoners on the battlefield, obtaining intelligence from those who may be in possession of it, the prosecution of those who can be charged with war crimes, and the detention of other enemy combatants, who may target civilians, who do not wear uniforms or follow any recognized chain of command, and who therefore could be detained at a minimum as unlawful combatants and are much too dangerous to release.

Here again, the Obama Administration's plan seems to abandon the view that we are involved in a war and that we ought to employ procedures appropriate to a war, which is the view that the Bush Administration had adopted after September 11. Instead, the current Administration's plan is to revert to a criminal justice model of the sort that prevailed in the 1990s, when the United States witnessed the first World Trade Center bombing in 1993,⁹ the bombing of our armed forces facility at Khobar Towers in Saudi Arabia,¹⁰ the attack on the U.S.S. *Cole* that killed 17 sailors,¹¹ the attempted attack on the U.S.S. *The Sullivans* that would have succeeded had the boat carrying the explosives not sunk,¹² the bombing of American embassies in Kenya and Tanzania,¹³ and eventually the attack on September 11, 2001 that killed almost three thousand people.

This policy change follows the Obama Administration's sweeping proclamations in January 2009 that implicitly suggested that the prior Administration had sanctioned torture and had been bent on detaining combatants at Guantanamo without proper treatment or access to legal proceedings.¹⁴ The

9. See *Jury Selection Begins in Trade Center Trial*, N.Y. TIMES, July 16, 1997, at B2.

10. See David Johnston, *14 Indicted By U.S. in '96 Saudi Blast; Iran Link Is Cited*, N.Y. TIMES, June 22, 2001, at A1.

11. See Josh White, *Charges Are Filed In Cole Bombing; Alleged Planner Could Face Trial*, WASH. POST, July 1, 2008, at A3.

12. See FED. BUREAU OF INVESTIGATION, TERRORISM 2000/2001, at 8 (2002), available at http://www.fbi.gov/publications/terror/terror2000_2001.pdf. Both the successful attack on U.S.S. *Cole* and the unsuccessful attack on U.S.S. *The Sullivans* were orchestrated by Abd al-Rahim al-Nashiri. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT, 152-53 (2004).

13. Benjamin Weiser, *Embassy Bombers Sentenced*, N.Y. TIMES, Oct. 21, 2001, at A2.

14. See Peter Baker, *Obama's War Over Terror*, N.Y. TIMES, Jan. 17, 2010 (Magazine), at 30; John F. Burns, *Obama Promises the World a Renewed America*, N.Y. TIMES, Jan. 21, 2009, at A24; Mark Mazzetti & William Glaberson, *Obama Will Shut Guantanamo Site and C.I.A. Prisons*, N.Y. TIMES, Jan. 22, 2009, at A1; Mike Mad-

Obama Administration announced boldly that it would abandon harsh interrogation techniques, which were loosely characterized as torture, and close the detention facility at Guantanamo within a year.¹⁵

What has followed has seemed in many instances to be a system in which policy is fashioned to fit antecedent rhetoric rather than a system that develops a policy first with public arguments then formulated in support of it. With respect to past interrogations, because of the implicit suggestion that the prior Administration had sanctioned torture, the Department of Justice successfully pressed the argument that previously classified memoranda describing the limits of coercive questioning should be revealed, along with the legal reasoning underlying how those limits were set.¹⁶ The result is that our enemies are now aware of the precise legal limits on their treatment if captured. Our enemies can now train accordingly to prepare for the specific interrogation methods they are likely to face.

During the 2008 campaign, President Obama dismissed the suggestion that we should read Miranda warnings to those captured on the battlefield.¹⁷ But the armed forces have been directed to provide such warnings to those captured in Afghanistan.¹⁸ In addition, cases involving claims that CIA personnel acted unlawfully in the course of interrogating prisoners were reviewed by career prosecutors in the Justice Department and found insufficient to justify prosecution,¹⁹ except for one case against a contractor that was successfully prosecuted.²⁰ The subjects of those investigations were notified of their exoneration, but the cases are now being reviewed for possible prose-

den, *Obama pushes back on torture, terror*, SALON.COM, May 21, 2009, http://www.salon.com/politics/war_room/2009/05/21/obama_speech/index.html.

15. See Baker, *supra* note 14.

16. See Mark Mazzetti & Scott Shane, *Memos Spell Out Brutal C.I.A. Mode of Interrogation*, N.Y. TIMES, Apr. 17, 2009, at A1.

17. Posting of Peter Slevin to The Trail, <http://voices.washingtonpost.com/44> (Sept. 8, 2008, 22:09 EDT).

18. Posting of Stephen F. Hayes to WeeklyStandard.com, <http://www.weeklystandard.com/weblogs/TWSEFP> (June 10, 2009, 14:05 EDT).

19. See David Johnston, *For Holder, Tough Choice on Interrogation Inquiry*, N.Y. TIMES, July 22, 2009, at A15.

20. See Carrie Johnson, Jerry Markon & Julie Tate, *Inquiry Into CIA Practices Narrows; Ex-Agency Directors Urge Administration To Drop Investigation*, WASH. POST, Sept. 19, 2009, at A1.

cution again.²¹ There is no claim that new facts have been discovered. Even worse, the Attorney General, who directed that the second review take place, did not read the memoranda that were drafted after the first review and that explained why the decision not to prosecute was made.²² This process is indefensible.

Most recently, the Obama Administration has announced that it may bring several detainees to this country for trial in a civilian court, including Khalid Sheikh Mohammed and Ramzi Binalshibh, the architect and principal operative of the September 11 attacks on this country.²³ The Administration also intends to try another group, headed by Abd al-Rahim al-Nashiri, before a military commission in a place not yet disclosed.²⁴ Bringing these detainees to the United States would be a decision that I consider not only unwise but also based on the Administration's refusal to understand that we are involved in a war with people who follow a religious ideology to kill Americans.²⁵ The decision would return instead to the mindset that prevailed before September 11: that acts like the first World Trade Center bombing, the bombing of American embassies in Kenya and Tanzania, and other such instances of terrorism can and should be treated as conventional crimes and tried in conventional courts.

History offers valuable lessons against this mindset. In 1942, two groups of German soldiers landed off of Long Island and Florida with the intent to commit sabotage.²⁶ Interestingly, notwithstanding that the landing is the most vulnerable part of such an operation, they landed in uniform, and then buried their uniforms on the beach.²⁷ They did so because they knew that if they were apprehended at that point, they could claim POW status because they were in uniform and followed a recognized chain of command, and they therefore could argue

21. *See id.*

22. *See id.*

23. Charlie Savage, *White House Postpones Picking Site of 9/11 Trial*, N.Y. TIMES, Mar. 6, 2010, at A13.

24. Charlie Savage, *Cole Attack Trial Will Test Tribunal System*, N.Y. TIMES, Dec. 1, 2009, at A16.

25. *See* Dale C. Eikmeier, *Qutbism: An Ideology of Islamic-Fascism*, PARAMETERS: U.S. ARMY WAR C. Q. 85, 85–86, 92 (2007).

26. *Ex Parte Quirin*, 317 U.S. 1, 21 (1942).

27. *Id.*

that they should be detained, rather than executed.²⁸ As it happens, when the group of soldiers was picked up, they were in civilian clothes, and they were tried on direct order of President Roosevelt before a military commission sitting in the United States, and convicted.²⁹ The Supreme Court's opinion in the case, *Ex Parte Quirin*, was issued after the saboteurs were already dead.³⁰

President Bush attempted by military order to authorize military commissions to try terrorists such as Khalid Sheikh Mohammed.³¹ Soon after, the Supreme Court said he could not do so absent congressional authorization.³² Congress then passed the Military Commissions Act to provide that authorization.³³ Thus, the military commissions are fully authorized by law and indeed the trials were to have already begun. Khalid Sheikh Mohammed and others even attempted to plead guilty and to achieve their martyr's reward during one of their appearances before the military tribunal that was supposed to have begun to try them.³⁴

Now, however, that procedure may be short-circuited—actually, long-circuited would be more accurate—so that the terrorists can be brought to this country and tried in a civilian court.³⁵ We should all be aware that those cases, which were scheduled already to have begun, may now have to start from scratch with the filing of indictments, customary motions, and the like.

We do not know whether Khalid Sheikh Mohammed will demand in civilian court that he be permitted to plead guilty to what he has already boasted on several occasions that he did,

28. See *id.* at 22 (explaining that the German High Command had instructed them to wear their uniforms while landing in the United States).

29. See 7 Fed. Reg. 5103 (July 7, 1942).

30. See Chad DeVeaux, *Rationalizing The Constitution: The Military Commissions Act and The Dubious Legacy of Ex Parte Quirin*, 42 AKRON L. REV. 13, 60 (2009).

31. Military Order of Nov. 13, 2001, 3 C.F.R. 918 (2002).

32. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

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

34. See William Glaberson, *5 Charged in 9/11 Attacks Seek to Plead Guilty*, N.Y. TIMES, Dec. 9, 2008, at A1.

35. See Savage, *supra* note 23.

including during an interview with Al Jazeera.³⁶ But if not, he can avail himself of the full array of procedural steps, including discovery and public presentation of evidence, that can turn a criminal proceeding into both a cornucopia of information for those still at large and a circus for those in custody.³⁷ As in other cases, there is no claim that new facts have been discovered. The Zacarias Moussaoui case—that case of the so-called twentieth hijacker in which the defendant pleaded guilty—lasted for over four years from beginning to end with the defendant acting out and using the courtroom as a forum for his views.³⁸ And, again, the defendant pleaded guilty in that case.³⁹

The tribunal and the facility at Guantanamo were organized with the explicit purpose of handling trials involving classified information and of presenting that evidence in controlled circumstances. They were also intended to be governed by rules of evidence whose touchstone for admissibility is simply relevance and apparent reliability, rather than conformity to all the technical rigors of the Federal Rules of Evidence. Unlike the case of Ahmed Khalfan Ghailani, who was recently brought to the United States from Guantanamo to stand trial for the embassy bombings,⁴⁰ the cases against defendants like Khalid Sheikh Mohammed were not investigated, nor was evidence gathered, on the assumption that they would be presented in a federal court with evidence and witnesses secured in the manner that they have to be secured for presentation in a federal court.⁴¹

That is only a hint of the difficulties presented by the decision to try terrorists in civilian courts, and it does not even touch on the security risks of trying to confine and try such high-profile prisoners, requiring security for the courthouses and jails involved, security for the judge and jurors involved,

36. Yosri Fouda, *We are leaving the nuclear targets—for now—The masterminds of Holy Tuesday—September 11—frankly describe their lives as professional terrorists*, GUARDIAN, Mar. 4, 2003, at 17.

37. See Neil Lewis, *Judge Ejects 9/11 Suspect After Outburst*, N.Y. TIMES, Feb. 15, 2006, at A20 (describing the courtroom outburst of Zacarias Moussaoui).

38. See Neil Lewis, *One Last Appearance, and Outburst, From Moussaoui*, N.Y. TIMES, May 5, 2006, at A21.

39. Neil Lewis, *Moussaoui's Move to Recant Guilty Plea Is Denied*, N.Y. TIMES, May 9, 2006, at A18.

40. William Glaberson, *Detainee to Be Transferred to U.S. for Trial*, N.Y. TIMES, May 22, 2009, at A16.

41. See Evan Perez, *Alleged 9/11 Plotters Face Trial*, WALL ST. J., Nov. 14, 2009, at A1.

and the like.⁴² The question is not whether they are going to escape; the Manhattan Correctional Center is a very secure place. They are not going to escape, but the question is not whether they are going to escape. The question is whether not only that particular facility, but also the city at large, will become the focus for mischief by adherents of Khalid Sheikh Mohammed. I would suggest that a civilian trial in New York City substantially raises the odds of such violence occurring. The question is also whether the proceeding—even assuming that it goes forward within our lifetime—is one where confidential information can be kept confidential, and where a trial can proceed in an orderly fashion.

When these detainees are held in civilian prisons, they are a threat there as well. Each of these people would be a totemic figure in a prison, so we must either keep such prisoners in solitary confinement or otherwise prevent their exposure to other prisoners. An example of the danger is Richard Reid, a prisoner currently held in Florence, Colorado.⁴³ He was in solitary confinement and challenged what are called the special administrative measures that had kept him there.⁴⁴ The Administration eventually capitulated to Reid's demands, and the special administrative procedures were dropped.⁴⁵ The same outcome is possible for any terrorists held in civilian prisons.

Trials, moreover, always involve risk. The Speedy Trial Act, which may apply to Ghailani,⁴⁶ will interfere to some extent. The period of time provided for the pretrial period in the Speedy Trial Act is seventy days, less excludable time.⁴⁷ I cannot say if the remedy here would be outright dismissal or simply permission to the government to bring the charges again because of overriding circumstances. I do not know whether the same will hold true with respect to those who have not yet been indicted in the civilian courts. One could see an argument

42. *See id.*

43. Debra Burlingame, Op-Ed., *Revenge of the 'Shoe Bomber,'* WALL ST. J., July 30, 2009, at 17.

44. *Id.*

45. *Id.*

46. As of April 5, 2010, a motion to dismiss the charges against Ghailani under The Speed Trial Act was pending in the Southern District of New York. *See* Docket, *United States v. Hage*, No. 1:98-cr-01023-LAK-9 (S.D.N.Y. Apr. 5, 2010).

47. Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (codified as amended at 18 U.S.C. § 3161 (2006)).

that says, “We were already charged before a military commission in Guantanamo with that crime. The government cannot charge us and then delay proceedings for years before recharging us in a different forum, so we are entitled to a speedy trial.”

There is a certain pressure in these cases that tends to distort rules when the stakes are high. If those pressures are brought to bear here, the law that is created is going to be a law that is applicable straight across the board—in all criminal cases—and it could do a lot of damage. Once the rules are created, it is nearly impossible to confine those rules solely to terrorist cases. Using military commissions would protect against this danger.

The possible move to civilian trials appears to have resulted simply from a commitment to close Guantanamo within a year⁴⁸ along with a desire to exceed what the law requires to show the world that we can do not only what the law requires but more. That a military trial at Guantanamo—a facility that I have visited and that is actually less harsh than most medium-security facilities in this country and nowhere near as harsh as maximum-security facilities—might actually be seen by the American public and the rest of the world as both fair and successful appears not to have occurred to anyone in authority.

In *The Terror Presidency*, Jack Goldsmith, who directed the Office of Legal Counsel, describes what he calls cycles of aggression and timidity that have beset the intelligence community, beginning with Watergate and including the Church Committee hearings, the pullback and resulting criticism of excessive timidity during the Cold War, Iran-Contra, another period of pullback and demoralization, and criticism after the September 11 attacks of the failure to be sufficiently aggressive and to both collect and connect the proverbial dots.⁴⁹ We now appear to be in a cycle where the pendulum has swung yet again in the other direction. Such a willingness to disclose the limits of how we gather intelligence adds to the risk that defendants will turn legal processes into a source of intelligence for themselves and into a forum for expressing their views.

If I thought that I, my family, or my fellow citizens had three lives to live, I suppose I could be persuaded that we should live

48. See Exec. Order No. 13,492, 74 Fed. Reg. 16 (Jan. 22, 2009).

49. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 163–64 (2007).

one of them as a social experiment to see whether the result here is one with which we would want to live. But we do not have three lives. It would take much more credulousness than I have available to be optimistic about the outcome of this latest experiment.