DISCUSSIONS FROM A FORMER CHIEF LEGAL OFFICER OF THE C.I.A.

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This is the second national security forum I've done here. Last year, some of us were in Toledo for a similar session, my friend Josh [Dratel] and others, and I've done a lot of speaking in various forums. The title of this forum was to look at various alternative forums for 9/11 prosecutions, so let me just briefly cover that. Actually this may surprise some of you or may alarm some of you and cause you to rethink your positions, but I think that, based on all the experience and observations that I have had over the years, Article III courts are, for the Agency and for the intelligence community, the optimum mode of proceeding.[1] While I was there, and certainly while I was in charge of the office, we never took a position with the Justice Department, the Defense Department, and the White House about what we wanted to do with our cases involving former CIA detainees. I figured that was a policy call and the powers that be would decide. Our overarching concern whenever we get involved in prosecutions in whatever form is the protection of intelligence sources and methods. And in that regard, our history—our experience with Article III courts—has actually been quite good. We have had for the last twenty years something called the Classified Information Procedures Act, CIPA for short.[2] It's been in effect to govern the admission of classified information in criminal trials,[3] and it has worked very well. I cannot think of any major CIA secret that has leaked out in any of these CIPA cases. Moreover, we have dealt with a series of lifetime, experienced judges on national security and terrorism cases. And because of the nature of the crime, they tend to be in New York, Virginia, and Washington, DC. These are all, as I said, experienced judges, familiar with classified information, and familiar with us. They are not pushovers, but they know what they are doing and they have a track record. We have also dealt with, over the years, very experienced, dedicated federal prosecutors, Mr. McCarthy being a prime example of that. Again they are very comfortable, very used to national

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1. Geneva Convention Relative to the Treatment of the Prisoners of War, art. 3, Aug 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

2. 18 U.S.C.A. App 3.

3. *Id.*

security cases. We have grown comfortable with them, and hopefully they have grown comfortable with us. And Andy [McCarthy] is right as well that, with respect to these 9/11 cases, foreign governments, as I have experienced, are much more comfortable and much more willing to share some of their information with the U.S. government in an Article III proceeding, rather than in military commission proceedings.[4] So for all those reasons, I'm an Article III guy.

On the military commissions, it never really got off the ground. I was involved in everything post 9/11 until I left in 2009. Looking back to some of those early years, I will say that the Bush Administration dropped the ball on creating and agreeing on processes for the military commissions.[5] It just dragged on and on, and then inevitably the court cases started interceding and frankly the whole military commission process never had a chance. If there had been a track record by now on military commissions cases, I think I would feel a lot better about them, but at least to me it still remains a crap shoot. We have our experiences, as Andy [McCarthy] said, with military commission judges who are dedicated officers, but simply do not have the experiences and, in some cases, the throw weight of federal judges. The same holds true for military prosecutors. And finally, the level of sophistication in the handling of classified information in those military tribunals has been uneven at best. It is true that the rules are somewhat more relaxed in the admission of classified information but, to tell you the truth, we have always operated under the assumption that anything that we provided there would have to pass severe hurdles before it could be introduced. Not just information acquired from detainees while under our enhanced interrogation techniques of years ago, but *any* classified information. So military commissions, for a number of reasons, just never came to be.

One of the reasons I love to come to these talks is to listen to all the speakers' different perspectives and, most of all, the questions and the comments from the audience. So that's why I'm going to be brief here. With respect to the Obama Administration decision, I think, frankly, the President—as I said I was chief legal officer six months into the Obama Administration—I think that his advisors did him a great disservice by recommending that he sign that executive order closing Gitmo in a year.[6] He signed the executive order I think two days into his presidency.[7] To tell you the truth, there was no way that Gitmo was going to be closed within a year, and they were certainly briefed, they certainly knew what

4. Geneva Convention Relative to the Treatment of Prisoners, *supra* note 1.
5. *See* 16 U.S.C.A. § 9486.
6. Exec. Order No. 13492, 74 Fed. Reg. 4897 (2009).
7. *Id.*

the problems were. To this day I do not entirely understand why they went ahead and put him out on that limb the way they did. And now he has had to walk back from it and I do not think that he was particularly well served. I also do not think he was well served by his Attorney General on this dithering about KSM,[8] about whether we are going to try him in a military tribunal at Gitmo, or whether we are going to try him in New York.[9] Apparently he never did any homework about asking anybody before making that announcement, now he had to do this moonwalk.[10] He is still thinking about where he is going to be tried. I do not think that anybody now questions the fact that there was no way that KSM was going to be tried in New York, it's just a reality.[11] So again, I think early on, the President did not get the best tactical legal advice from his incoming team.

One final point on the new administration, various speakers have already alluded to this. Again I find this interesting and perhaps insightful: It surprised me how much the Obama Administration has continued the policies of the Bush Administration.[12] You take away the interrogation program, and the CIA is out of the interrogation business, and thank God for that; it has done terrible damage to the Agency as an institution and I doubt the CIA will ever get back into it, even if there's another attack. So that was out; no more waterboarding, all of that's gone. President Obama made that clear in his campaign and he did it. However, as many who read the newspapers can tell, the Obama Administration has not only continued, but has significantly stepped up the lethal operations—killing terrorists.[13] I was at a talk at the ABA a couple of months ago, and I made the point that if we had pumped 183 bullets into KSM, that wouldn't have caused a hassle; but because we waterboarded him 183 times, there was all this opprobrium. But the Obama Administration has doubled down on the lethal operations and, up until recently, perhaps the ACLU will contest this, but everyone knew

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8. Khalid Sheikh Mohammad, the self-proclaimed mastermind of the 9/11 terrorist attacks. As of April 4, 2011, Mohammad was to be tried by a military commission at Gitmo. *See* Stephanie Condon, *KMS to be tried by Military Commission at Gitmo*, CBSNEWS.COM (Apr. 4, 2011), http://www.cbsnews.com/8301-503544_162-20050405-503544.html.

9. *See* Charlie Savage, *Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 5, 2011, at A1.

10. *Id.*

11. *Id.*

12. David Johnston, *U.S. Says Rendition to Continue, But With More Oversight*, N.Y. TIMES (Aug. 24, 2009), *available at* http://www.nytimes.com/2009/08/25/us/politics/25rendition.html.

13. *Id.*

that these operations had been going on for the last eight or nine years. I do not recall any great public outcry about the legality or morality of stalking and killing specific targets, which is what this is. So I just find that ironic.

In my early talks during the transitions with the Obama people, they made it clear that in that new executive order they were writing (there were actually two orders: one closed Gitmo and one terminated the interrogation program), they made it clear that they wanted to keep the option open to perform renditions. Renditions, as you probably know, were not invented with the Bush Administration, but they go back at least twenty to twenty-five years. The Obama administration clearly wanted to continue the renditions.

State secrets invocation—now that was fascinating to me. Shortly after the President came on the campaign, he said that he was going to review all these uses of the state secrets privilege over the years of the Bush Administration; the implication being that it had been abused and used excessively to cover up wrongdoing. Not all, but a lot of these frankly were based on CIA equity, these state secret declarations (not the NSA programs but a few of the others). So Greg Craig asked me to be on a task force with the Justice Department to review all of these cases. The DOJ was headed by Don Verrilli, who I see was just recently nominated to be Solicitor General. He went through all of these cases, including the NSA case. And he went through every single one: the background, the justification. They sustained every single invocation of the state secret privilege that the Bush Administration had made, and endorsed every single one, which surprised me. So I guess what I'm saying in conclusion, "plus ça change plus les choses restent les memes;"[14] and you can take whatever lesson you choose to take. I've enjoyed all this, thank you.

14. The more that changes, the more it's the same thing. *Plus ça change, plus c'est la même chose*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/plus+%C3%A7a+change%2C+plus+c%27est+la+m%C3%AAme+chose?show=0&t=1319243499 (last visited Oct. 21, 2011).