

CHANGE VERSUS CONTINUITY AT OBAMA'S CIA[†]

*A. John Radsan**

Sweeping change is necessary at the Central Intelligence Agency (“CIA”). During President Barack Obama’s transition into office, change should go deeper than usual between administrations. To restore the trust of the American people and to regain the confidence of the international community, the CIA needs to do better.

These comments might make me sound like a reformer, and you may wonder if I am a Democrat or a Republican. It does not matter, because this applies across the parties. Deeper change is necessary within the CIA offices of the Director, General Counsel, and Inspector General. The CIA has failed the American people and created a perception that security has come at the expense of fundamental rights. As a justice of the Supreme Court of Israel said, “Sometimes, a democracy must fight with one hand tied behind its back.”¹ That is what makes the United States better than the people it is up against.

I will outline three areas for legislative change relating to my former employer, the CIA. The first proposal is to have a national security court for the trials of terrorists. The second is to permit the CIA to continue to have an exception to pursue aggressive interrogations with a lot of oversight and checks. The third is to continue the process of rendition or the transfer of suspected terrorists with more oversight and checks.

I. PROPOSAL FOR A NATIONAL SECURITY COURT

The first proposal is the creation of a national security court to deal with the trials of suspected terrorists. By a national security court, I mean something different from the criminal justice system—the Article

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^{*} Associate Professor of Law, William Mitchell College of Law. Mr. Radsan was Assistant General Counsel at the CIA from 2002–2004.

¹ Aharon Barak, President (Chief Justice), Supreme Court of Isr., Keynote Address to the Brandeis Univ. Class of 2003 (May 18, 2003), http://my.brandeis.edu/news/item?news_item_id=101585 (discussing the importance of law and individual rights even while fighting a war).

III courts that were used in prosecuting Zacarias Moussaoui,² Jose Padilla,³ and the people involved in the first attack on the World Trade Center.⁴ We need something different. I will not go into detail, but I would like to claim some ownership here. There is much writing in this area, and I am part of the group that says terrorism cases cannot all be handled through the criminal courts. I am not necessarily in favor of Guantanamo Bay. I am not in favor of court martial under the Uniform Code of Military Justice (“UCMJ”) for suspected terrorists.⁵ Instead, we need a national security court that blends what works in the criminal justice system with adjustments that take into consideration this new threat.

I differ from the Bush Administration because I think it was a profound mistake to try to create a new type of court by executive order based solely on the President’s prerogative.⁶ Instead, Congress should sort out the intricacies through congressional hearings and then pass a statute for special trials that protect the intelligence community’s sources and methods. I am spreading the blame, but it is fair to say that Congress has let the United States down. Congress has not done enough to think through these difficult issues—in the seven years since September 11, 2001, there is still no consensus on what the legal framework is going to be for dealing with terrorism cases.⁷

During the last presidential campaign, the media let the American people down. I understand the importance of energy security and economic security—these are also important issues—but the media would have served the American people well by simply asking the candidates whether they were for a national security court.

The idea of a national security court is fashionable now. It has some proponents, including one who formerly wrote for *The Washington Post*,⁸ and other professors.⁹ Commander Glenn Sulmasy was probably one of

² See *United States v. Moussaoui*, 483 F.3d 220, 223 & n.1, 224 (4th Cir. 2007).

³ *Rumsfeld v. Padilla*, 542 U.S. 426, 430–31 (2004). Padilla was first held in the criminal justice system, transferred to military custody, and then transferred back to the criminal justice system for trial in Miami, Florida.

⁴ See *United States v. Salameh*, 856 F. Supp. 781, 782 (S.D.N.Y. 1994) (listing individuals convicted for World Trade Center bombing).

⁵ Uniform Code of Military Justice, 10 U.S.C. § 816 (2006).

⁶ See *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror* § 4, 66 Fed. Reg. 57,833, 57,834–35 (Nov. 13, 2001).

⁷ See *Boumediene v. Bush*, 128 S. Ct. 2229, 2240–42, 2277 (2008) (discussing the varied attempts the U.S. government has undertaken to bring detainees to justice and concluding that “the law . . . is a matter yet to be determined” for detainee cases).

⁸ *Workable Terrorism Trials: A Special Federal Court Could Balance Fundamental Rights and National Security Needs*, WASH. POST, July 27, 2008, at B6.

⁹ Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19.

the first to publicly advocate for a national security court.¹⁰ I also wrote on the topic at length in the *National Law Journal*¹¹ and *Temple Law Review*.¹² I have consistently supported the idea of a national security court.

The national security court should be modeled after something like the FISA Court to review who goes into the program and to ensure compliance with the rules.¹³ The Inspector General of the CIA, the General Counsel of the CIA, and the oversight committees should not be blindly trusted to monitor secret proceedings. Instead, another branch of government or its representative should monitor this program.

II. INTERROGATION REFORM FOR THE CIA

The second area I propose for legislative change is a special set of rules for the CIA. Should the CIA use interrogation tactics that differ from what Federal Bureau of Investigation agents can use in the criminal justice system or from the rules that investigators for the Department of Defense can use under the Army Field Manual? The CIA should be able to use different tactics, I say, subject to some checks and controls in the proposed legislation.

To review the current legal markers of what covers interrogation, you may refer to the U.S. Constitution. But you can also look at the Military Commissions Act¹⁴ ("MCA"). Congress passed the MCA in response to the *Hamdan v. Rumsfeld* decision, which held that the President's military commissions in Guantanamo were illegal because they did not comply with Common Article 3 of the Geneva Conventions as incorporated through the UCMJ.¹⁵ The MCA amended the War Crimes Act, permitting the President discretion to decide what tactics would be consistent with Common Article 3.¹⁶ As a result, President Bush issued a secret executive order.¹⁷ The Bush Administration operated in an intermediate zone of tactics beyond what the criminal

¹⁰ Glenn Sulmasy, Op-Ed., *The National Security Court: A Natural Evolution*, JURIST, May 10, 2006, <http://jurist.law.pitt.edu/forumy/2006/05/national-security-court-natural.php>.

¹¹ A. John Radsan, Op-Ed., *Unfinished Business*, NAT'L L.J., July 24, 2006, at 30.

¹² A. John Radsan, *A Better Model for Interrogating High-Level Terrorists*, 79 TEMP. L. REV. 1227, 1233, 1244–46, 1288 (2006).

¹³ Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1811 (2000 & Supp. III 2004). The FISA Court, also known as the Foreign Intelligence Surveillance Court, was established to deal with matters of electronic surveillance. *Id.*

¹⁴ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

¹⁵ 548 U.S. 557, 567, 635 (2006).

¹⁶ Military Commissions Act of 2006 sec. 6(a)–(b), 120 Stat. at 2632–35 (codified as amended in 18 U.S.C. § 2441 (2006)).

¹⁷ See John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26, 31.

justice system would permit for a crime suspect, while insisting its actions did not fall within the definition of torture.¹⁸ I agree with Elisa Massimino that an interrogation tactic such as waterboarding is torture;¹⁹ but I think we disagree on what tactics we are willing to permit the CIA to use, as matters of law and policy.

When I think about aggressive interrogation, I have Khalid Sheikh Mohammed in mind.²⁰ When he was captured in March of 2003, in what was thought to be a joint operation between Pakistani intelligence agencies and the CIA,²¹ President Bush had to decide whether to allow Khalid Sheikh Mohammed access to the criminal justice system and all it entails. This would include access to a lawyer, an obligation to appear before the nearest available magistrate, and the beginning of the criminal process. Access to a lawyer would almost inevitably result in advice not to talk to the government unless Khalid Sheikh Mohammed received a plea agreement in exchange. It is unlikely, however, that President Bush would have been able to plea bargain with Khalid Sheikh Mohammed.

In 2003, Americans had a heightened sense of urgency—a sense of fear that there may be more attacks on the United States. President Bush made a decision that we needed to interrogate Khalid Sheikh Mohammed more aggressively than is allowed by the criminal justice system.²² I am not supporting black sites.²³ I am not supporting

¹⁸ See Condoleezza Rice, Sec'y of State, Remarks Upon Her Departure for Europe at Andrews Air Force Base (Dec. 5, 2005), <http://2001-2009.state.gov/secretary/rm/2005/57602.htm>.

¹⁹ Mark Benjamin, *The CIA's Favorite Form of Torture*, SALON.COM, June 7, 2007, http://www.salon.com/news/feature/2007/06/07/sensory_deprivation (quoting Elisa Massimino during a discussion of “what worries human rights advocates” as stating, “People finally came to an understanding of what waterboarding really was, and once that happened, it was no longer sustainable”). Waterboarding is “the technique of strapping a subject to a board with his feet raised and pouring water on his face to produce a sensation of imminent death.” *Id.*

²⁰ Khalid Sheikh Mohammed is a career terrorist and the mastermind of the 9/11 attacks. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 145–47 (2004), <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

²¹ See Erik Eckholm, *Pakistanis Arrest Qaeda Figure Seen as Planner of 9/11*, N.Y. TIMES, Mar. 2, 2003, at 1.

²² *Bush Admits to CIA Secret Prisons*, BBC NEWS, Sept. 7, 2006, <http://news.bbc.co.uk/2/hi/americas/5321606.stm> (noting President Bush's view that new questioning has “helped us to take potential mass murderers off the streets before they have a chance to kill”).

²³ Black sites were secret, overseas interrogation centers used predominately by the CIA. CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, ON THE RECORD: U.S. DISCLOSURES ON RENDITION, SECRET DETENTION, AND COERCIVE INTERROGATION 11, 15–16 (2008) (referring to black sites as CIA's “secret facilities,” “secret prisons,” and “covert prisons”), available at <http://www.chrgj.org/projects/docs/ontherecord.pdf>.

waterboarding. But I am carving out the possibility for more aggressive interrogations on someone like Khalid Sheikh Mohammed. As I have previously stated, “As a society, we haven’t figured out what the rough rules are yet There are hardly any rules for illegal enemy combatants. It’s the law of the jungle. And right now we happen to be the strongest animal.”²⁴

What I propose, in order to find some common ground with my opponents in the human rights community, is to incorporate more checks on the CIA while allowing these enhanced tactics to be used on a limited number of people considered to be high-value detainees. In contrast to the view of the Bush Administration, I do not think the actual tactics need to be classified. I understand that the “bad guys” may train against tactics if we announce which techniques are permitted. But the “bad guys” already have some sense of the interrogation techniques currently used.²⁵ Plus, any loss in the value of that intelligence is far outweighed by the gain of transparency, which would help the American public and the world buy into these interrogation efforts to defeat terrorism.

It is a principled debate, but if you believe that the government should limit itself to the criminal justice system in trying terrorists, and we have another attack—which sadly, I think we will—then I hope you will not blame your politicians for not doing what they think should be done to people like Khalid Sheikh Mohammed. Their view of what should be done, sadly, is informed by television programs like *24* rather than helpful programs like this Symposium and the reading of deep, knowledgeable materials about the very important tactics of how to interrogate high-level terrorists.²⁶

Transparency is key. I would publish a list of available tactics. Then there would be no guessing game where it is unclear which tactics are permitted. Is sleep deprivation permitted? Sensory deprivation? Bombarding with music? Imagine listening to Madonna—maybe that would be fine for five or ten minutes. But what if Madonna is played for twenty-four hours, and it is played loudly? These are serious questions that need answers. I understand that these tactics cannot be considered in isolation; it is necessary to talk about the cumulative effect—the long-

²⁴ Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, NEW YORKER, Feb. 14 & 21, 2005, at 106, 123.

²⁵ Greg Jaffe & David S. Cloud, *Investigators Cope with Curbs in Iraq on Interrogation*, WALL ST. J., Aug. 25, 2004, at A3.

²⁶ Dahlia Lithwick, *The Fiction Behind Torture Policy*, NEWSWEEK, Aug. 4, 2008, at 11 (“[T]he star of Fox television’s ‘24,’ Jack Bauer. . . . has his fingerprints all over U.S. interrogation policy. . . . [T]he lawyers designing interrogation techniques cited Bauer more frequently than the Constitution.”); Evan Thomas, *‘24’ Versus the Real World*, NEWSWEEK, Sept. 20, 2006, <http://www.newsweek.com/id/45788> (discussing the impact that the FOX Network television show *24* has had on the views of Americans toward torture).

term effect on both the person being interrogated and the interrogator. But the law deals with difficult issues. This is one more difficult issue that needs to be sorted out.

Strict limits should be put on the number of people that can be subject to these interrogation tactics. Legislation should build in a low number that binds the President for this special program. This number could be classified, but the President could be required to designate in advance those people who, if captured, the government would like to use enhanced interrogation tactics against. I think most Americans would agree that in February of 2003, Khalid Sheikh Mohammed would have been on that list.

Flowing from my idea of a national security court, I say defense counsel should not be present during the beginning of the interrogation process. Interrogators should have a one-on-one relationship with the detainees who may have important information that could make us all safer if disclosed. I understand, however, that putting an interrogator in a room without an outside monitor from another agency creates the possibility for abuse. Therefore, it would be sensible to borrow from other systems and incorporate an ombudsman, who should have a security clearance.²⁷ The ombudsman would serve as another check to help keep the process honest. Furthermore, videotaping the interrogations and making sure the tapes are not destroyed create accountability. If people destroy the tapes, they should be accountable for their crimes. This proposal creates a limited exception for the CIA—an exception that allows for necessary interrogation tactics. The government should not authorize invasions of countries based on a tidbit of information that comes out of the detainee's mouth without first comparing and corroborating it with other sources of information. We do, however, want to get the detainee talking.

III. EXTRAORDINARY AND IRREGULAR RENDITION

The third proposal centers around rendition. Extraordinary or irregular rendition must continue. What is rendition? Rendition is the transfer of individuals—in this case suspected terrorists—from one jurisdiction outside the United States to another,²⁸ and may be used to bring someone to trial or gather intelligence.²⁹

²⁷ Other governmental departments have established ombudsmen. *E.g.*, 6 U.S.C. § 272 (2006) (creating ombudsman for the Department of Homeland Security); Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 101, 110 Stat. 1452, 1455–56 (1996) (codified as amended at 26 U.S.C. § 7811 (2006)) (changing title of “ombudsman” to “taxpayer advocate” although responsibilities are quite similar).

²⁸ BLACK'S LAW DICTIONARY 1322 (8th ed. 2004) (defining rendition).

²⁹ Ingrid Detter Frankopan, *Extraordinary Rendition and the Law of War*, 33 N.C. J. INT'L L. & COM. REG. 657, 662 (2008).

What is the alternative? The alternative is to do extradition, a formal process that involves the courts and foreign ministries of the countries involved.³⁰ Why is extradition not possible in all cases? The United States does not have the cooperation of all countries. Why does the United States need to use extraordinary or irregular rendition? There are some “bad guys” and “bad gals” that the United States needs to bring to justice or bring into a situation where information can be gathered.

We are taught, because of the good reporting of Jane Mayer and others, to sneer whenever we hear the word “rendition.”³¹ If the sole purpose of rendition is to transfer someone to another place to torture him, then of course rendition is wrong—no reasonable person can be in favor of that. Rendition for the purpose of torture is off limits. But if you feel yourself being trained to say that rendition is horrible, think of all the people who were held in Guantanamo. The human rights community wants to release many of them, claiming that they are not a threat, that there is no need to hold them, and that Guantanamo is a stain on our reputation.³² The process by which they would be transferred to their home countries or third countries is irregular rendition, as I define it. It is not extradition.

Cases which involve the risk of torture or improper treatment by the receiving country create a need to negotiate. Assurances of fair treatment and proper monitoring reduce the risk of torture. Rendition can work, and the United States needs the ability to transfer suspected terrorists. The United States does not need to use rendition as frequently as it has. We should not outsource to other countries—having other countries interrogate our prisoners in a way that is more aggressive than we ourselves permit. Instead, allowing for enhanced interrogation techniques reduces the temptation to send detainees to other countries with harsher interrogation tactics than U.S. law allows.

Again, my proposals seek to find a middle ground to tie a reformer’s thread with a conservative thread. I would involve the secret court to monitor irregular rendition, and I have moved forward with this idea in

³⁰ See *id.* at 659–61.

³¹ Mayer, *supra* note 24, at 107, 118 (equating the term “rendition” with various forms of abuse); see also Reuel Marc Gerecht, Op-Ed., *Out of Sight*, N.Y. TIMES, Dec. 14, 2008, at 11 (equating “extraordinary rendition” with abuses).

³² See, e.g., *Military Commissions Act and the Continued Use of Guantanamo Bay as a Detention Facility: Hearing Before the H. Comm. on Armed Servs.*, 110th Cong. 112–13, 116–18 (2007) (statement of Elisa Massimino, Washington Director, Human Rights First).

my writing.³³ We have had too many mistakes and too little accountability in the current program. I respect the work of Elisa Massimino and others who are saying that we need checks.³⁴ The human rights community says rendition should be banned,³⁵ but it should consider the case of Adolf Eichmann who was brought to Israel for trial for his war crimes by rendition from Argentina, although Israel did not get Argentina's permission to do so.³⁶ Renditions, in special cases, make sense.

I propose fewer renditions and much better oversight of them with a secret court and a new regime at the CIA in the offices of the Inspector General and the General Counsel. Rendition will continue and should continue. It is not something that was invented by the Bush Administration; renditions were also done in the Clinton Administration.³⁷ What has evolved—from what we can tell in the public record—is that rendition occurs more now for interrogation rather than to bring people to justice. And there have been more renditions after 9/11 than under the Clinton Administration.³⁸

For the CIA, there will be both change and continuity under President Obama. A national security court is a big change that is necessary. By contrast, aggressive interrogations and irregular renditions are tactics that should continue with small changes through new personnel and new controls.

³³ See generally A. John Radsan, *Irregular Rendition's Variation on a Theme by Hamdi*, 33 N.C. J. INT'L L. & COM. REG. 595 (2008); A. John Radsan, *A More Regular Process for Irregular Rendition*, 37 SETON HALL L. REV. 1, 54–56 (2006).

³⁴ Elisa Massimino & Avidan Cover, *While Congress Slept*, HUM. RTS., Winter 2006, at 5, 5, 8–10; Kenneth Roth, *Why the Current Approach to Fighting Terrorism Is Making Us Less Safe*, 41 CREIGHTON L. REV. 579, 592–93 (2008).

³⁵ See AMNESTY INT'L, *BELOW THE RADAR: SECRET FLIGHTS TO TORTURE AND 'DISAPPEARANCE'* 31 (2006), available at <http://www.amnesty.org/en/library/info/AMR51/051/2006> (recommending the ban of renditions unless certain procedures are followed).

³⁶ James Paul Benoit, *The Evolution of Universal Jurisdiction Over War Crimes*, 53 NAVAL L. REV. 259, 273 (2006).

³⁷ Frankopan, *supra* note 29, at 665.

³⁸ *Id.*