John Ensign, Chairman
Pamela Thiessen, Staff Director

347 Russell Senate Office Building
Washington, DC 20510
202-224-2946
http://rpc.senate.gov

U.S. SENATE REPUBLICAN POLICY COMMITTEE

April 29, 2009

100 Days of Obama Counterterrorism Policies

What if We Captured Osama bin Laden Tomorrow?

Executive Summary

- Upon the media celebration of President Obama's first one hundred days in office, it is instructive to review what the United States would, and perhaps more importantly, would not, do upon the capture of Osama bin Laden.

- President Obama's actions seem to make it likely that bin Laden would be brought to a mainland U.S. facility, as the Guantanamo detention facility is likely not an option, and any CIA detention facilities are assuredly not available.

- Bin Laden would not be subject to CIA interrogation, even though such interrogation was instrumental to learning of and disrupting past al Qaeda plots against the homeland.

- He would, however, know that he would only be subject to the interrogation techniques of the Army Field Manual, which is available on the Internet.
    - General Michael Hayden, former CIA Director and career intelligence official, has advised in the past that restricting interrogation of al Qaeda terrorists to only the techniques listed in the Manual "would substantially increase the danger to America."

- When it comes time to bring bin Laden to justice, military commissions are currently not available, and past public trials of terrorists have compromised U.S. intelligence information pertaining to al Qaeda.

- Upon capture, bin Laden would likely demand to talk to his attorney before talking to any interrogators, which seems to be the inevitable outcome of the *Boumediene* Supreme Court case President Obama supported as a presidential candidate, along with the legislative positions he took as a senator.

- In terms of the counterterrorism policies considered here, if bin Laden were captured tomorrow, it seems that it would look the same as if he were captured on September 10, 2001.

Introduction

Upon the media celebration of President Obama's first one hundred days in office, it is instructive to review what the United States would do upon the capture of Osama bin Laden. Given the counterterrorism policy preferences President Obama has expressed during his first three months in office, along with other counterterrorism developments he supported as a senator and presidential candidate, perhaps it is more illustrative to review what the United States would not do.

Could Osama bin Laden be headed to a mainland U.S. facility?

The answer to this question is wholly unclear, more due to the elimination of possibilities of where a captured Osama bin Laden should go. It would seem odd to send him to Guantanamo, since President Obama is closing the facility in nine months.[1] Furthermore, President Obama has directed that the CIA close any detention facilities it may have, and ordered that it never operate such a facility again.[2]

It is clear that bin Laden would not be subject to CIA interrogation, which was instrumental to learning of past al Qaeda plots.

The interrogation memos President Obama just released took note of the CIA's position that "'the intelligence acquired from these [CIA] interrogations have been a key reason why al-Qa'ida has failed to launch a spectacular attack in the West since 11 September 2001,' . . . [and] the CIA believes that it would have been unable to obtain critical information from numerous detainees, including KSM and Abu Zubaydah, without these enhanced techniques."[3] In fact, President Obama's own intelligence advisor stated privately to his colleagues, but not in his public press release, that "high value information came from interrogations in which those [enhanced] methods were used and provided a deeper understanding of the al Qa'ida organization that was attacking this country."

It is equally clear to bin Laden himself the interrogation techniques to which he would be subject—those listed in the publicly available Army Field Manual.

As one of his first acts in office, President Obama ordained that any interrogation of a captured Osama bin Laden would at most be restricted to the techniques listed in the Army Field

[1] Exec Order No. 13,492 ¶ 3, 74 Fed. Reg. 4,897, 4,898 (Jan. 27, 2009) (providing that the "detention facilities at Guantanamo . . . shall be closed . . . no later than 1 year from the date of this order," without providing a plan on where detainees there now, or where any individuals captured between now and the date of closure, are to go).
[2] Exec Order No. 13,491 ¶ 4(a), 74 Fed. Reg. 4,893, 4,894 (Jan. 27, 2009) ("The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future.").
[3] Memorandum for John A. Rizzo, CIA Senior Deputy General Counsel, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, pp. 8-9, dated May 30, 2005 (released Apr. 16, 2009).

Manual, which is available on the Internet.[4] General Michael Hayden, former CIA Director and career intelligence official, has advised in the past that the decision to restrict the interrogation of al Qaeda terrorists to only the techniques listed in the Army Field Manual "would substantially increase the danger to America."[5]

To bring bin Laden to justice, military commissions are currently not available, even though past public trials of terrorists have compromised intelligence information.

On a bipartisan basis, Congress created a military commissions system to use in prosecutions of al Qaeda terrorists for their war crimes in a way consistent with protecting U.S. national security.[6] As one of his first acts in office, President Obama directed a halt to all proceedings in the congressionally-authorized military commissions,[7] despite the fact that, as one of the military commission judges remarked, "Congress passed the Military Commission Act which remains in effect."[8]

Past public trials of terrorists have compromised U.S. intelligence information pertaining to al Qaeda. For example, the 9/11 Commission described how intelligence information was compromised during the prosecution of Omar Abdel Rahman (the Blind Sheikh) for his role in the 1993 World Trade Center bombing. During that case, the government was compelled to turn over to the defense a list of unindicted co-conspirators, as it is in all cases charging conspiracy. That list soon reached Osama bin Laden, which had the "unintended consequence of alerting some al Qaeda members to the U.S. government's interest in them," namely alerting bin Laden "that his connection to that case had been discovered."[9]

Additionally, Judge Mukasey has described how during the Ramzi Yousef trial, "an apparently innocuous bit of testimony in a public courtroom about delivery of a cell phone battery was enough to tip off terrorists still at large that one of their communication links had been compromised." This communication link "had provided enormously valuable intelligence," but the consequence of the public testimony was that the link "was immediately shut down and further [intelligence] information lost."[10]

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[4] Exec. Order No. 13,491 ¶ 3(b) (providing that any individual detained by the United States in any armed conflict shall not be subject to any interrogation technique, approach, or treatment not listed in the Army Field Manual).
[5] General Michael Hayden, Statement of the then CIA Director to the Senate Select Committee on Intelligence hearing on the Annual Worldwide Threat Assessment, Feb. 5, 2008, *available at* http://www.dni.gov/testimonies/20080205_transcript.pdf.
[6] Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).
[7] Exec. Order No. 13492 ¶ 7.
[8] U.S. v. al-Nashiri, Ruling on Government Motion to Continue Arraignment, Jan. 29, 2009, *available at* http://www.defenselink.mil/news/Jan2009/DelayArraignment_MJ.pdf.
[9] *9/11 Commission Final Report*, p. 472 n.8.
[10] Michael B. Mukasey, "Jose Padilla Makes Bad Law—Terror trials hurt the nation even when they lead to convictions," *Wall Street Journal*, Aug. 22, 2007, *available at* http://www.opinionjournal.com/forms/printThis.html?id=110010505.

Upon capture, Osama bin Laden asks for his lawyer, thereby thwarting access to information that could prevent attacks on the homeland.

It is reported that Khalid Sheikh Mohammad told his captors he would see them in court with his lawyer.[11] If this had been how that case developed, the United States government would not have disrupted terrorist plots directed against the U.S. homeland, because it would not have obtained information from KSM to disrupt such plots.[12]

This is the case because interruption of the interrogation process, namely through the introduction of counsel into the detainee-interrogator relationship, can be devastating to the intelligence-gathering goal.[13] Any detainee with access to counsel is unlikely to cooperate with interrogators, as the detainee's counsel is likely to advise his client to remain silent. Moreover, individuals given access to detainees, such as counsel, could unwittingly provide information to the detainee, or be used by the detainee to communicate to the outside world.[14]

The Supreme Court recently created for al Qaeda terrorists a constitutional right to challenge the legality of their detention through a habeas petition.[15] Given this ruling, which then-Senator Obama welcomed and praised,[16] Osama bin Laden would likely demand a lawyer before speaking to interrogators. Moreover, prior to this Supreme Court ruling, then-Senator Obama supported on at least two separate occasions legislation to give al Qaeda terrorists held at Guantanamo full access to U.S. civilian courts to second-guess the military's decision to detain al Qaeda operatives as enemy combatants.[17] As the detainee habeas cases are now proceeding, the question of when a right-to-counsel may attach remains unanswered, although the courts addressing this issue seem to assume that some sort of right-to-counsel exists.[18]

These policies will have a debilitating effect upon the effort to collect vital intelligence information from Osama bin Laden upon his capture. These policies will be even more

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[11] Id. ("Khalid Sheikh Mohammed, the mastermind of the 9/11 attacks, is said to have told his American captors that he wanted a lawyer and would see them in court.").

[12] On the plots such interrogation prevented, see George W. Bush, Speech of the President Discussing Creation of the Military Commissions to Try Suspected Terrorists, Sept. 6, 2006, *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html; OLC memo, supra note 3, pp. 8-10.

[13] Declaration of Vice Admiral Lowell E. Jacoby, Defense Intelligence Agency Director, p. 5, Jan. 9, 2003, *Padilla v. Bush*, 233 F. Supp. 2d 564, Case No. 02 CIV 4445 (S.D.N.Y. 2002) (stating that "insertion of counsel into the subject-interrogator relationship . . . may permanently shut down the interrogation process").

[14] Id. at p. 6 (stating that outsiders with "access to detainees could unwittingly provide information to the detainee, or be used by the detainee as a communication tool").

[15] *Boumediene v. Bush*, 553 U.S. __, 128 S. Ct. 2229 (2008).

[16] Obama's Statement on Today's Supreme Court Decision, June 12, 2008, *available at* http://www.barackobama.com/2008/06/12/obama_statement_on_todays_supr.php (praising the Boumediene decision).

[17] Roll Call Vote No. 255, 109th Cong., 2d Sess., Sept. 28, 2006 (rejecting by a vote of 48-51 S. Amdt. 5087 to S. 3930, Military Commissions Act); Roll Call Vote No. 324, 109th Cong. 1st Sess., Nov. 15, 2005 (rejecting by a vote of 44-54 S. Amdt. 2523 to S. Amdt. 2515 to S. 1042, FY06 Defense Authorization Bill). See also 152 Cong. Rec. S10346 (daily ed. Sept. 27, 2006) (statement of Sen. Obama) (speaking in favor of granting al Qaeda terrorists the right to access U.S. courts to challenge their detention with a habeas petition).

[18] *Boumediene*, 128 S. Ct. at 2276 ("We make no attempt to anticipate all of the . . . access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings."); *Al Maqaleh v. Gates*, No. 06-1669, 2009 WL 863657, at *20 (D.D.C. Apr. 2, 2009) (declining to decide an access-to-counsel issue arising in a Bagram habeas case).

devastating to the national security of the United States if the military were called upon to wage war with a great power competitor. To provide context, the United States detained over two million enemy prisoners during World War II.[19] The counterterrorism policies President Obama welcomes consign the military to defending potentially two million habeas petitions in a time of great power conflict.

Conclusion

If the United States captured Osama bin Laden tomorrow, it is unclear where he would go. Yet, he knows exactly how he would be interrogated, given that President Obama has restricted interrogation of high value al Qaeda terrorists to the techniques listed in the Army Field Manual, which is available on the Internet. Moreover, he is likely to demand access to his lawyer before talking to any interrogators. As for eventually bringing him to justice, President Obama has halted all trials in the military commission system, even though past public trials of terrorists have compromised U.S. intelligence information pertaining to al Qaeda. In terms of the counterterrorism policies examined in this paper, if bin Laden were captured tomorrow, it seems that it would look the same as if he were captured on September 10, 2001.

[19] S. Rpt. 110-90, Report to Accompany S. 185, Habeas Corpus Restoration Act of 2007, p. 15 (minority views of Sen. Kyl et al).