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A CIA Special Prosecutor: A Wolf in Wolf's Clothing

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Given President Obama's stated desire to look forward, not backward, with respect to interrogation policy and practice, news reports that Attorney General Holder is seriously considering appointing a special prosecutor to determine whether criminal charges should be brought against some CIA interrogators raise a host of questions and concerns. But the answer to the most important question—whether Holder should appoint a special prosecutor—is not even debatable: Holder most definitely should *not* appoint a *special* prosecutor, even assuming a criminal investigation is warranted.

Special Prosecutor: The Wrong Choice. Assuming there are grounds to investigate whether individual CIA interrogators exceeded the scope of their instructions and legal guidance, there are several reasons why the appointment of a "special prosecutor" with power to bring criminal charges is the wrong means to investigate, prosecute, or bring about policy changes.

First, the activities of a special prosecutor are likely to be duplicative of congressional and potential criminal investigations already in progress—and this is particularly true if the goal is investigation and fact-finding. For example, former Attorney General Michael Mukasey ordered an investigation into the destruction of videotapes of CIA interrogations of a handful of high value detainees, an investigation that is still being undertaken by veteran federal prosecutor John Durham. Additionally, the Senate Select Committee on Intelligence is conducting a wide-ranging investigation into all aspects of the CIA's interrogation and detention program.

There is every reason to expect that a non-criminal, congressional investigation (that granted immunity from prosecution) would uncover more information—even if it were a classified investigation. If the purpose of such an investigation were to really uncover facts on which to base future policy, this would be the obvious choice. Of course, there is always the danger that such an inquiry, conducted by politicians, would itself devolve into a political quagmire. But judging from publicly available information, the investigation currently being conducted by the Senate Select Committee on Intelligence, which set out to study the CIA's detention and interrogation program, suggests that such an inquiry can be conducted in a fair manner, all the while protecting sensitive national security matters. The only "disadvantage" to the Senate Committee, or any other congressional committee, providing adequate safeguards to protect means, methods, and other classified materials is that the bloodthirsty partisans most likely would not have scalps to dangle before the mob.

The duplication of efforts raises issues beyond the non-trivial expenditure of money and prosecutorial time. Both of the pending investigations require the CIA to cooperate with the inquiries and

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have necessarily caused disruptions to the ability of the intelligence community to carry out its lawful mission. Any additional investigation must take into account the costs—both to the public fisc and to scarce intelligence resources—in conducting a sweeping investigation. Prosecutors answerable directly to the Attorney General are usually more restrained in their activities than independent prosecutors, who operate with built-in incentives to extend investigations with less concern as to legitimate government interests in, for example, privilege and to spend whatever resources necessary to bring about some prosecution and thereby justify their positions. By contrast, the Attorney General, who coordinates with the intelligence agencies about current intelligence gathering operations, is in a better position to assess claims and make decisions regarding the negative impact of an investigation on current and future operations and has to balance the resource allocation associated with this one prosecution against other departmental priorities. The Attorney General's supervision is therefore a requisite check to assure that the government's interests—not just in terms of the investigation and resource allocation but in continued intelligence operations—are vindicated.

"**This Wolf Comes as a Wolf.**" Second, there is no good reason why the Holder Justice Department could not conduct the investigation at Main Justice with senior prosecutors who report to him through the normal chain of command. The ordinary justifications for utilizing a special prosecutor—that an investigation would be or would have the appearance of being compromised by virtue of the targets of the investigation holding critical offices in the Administration or that there is a substantial conflict of interest—simply do not apply to the current investigation of acts committed in a prior Administration. Although Holder might try to argue that an investigation of prior Administration practices would raise issues of bias, such a theory is undermined by the fact that reports of the potential investigation suggest that it would evaluate individual, front-line CIA interrogators as to whether they *exceeded the official policy* of the prior Administration. Any conflict claims therefore seem tenuous at best.

The opposite concern is far greater as Justice Antonin Scalia prophetically warned in his dissent in *Morrison v. Olson* (1988). In questioning the constitutionality of the former (now expired) independent counsel law, he wryly observed that some questionable practices "come before the Court clad, so to speak, in sheep's clothing." The practice of appointing independent counsels was not such an instance: "This wolf comes as a wolf."

Although the "independent counsels" under the expired statute were admittedly worse than special counsels in constitutional dimensions, Scalia's dissent is worth careful review because the dangers of insulating prosecutors from the Attorney General's control are strikingly similar. His dissent is a chilling reminder of how such an Ahab-like prosecutor has none of the institutional constraints or perspective of a normal prosecutor and all the wrong incentives to become the instruments of tyranny. That some independent counsel exercised proper control is much more a testament of their restraint and is the exception that proves the rule.

Highly Sensitive Information at Stake. Third, before commencing any criminal investigation, the Department of Justice (DOJ) must give due consideration to any and all inevitable defenses that are likely to be asserted by individuals involved in the CIA interrogation and detention program. CIA interrogators are likely to raise certain defenses or seek the introduction of certain evidence that may require the government to consider invoking the States Secret doctrine or executive privilege. For example, it is difficult to demonstrate that an action transgressed applicable policies and orders without knowing what those very specific policies and orders are. In addition to the instructions and legal standards that the government will assert existed, the defendant may seek wide-ranging discovery to prove that other orders, instructions, or legal standards existed that somehow re-defined or countermanded those that the government asserts were controlling.

The collection and introduction of this evidence raises serious questions about whether and how the government should reveal this highly sensitive information. The questions of how to safeguard classified intelligence information is one that the

Attorney General will have to make, and therefore it is better that any investigation, if warranted, be carried out by those more directly accountable to him. This also has the virtue of assuring that decisions made have an element of political accountability—the President and the Attorney General should not be able to pass the buck on these sensitive questions, claiming that the scope and course of the investigation are somehow governed by a non-politically accountable special prosecutor.

A Partisan Pandora's Box. Fourth, there are prudential concerns that arise if the investigation turns into or is perceived in the intelligence services as constituting a "witch hunt." This would have corrosive effects on the morale and willingness of front-line interrogators and other intelligence officers to serve in the future—effects that President Obama tried to avoid when he spoke at CIA headquarters last spring, when he seemed to indicate that he would protect those who conducted the interrogations from post-hoc investigations. These are serious issues that would extend to agencies beyond the CIA and should be considered again in more detail.

It is also important to briefly note the legitimate concerns by both liberals and conservatives that the criminalization of policy differences that such investigation heralds will further inflame partisan battle lines and prevent progress on a host of issues, including the conduct of the current wars and the detention and trials of unprivileged belligerents. President Obama's senior advisers, who themselves will one day be former Administration officials, have reason to share this concern even if the hard-core, anti-war left agitates continuously to see former military and CIA officials in prison jumpsuits.

Yet some partisans in DOJ may cynically see the "special prosecutor" or a similar appointment as a means of having it both ways: in short, a way to please the anti-war base while sparing the Administration the consequences of doing so. The opposite is more likely. Such an appointment would have the negative consequences reasonable people fear, and the blame would also fall on the Administration for inflaming partisan infighting and damage to current and future Obama Administration officers and employees. The only difference would be that it would be much harder for the Obama Justice Department to contain the damage once a special prosecutor process is set in motion.

A Narrow and Focused Investigation. Any criminal investigation of individuals associated with the CIA detention and interrogation program must be conducted in a politically accountable, transparent fashion. The Attorney General must be the one who personally authorizes any criminal investigation and subsequent trial. He, with the President, must also bear the responsibility for any direct or collateral results of such an investigation. Additionally, the Attorney General should be directly responsible for any negative impact such an investigation and trial will have on the intelligence community and the willingness of that community to carry out all lawful acts in support of America's defense.

If the Attorney General decides, in the exercise of sound prosecutorial discretion and with due concern for legitimate, national security concerns, that a criminal investigation is warranted, he should reject the appointment of a "special prosecutor." History has shown that special prosecutors are unaccountable and often widen the scope of their initial charge well past that contemplated by anyone. Rather, the Attorney General should appoint an experienced career prosecutor currently working for the DOJ who will report directly to the Attorney General at all critical stages of the investigation and whose scope of investigation is narrow and carefully focused.

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