

The History of That Particular Day

Interviewer

Sophomore, which served as an intern for me in the summerâ€”

Michael Chertoff

Oh, great.

Interviewer

And heâ€™s on break, and I said, â€œYou got to come with me and do thisâ€”â€

Michael Chertoff

Okay.

Interviewer

So heâ€™s a pre-law majorâ€”right?

Michael Chertoff

Yes.

Interviewer

At Amherst, and heâ€™s been terrific, so. So Iâ€™ll ask you, for the transcriber to get the spelling of your name, and then Iâ€™ll ask your other details.

Michael Chertoff

Sure. Michael Chertoff. Michael is M-I-C-H-A-E-L, Chertoff is C-H-E-R-T-O-F-F like Frank.

Interviewer

Okay. And today is January the 18th. We are in Washington, DC, in the offices of the Chertoff Group, a consulting firmâ€”is that right?

Michael Chertoff

Correct.

Interviewer

And conducting our interview here for the Center for Oral History. So Secretary Chertoff, or Judge Chertoff, tell me where you were on 9/11 and what that day was like for you.

Michael Chertoff

Well, you know, like people remember, it was a beautiful day from a weather standpoint, and I had a little errand I had to run in the morning, so I was headed into the office shortly before nine oâ€™clock.

Interviewer

And what office would that be?

Michael Chertoff

That wasâ€”at the time I was the head of the criminal division, the assistant attorney generalâ€”

Interviewer

In DOJ.

Michael Chertoff

In charge of the criminal division at the Department of Justice. And probably one of a half-dozen confirmed Presidential appointees, in fact, at that stage, because even though it was September, there were a lot of people backed up in the confirmation process. So I was in the car driving myself in, and I was on the phone with my office, just to kind of check in as to what was going on, and my personal assistant said, â€œWell, one of your deputies wants to talk to you.â€ So she transferred me overâ€”I spoke to one of my deputies, and he said, â€œA plane just hit the World Trade Center.â€ And I thought, â€œWell, thatâ€™s some idiot in a private plane, probably got a little lost.â€ And weâ€™re talking about it, and then he said to me, â€œA second plane just hit.â€

Michael Chertoff

At that point, he and I both realized it was not an accident. So I arranged to meet with him at the Department of Justice building on Constitution Avenue, and to walk across the street to the FBI operations center, which was the location where any domestic incident was really going to be managed under the regime that then existed for crisis management.

So I got there a little bit after 9

00â€”I think at the point at which I arrived, we learned about the plane hitting the Pentagon, and we were in the process of getting into the FBI and going up to the fifth floor operations center when we learned about the third plane. And I then spent the next 20 hours in the operation center as we tried to put together what was going on, and the way we did it is there were people on the plane who had called up loved ones, and based on some of the information that they conveyedâ€”

Interviewer

Youâ€™re talking about the Pentagon plane now.

Michael Chertoff

Well, all the planesâ€”based on the information they conveyed, which was then being phoned in to the FBI or the police, we began to get a picture of who the hijackers were and approximately where they were sitting. And based on the manifests of the airliners, we were then able to identify them and begin the process of putting together who was involved and who was connected to them. While this is going on, weâ€™re aware of the fourth plane being hijacked, and there was present in the FBI Bob Mueller, who had just become FBI director. I was thereâ€”I donâ€™tâ€”the AG was still out in the Midwest trying to get back.

Interviewer

So that would be, at that time, John Ashcroft.

Michael Chertoff

John Ashcroft. The Deputy AG, Larry Thompson, had been asked to go to a remote location, so it was basically I was the

Interviewer

In order to protect him, right?

Michael Chertoff

In order to protect him. So I was the senior DOJ lawyer on the scene, and Bob Mueller, obviously, was present as the FBI director. And during that period, there were a series of secure video conferences where we tried to put together, first, what was going on, and (b) what we needed to do to prevent other things from happening. What has been lost, I think, sometimes in the history of that particular day is how uncertain we were about how many other attacks there were going to be. I was present, for example, when the decision was relayed to give the military the authority to shoot down that fourth airliner, and in fact, I didn't know until later that day that the plane had crashed because of the actions of people on the plane.

Interviewer

You thought it might've been shot down.

Michael Chertoff

I thought it might've been shot down. There was one other plane

Interviewer

And that authority came directly from the President.

Michael Chertoff

Came from the President. There was one other plane that had a transponder, a hijack transponder that went off at some point during the course of the day that was coming in from the west, and it turned out that was an accident, but we thought we might have to see another plane get shot down. A fire alarm went off at the State Department. I remember watching the State Department people on the scene when the alarm went off, and there was a rumor at that point that maybe a bomb had gone off at the State Department.

Michael Chertoff

So we were in the middle of a very dynamic event, without any knowledge about whether the three planes that had plowed into the World Trade Center and the Pentagon were merely the first wave, or whether that was really, you know, with the fourth plane, all that was to be expected that day. During the course of the day, as we got a picture of who was on the airplanes that had been hijacked, and we began to home in on them in terms of their identities, we started the process of trying to figure out who they were connected to, because our big concern was who else is involved in this, and what's the next attack going to be?

Interviewer

Did you have any inkling did this set off any instinct for you that al-Qaeda or some

terrorism was involved right from the start?

Michael Chertoff

I think during the course of that day we had already begun to speculate that al-Qaeda was involved, because when you saw the names of the people on the planes, and you knew they were Arab names, and we obviously were familiar with the Cole bombing and the East African bombings, I think that was the kind of immediate first reaction.

Interviewer

Not to mention the first World Trade Center bombing as well, right?

Michael Chertoff

Correct, although I think that oneâ€” you know, you can argue whether that was truly al-Qaeda, or whether it wasâ€”

Interviewer

Right.

Michael Chertoff

It was Ramzi Yousef and the connection of Ramzi Yousef to Khalid Sheikh Mohammedâ€”took a little while to get to that point. But I think we all had a suspicion it was bin Laden. And what we then did is once we identified the probably hijackers, FBI agents were sent to the airports to get credit card information and try to track back where they had stayed, you know, where they had rented cars.

Michael Chertoff

We went into, the Bureau went into the hotel rooms and looked at their garbage to see if there was any paper, pocket litter that might shed light on who was involved. We tracked down the phony licenses, and ultimately that led to our finding the people who sold the licenses, and so for the next several days, what we did is we basically builtâ€”

Preventing September 12, 2001

Interviewer

These would be the flight licenses youâ€™re talking about?

Michael Chertoff

No, the driver licenses, â€”cause they had phony ID.

Michael Chertoff

We tracked essentially a giant link chart to connect the hijackers to the people who had sold them licenses, people theyâ€™d interacted with, and that went on over a period of days and weeks. And then those people were interviewedâ€”in some cases, if they were here illegally or if there was evidence of a crime, they were arrestedâ€”and the effort was, as quickly as possible, to identify anybody who was potentially part of a conspiracy that was still present in the US that might be involved in the next wave of attacks.

Interviewer

â€˜Cause at that pointâ€˜”people forget this, but at that point, those weeks right after September 11, the real fear was that thereâ€™d be a September 12, 13, 14, and 15.

Michael Chertoff

Oh, absolutely. I mean there wasâ€˜” I mean now people go back and they go, â€œThat was one day,â€˜ but for all we knewâ€˜”and in fact, for all we now knowâ€˜”there were subsequent attacks that were going to occur. They might not have been airline attacksâ€˜”they mightâ€™ve been, for example, taxicabs with bombs, which is one rumor that went on that day.

But what we did know is that the initial plot had occurred or had been put together, at least for some period of time, in the United States. We had been unaware of it when it was in the process of unfolding, before the hijackings occurred, and that raises an immediate question

what else donâ€™t we know? So the real premium was how do you get as much information as you can, from as many leads as you can, and disrupt anything thatâ€™s in the works?

Interviewer

Now, I imagine one of the first thingsâ€˜”and maybe we could sort of go around this subjectâ€˜”as theâ€˜”one of the first things to think about here is at DOJ, basically, the criminal division, Iâ€™m assuming youâ€™re mostly handling domestic issues.

Michael Chertoff

Correct, yeah.

Interviewer

So the FBI is mostly handling domestic issues.

Michael Chertoff

Right.

Interviewer

So then we have the CIA, who conceivably would be the other party here, but of course, the amount of sharing of information was a critical flaw.

Michael Chertoff

Right. At that point, we were still operating under the regime of the information separation, where you had basically a wall between intelligence information and criminal information, and the old rule was that if you were doing an intelligence operation and using FISA and some of the tools you can use for intelligence collection, you could not share that with the criminal division. And once you did share it with the criminal division, you basically had to cease the intelligence collection, and it moved over into the domain of law enforcement, where youâ€™re operating under a different set of rules.

Interviewer

And the philosophy there is that if you do not, youâ€™re kind of in a witch hunt, kind of, maybe?

Michael Chertoff

Well, the philosophy is you're circumventing the Fourth Amendment, and therefore, once you begin to focus on criminal investigation, you're in the regime of the Fourth Amendment, Fifth Amendment.

Interviewer

Explain to the viewers, the cadets in particular here, what the Fourth Amendment and the Fifth Amendment say with respect to these questions here.

Michael Chertoff

Fourth Amendment says that you need to have reasonable grounds for search and seizure, and you need to have, in many cases, a warrant to either search premises or to collect intelligence information by electronic surveillance. The Fifth Amendment gives people, for example, the right to Miranda warnings, and the right not to incriminate themselves. So information gathered using intelligence means, which do not require the same level of Fourth Amendment protection as a criminal investigation, and which operate under a legal statute called the FISA statute, the Foreign Intelligence Surveillance Act—the idea was that that information could only be collected if the imprimatur—basically exclusive reason—was intelligence gathering. And once you convey to the criminal division, the purpose would change: it would then be a matter of collecting for a criminal case, and that meant you could no longer use FISA, and you had to use the more rigorous requirements under the Fourth Amendment and that.

Interviewer

Because then it gives a violation of due process and the Fourth and Fifth Amendments.

Michael Chertoff

Correct, and there's also a statute that governs domestic criminal investigation as opposed to intelligence. So based on this, these two separate regimes, there had grown up a set of legal rules that essentially required you to keep a wall between intelligence collection and criminal investigation. And based on that—for example, when I was head of the criminal division I had no knowledge of what had been collected on the intelligence side prior to 9/11.

Interviewer

That leads me to—yes, I was about to say, so your familiarity with al-Qaeda and foreign terrorist organizations had to be limited by the scope of your particular office.

Michael Chertoff

Right. Now, there had been prior prosecutions of al-Qaeda, you know—there was the East African bombing and there was the Cole, so we all knew about al-Qaeda and we all knew about terrorism. But the real-time information collection was opaque, and I was not able to have visibility into that. Now, after 9/11 they went to the judge at the court that supervises foreign intelligence surveillance and they got permission to lower the wall for purposes of the reaction after 9/11.

Michael Chertoff

And as a consequence of that, about two or three days after 9/11 I was, for the first time,

allowed to see the files at the FBI that have been collected using intelligence methods as opposed to criminal methods. And thatâ€™s when I first saw the information about Moussaoui, which had been collected based on the initial arrest and interviews of him up in Minnesota, and which also had in the file, in other files, information that had come out of the flight school in Oklahoma, and some of the stuff in San Diego.

Michael Chertoff

And I remember sitting in a conference room at the Bureauâ€”again, this is three or four days after 9/11, and the judge has finally given me permissions to look at thatâ€”and I looked at the stuff about Moussaoui, and I looked at the discussion about how he had trained. Heâ€™d gone to the flight schoolâ€”heâ€™d trained in personal combatâ€”he had all the characteristics that we had learned in the last few days, all the characteristics of the 19 hijackers, and I said to the person in the room with meâ€”who I think was Pat Fitzgerald, actuallyâ€”I said, â€œWhen thisâ€”â€

Interviewer

Turned out to be a prosecutor in Chicago, right?

Michael Chertoff

Right. I said, â€œWhen this sees the light of day,â€ I think I used a four-letter wordâ€”â€œitâ€™s going to be an â€”oh, you-know-whatâ€™ moment. Weâ€™re going to say, â€”Wow, look at this.â€ And it was obvious at that point that Moussaoui had been part of this general plot, because his activities mirrored what, in fact, the 19 hijackers had done.

Interviewer

Sureâ€”but thenâ€”

Michael Chertoff

So that was a very dramatic illustration of the problem of keeping these things separate.

Interviewer

But now that means that the CIA had collected that informationâ€”

Michael Chertoff

Actually, some of it was the Bureau.

Interviewer

It was the Bureau.

Michael Chertoff

The Bureau, but one part of the Bureau was not able to talk to another part of the Bureau becauseâ€”and in fact, in the file there was discussion about can we get a search warrant for Moussaouiâ€™s computer, to look at whatâ€™s in the computer?

Interviewer

Right.

Michael Chertoff

And the lawyers at the Bureau had said to the field agents, "You don't have enough probable cause under the Foreign Intelligence Surveillance Act." And because they were not able to share it with the guys on the criminal side of the house, no one looked at whether there might've been a criminal basis to go and get a search warrant. So it was like you had two hands, not tied behind your back, but one tied to one side and one tied to the other side, and they weren't able to work in concert.

Interviewer

This had all been gathered since 9/11.

Michael Chertoff

Right—"this is all some stuff that we learned after 9/11, because prior to 9/11, it would've been illegal for me to look at this.

Interviewer

Not only that, but had the intelligence been gathered before 9/11 as well?

Michael Chertoff

Well, no—"the intelligence had been gathered prior to 9/11. The information about Moussaoui was in the file as of August, because they had seen—they had arrested him on an immigration charge, and they interviewed him. They had begun to see some of the suspicious things about his activity, but they had not looked at the computer, so the full scope of what he had done was not evident. But after 9/11, they were able to get into the computer—then they really saw what he had done in terms of what his preparations were and his training, and that's when the light bulb went on.

Interviewer

So this really goes to the question that if we had had what the Patriot Act eventually was able to achieve.

Michael Chertoff

Correct.

Interviewer

In terms of the joining of, partnership of various law enforcement agencies and intelligence agencies, right—"

Michael Chertoff

Yeah.

Interviewer

To sharing of information, then we would maybe have avoided 9/11.

Michael Chertoff

I don't want to overstate this. What they had in his file—even what we saw after the

wall came downâ€”I donâ€™t know that that, in and of itself, wouldâ€™ve been sufficient. And remember, he was only, I believe, arrested in August, so there wouldâ€™ve had to have been a very, very quick turnaround.

Michael Chertoff

Nevertheless, there is at least the possibility that had someone been able to get into that computer prior to 9/11, had they seen what was in there, and then had they connected his travel back to the financier, who also financed the travel of the 19 hijackers, it might have alerted the authorities to at least some of the hijackers being in the United States, and they might have been able to disrupt the plot. You canâ€™t say itâ€™s a sure thing, but it took what wouldâ€™ve been an impossibility and at least created some possibility of disruption.

Interviewer

How did the FISA judge get around the Fourth Amendment and Fifth Amendment issues to be able to release it?

Michael Chertoff

I mean he had the right toâ€”see, part of what had happened over time is this: if you actually looked at the law, itâ€™s not clear that the strict division between the intelligence side and the criminal side, which had grown up over a period of years, was, strictly speaking, legally necessary. What happened isâ€”and this is characteristic of lawyers in governmentâ€”is they become risk-averse. So they becomeâ€”they take the most cautious interpretation of the law to avoid creating a legal problem down the road. It was compounded by the fact that the judgeâ€”judges tended to be very aggressive in reading their role in the FISA process, so the judge in question who was presiding over it tended to beâ€”

Interviewer

Who was that judge, by the way?

Michael Chertoff

It was Judge Lamberth. Iâ€™m not criticizing his motives, but he was very aggressive in policing that line, and he actually took a very active role in basically having the government come to him for permission, so. And the reason I say he was probably over-aggressive is because in the end, there was a FISA court of review opinion that actually wound up saying that the Justice Department and the district court had been overly restrictive in its interpretation of the statute.

Michael Chertoff

So it might have been that, had the Justice Department appealed some of the FISA court rulings years earlier, that the law might have developed a little differently. But it was quite clear after the World Trade Center, the judge was going to reallyâ€”was going to start leaning the other direction, and he basically said, â€œLook, you canâ€”at this point, obviously, you can do both intelligence and criminal investigation at the same time,â€”and that opened the door for me to look at that file. Could he have done it prior to 9/11? Probablyâ€”the answer is probably â€œyes.â€”But I would say that everybody in the process was very, very conservativeâ€”I donâ€™t mean politically conservative, I mean in a cautious senseâ€”about opening the door on that statute, and the irony is when it finally

was appealed, the court of appeals said, “You know, you guys were way too cautious. You could’ve actually done a lot more sharing earlier, but you didn’t do it.”

Interviewer

I mean the FISA court is its own separate court, so the court

Michael Chertoff

Right. There’s “so there are district judges” I think there are 11 “who did the actual, initial legal review for FISA applications, and then there was a court of review composed of three court of appeals judges picked by the chief justice, who would review on appeal. And there’d never been an appeal to the FISA court of review, because the Department of Justice had never wanted to challenge a district judge’s opinion, so they’d always acquiesce. And you can argue that part of that is a reluctance to get the judge irritated by appealing his ruling. I would argue that was a mistake, and that actually the Department might’ve been better served had they sought review years earlier on other decisions, because it might’ve calibrated the balance to a little bit more of a middle position.

Interviewer

And who were the three judges that ruled in this case?

Michael Chertoff

I don’t remember all of them, but the judge who wrote the opinion was Judge Laurence Silberman from the DC circuit.

Interviewer

Sure. And if that decision were appealed it would go to the United States Supreme Court?

Michael Chertoff

The Supreme Court’s “correct.

Interviewer

So the direct appeal from there to them.

Michael Chertoff

Yeah “and there’s never, to my knowledge, been an appeal to the Supreme Court.

Interviewer

Well, you said there’s never been one to this FISA

Michael Chertoff

Correct, court of review’s “right.

Interviewer

Three-judge panel. Does that rotate, those three judges?

Michael Chertoff

Yeah. Over a period of time, they rotate them.

Interviewer

And just thinking back, then, this is the decision to challenge the district court on this was yours?

Michael Chertoff

No, it was actually the attorney general's decision--this was not in my domain. But there was a legal issue that came up in 2002, and based on that, the attorney general and the people who were on that side of the house, the intelligence side of the house, decided they were going to authorize a review of an adverse decision they had gotten on a particular issue, and I forget what it is, from I think it was Judge Lamberth. And so they appealed his ruling, and in the course of reversing that, the FISA court of review looked at the entire statute and essentially said, "You guys have been way too cautious in interpreting the statute," and in fact, suggested that much of what we did in the Patriot Act we could've done under the prior law, but the Justice Department was too conservative about really pushing on that.

Interviewer

So the Patriot Act preceded the FISA court's decision.

Michael Chertoff

I think it had been passed prior to the decision, but the decision related to events that occurred prior to the Patriot Act, so they had to look at the law prior to the Patriot Act.

Military Tribunals Vs. Civil Courts in a Post-9/11 World

Interviewer

So let's come back to your timeline. So you have four days out, you discover this information--

Michael Chertoff

Approximately four days.

Interviewer

Whatever-- I mean within the week or whatever.

Michael Chertoff

Right.

Interviewer

You're also, I imagine, in conference about how to rearrange the law so that--

Michael Chertoff

Right.

Interviewer

You can share this kind of informationâ€”

Michael Chertoff

Right, and also investigating, in real time, who are the other people who are potentially connected to these 19 hijackers. So weâ€™re following the money, weâ€™re following their travel pattern, weâ€™re looking to see who they communicated with, so weâ€™re doing all these things at the same time.

Interviewer

But youâ€™re finding impediments to this that end up being relieved through the authorship of the Patriot Act, is that right?

Michael Chertoff

Well, what the Patriot Act did is once 9/11 occurred and the judge really lowered the wall, at that point, we really had much freer rein than we had previously. What the Patriot Act was designed to do, though, was to recalibrate the entire architecture, so that once things resumed kind of a little bit more of a normal circumstance, we had a better set of tools on information sharing. And that included information sharing both ways, from the intelligence side to the criminal side, and from the criminal side to the intelligence side. So this was designed toâ€”the Patriot Act was not a short-term solutionâ€”it was designed to really reset the architecture to make sure we never had the same problem again.

Interviewer

So you discover this about Moussaoui. Is there a question immediately as to whether to try him in a civil court or a military tribunal of some sort? I mean this discussionâ€”that has become a kind of argument of the decade since thenâ€”did it start right away?

Michael Chertoff

Well, first of all, you know, this occurred before there were military tribunals. Military tribunals were ultimately authorized by the President I think sometime in October or November of 2001. We began looking at Moussaoui in September, and soonâ€”

Interviewer

Within days of 9/11.

Michael Chertoff

Yeah, within days of 9/11. Once we got that file. And then there were lawyers up in Boston who had independently discovered some financial relationships between the hijackers and a financier named Hawsawi in the Middle East, who actually paid for some of their tickets. And when we wound up connecting Moussaouiâ€™s ticket with the same financier, thatâ€™s when we realized we had a case against Moussaoui. So since we had Moussaoui in custody on immigration charges, what we did is we started by creating an indictment, which I think was issued in Boston, if Iâ€™m not mistaken, that used all of the financial evidence and the tickets and the stuff on the computer to put together a circumstantial case against him. It was a very powerful circumstantial case that he was part of the conspiracy to hijack planes and obviously put them into the World Trade Center.

Michael Chertoff

Now, the press ultimately characterized him as the 20th hijacker, and I don't know that he was the 20th hijacker, or just someone who was potentially one of the hijackers, but there was no question

Interviewer

Then later on didn't you say that he was actually involved in a different plot.

Michael Chertoff

Correct. He may have been involved in the follow-on plot.

Interviewer

Right.

Michael Chertoff

And actually, what really, I think, emerged over time was he was a hijacker, but if you kind of look at it as a team, he was on the bench. He was not maybe an A player he was a little bit

Interviewer

He was a utility player.

Michael Chertoff

Yeah, he was a little bit kind of he had some personality issues. But he was the kind of guy, if you needed somebody, you could call him up to the A team, but I think he was originally a reserve player. But nevertheless, from the legal standpoint, that makes him every bit as guilty of the conspiracy as the guys who were on the planes themselves.

Interviewer

Sure. So having gathered so much evidence on him in September but the President turning to the military tribunals option by October

Michael Chertoff

Yeah.

Interviewer

Couldn't you have tried him in a military tribunal?

Michael Chertoff

Yeah, we could have, and there was discussion about that, and a little-known fact is that the Department of Justice in the Bush administration generally took the view that if someone was caught in the United States, they should be tried in the civil justice system. Now, that wasn't an ironclad rule, and there were a couple of cases where, because of exigencies, which I can explain, they put people in the military system and held them. But there was a reluctance to use military tribunals for people caught in the United States itself, and there were a couple reasons. One is there were legal uncertainties about whether that

would be Constitutionally sustainable, but I think there was also a feeling that in the United States, as a general matter, we don't want to give Presidents too easy access to a military justice system. It's one thing when you capture people overseas in the field of battle—it's another thing when you're in the United States, where we do have a higher protection for civil liberties, even for people who are not American citizens. Now"

Interviewer

Of course, there are obvious, too, historical examples, right—which ex parte Quirin, right?

Michael Chertoff

Right, which allows you to do it in the US, but if you look at Milligan, ex parte Milligan, back in the Civil War, there the court seems to say, you know, if the courts are functioning in the US, you should be trying people in the courts. Now, you know, those two cases have never been totally reconciled, and to me, good lawyering is you don't ever push the extreme example. I think the general view at the Department was unless we really have to take someone in the US into the military system, let's not push the envelope. Let's try to be cautious and conservative and do them in the regular criminal justice system, unless there's some reason that that system is not going to work properly for someone caught in the US. So this decision actually went to the President, and in the end, I remember—the AG asked me to go into a meeting with the president.

Interviewer

The decision on Moussaoui, or the decision on whether—

Michael Chertoff

Moussaoui. And there was a question about should Moussaoui be put into the military channel, or should he be put into the ordinary criminal justice system, and I was present at a meeting with the President and the decision was ultimately made to put him into the criminal justice system.

Interviewer

Explain that meeting to me, 'cause that seems to be—again, as I said, I think one of the critical—one of the reasons why this issue has become so much the subject of argument over the past decade is because it is so hard to figure out, right? It's a modern, 21st century problem.

Michael Chertoff

Right.

Interviewer

So where did that meeting happen, who was in the room, what was—

Michael Chertoff

Well, I mean, as I'm always careful. I don't ever discuss actual conversations with the President, but—

Interviewer

No, I understand.

Michael Chertoff

But it was in the Oval Office, and it was a couple of days before we issued that indictment against Moussaoui—it was the final kind of “ego or no-go” decision. The AG was there, the deputy AG was there, the President was there.

Interviewer

Larry Thompson was there.

Michael Chertoff

Larry Thompson was the deputy, yeah. I think there were a few other people. And the issue was: is this something that we should do, and is it something we can do in the criminal justice system? And as a consequence of that meeting, the determination was that we would go forward in the criminal justice system. I think the Department of Justice was confident we could successfully bring that case to a conclusion in the criminal justice system, and frankly, in part, it was an effort to see whether the criminal justice system would work in this kind of a case. And although it was a little bit of a rocky journey, it did work at the end of the day. Something people—

Interviewer

In that you convicted him.

Michael Chertoff

In that we convicted him. One of the ironies is that I remember at the time that we indicted Moussaoui, and then the initial stages thereafter, there was a lot of press criticism of the fact that we didn’t put it to the military commission. The very same people who criticized the administration afterwards for doing things in a military commission criticized us at the time because we didn’t do them in the military commission.

Michael Chertoff

But if you look at the entirety of the approach that the Department of Justice took under I would say both attorneys—under all three attorneys general—generally speaking, the presumption was if you’re caught overseas, you’re going into a military process. If you’re caught in the US, you’re going into a civilian process, unless there is some, you know, pretty compelling reason why the civilian process won’t work, and then we reserve the right, as Quirin permitted us to do, to put people into the military process.

Interviewer

And this discussion, what was your input? What was your point of view?

Michael Chertoff

That was general—my general point of view was consistent with the view that the presumption ought to be if you’re caught in the US, you’re in a civilian court—if you’re caught overseas, you’re in a military process—but we’re always free to change that if conditions warrant. I’m what I call an “all the above” use all the tools type of person. I believe nothing ought to be off the table that was a potential legal option, but that in general, if you take people to court in the US and you put them in the

military process, youâ€™re kind of pushing the envelope a little bit, and youâ€™re creating at least some discomfort from a civil liberties standpoint, because we donâ€™t really want the Presidents of the United States to be able to use the military justice system against civilians on a widespread basis in the US.

Interviewer

Well, look at the opposition that Lincoln, our most revered Presidentâ€™

Michael Chertoff

Correctâ€™right.

Interviewer

Afterâ€™this wasâ€™he was severely criticized, and historically severely criticized.

Michael Chertoff

Correct. And part of what I think, you know, the attorney general believed, and what I believed and others believed, was if youâ€™re going to go to the court, and youâ€™re going to say, â€œWeâ€™ve caught somebody in the US, but weâ€™re going to need to take him to a military process,â€ you better be able to demonstrate that thereâ€™s a compelling reason. What you donâ€™t want to do is take the position that weâ€™re going to do it willy-nilly and kind of heedlessly, because generally my experience with courts is they want to do as little change as possible.

Michael Chertoff

You know, the history of the American legal system, the common law method for adjudicating cases, is not to be writing broad strokes and do very aggressive things, but itâ€™s to do only that which you can demonstrate is necessary. And I think we believed that in order to get the courts to beâ€™rule positively to what we were trying to do, we should demonstrate we were being responsible and we were only making changes that were strictly necessary in order to achieve compelling reasons. Now, we felt that builds up credibility with the courts. There are other people who believe no, you ought to, you know, take the most aggressive position you can, and wait until somebody stops you.

Michael Chertoff

My experience as a lawyer, and particularly as a lawyer who tried a lot of cases, is generally thatâ€™s how you lose cases in court. You win cases by demonstrating youâ€™re being incrementalâ€™you lose cases by being aggressive.

Michael Chertoff

And when I look back on that period of timeâ€™and Iâ€™ve said this publiclyâ€™I think that where the administration was overly aggressive with the courts that tends to be where the courts ruled against the administration. Where the administration was able to demonstrate that we were being careful and incremental, we won.

Interviewer

It could also be confused with jurisdiction shopping, in a sense, if you went back and forth between the military tribunalâ€™

Michael Chertoff

You could, and some peopleâ€”

Interviewer

My badâ€”for the viewers, itâ€™s picking wherever youâ€™re going to have the best chance of getting conviction, which is not uncommon in the system.

Michael Chertoff

Yeah, rightâ€”correct. Yeah, there were some people who argued that taking an â€œall of the aboveâ€ approach allows you to shop for the location youâ€™re going to get the best result in, and thereâ€™s some truth to that, but as you pointed out a moment ago, thatâ€™s always been a feature of our system. For example, in a criminal case, itâ€™s almost always been the case in a federal case, you couldâ€™ve brought the case in state court. I mean we see it now, for example, with this shooting in Tucson of Congresswoman Giffords, and Iâ€™ve seen this historically in a lot of cases.

Michael Chertoff

So the mere fact that you have a choice does not mean itâ€™s illegitimate. What you do want to have is a process that has some discipline to it, and our process, as I said, the discipline we had in our process was a presumption, depending on where you caught somebody, that you would either take him to the military or the civilian courts, but it was a presumption that you could overcome if you had a good reason.

Interviewer

And if youâ€™re not comfortable saying this, I understand, but in the meeting with the President, did he come with a point of view, or did he just listen and then arrive at his decision?

Michael Chertoff

Yeah, again, I donâ€™t want to get into discussions with the President. I can tell you in generalâ€”and now Iâ€™m including all the years I dealt with the President on various issuesâ€”contrary to the public image, the President actually was quite open-minded about these kinds of issues, and open to persuasion on the legal advantages or disadvantages of any particular course of action.

For the Benefit of Intelligence

Interviewer

So the Moussaoui trial ended up being a bit of a rocky road, you said.

Michael Chertoff

Rightâ€”although I have to say no rockier, and in many ways less rocky, than the few instances in which military commissions were used against defendants. And you know, that was part of the argument that we made internally on why a civilian court could be an advantage in some circumstances was because thereâ€™s a tried and true process. Sometimes itâ€™s not perfectly adaptive, but at least you have a kind of a track record, and that means you have some predictability about what judges will do. The problem with the military commission system is that it had not been used in decades, so you had to really start from scratch, and again, my experience dealing with judges is the less of a track

record you have, the more uncomfortable the judges are. And so, for me, I always thought actually there was an advantage, to some degree, inâ€”at least when youâ€™re talking about people caught in the USâ€”in taking the case into a somewhat more familiar method. So we started the process with Moussaouiâ€”he wasâ€”

Interviewer

More familiar for the attorneys and for the judge, Iâ€™m sure.

Michael Chertoff

And for the judges, right. And frankly, also I had some reason to believe that a federal judge might be more willing to actually rule in favor of the government than a military judge, who might be more conscious of the questions about the legitimacy of the process, and he might bend over backwards. And if you look at the military tribunals, thereâ€™s actually been some evidence that thatâ€™s the caseâ€”the military judges have really bent over backwards so as not to appear to be leaning in favor of the prosecution, and you mightâ€™ve had judges in the federal court who wouldâ€™ve actually been slightly more favorable.

Interviewer

But to this day, do you believe as you did then, that this formula that you follow, that if the indicted has been found here, then itâ€™s civil courtsâ€”if heâ€™s been found abroadâ€”or do you have a preference, actually, for the civil courts becauseâ€”

Michael Chertoff

No. My general ruleâ€”hereâ€™s where I am now, which is pretty much where I was then, and nothing Iâ€™ve seen has changed my opinion: if you catch a non-American overseas in a field of battle, they ought to be in a military tribunal. Our ability to collect evidence is really hampered in a battlefieldâ€”weâ€™re just not geared for that. And beyond that, thereâ€™s no civil liberties issueâ€”weâ€™ve never had a civil liberties concern about foreign combatantsâ€”again, the benefit of the Constitutionâ€”so itâ€™s not like weâ€™re worried that a President is going to, you know, somehow misuse the military process against his domestic enemies when weâ€™re talking about people caught in Afghanistan or Iraq or whatever.

Interviewer

Right.

Michael Chertoff

So my belief has been if itâ€™s a non-American and theyâ€™re caught overseas in a field of battle, you put them in a military process. In the US, I continue to believe the presumption ought to be that you put people into the criminal justice system when youâ€™re going to try them. However, I donâ€™t know that you have to do that right away, and at least in a couple of instances, when weâ€™ve caught people in the US and there was either an evidential problem with trying them right away, or there was a compelling need to get intelligence information from them, they were actually put into a military process and held there for some period of time in a military detention, which the courts have allowed. And then atâ€”

Interviewer

For instance, the so-called “underwear bomber” from last year was”

Michael Chertoff

Then was not done, but we did”it was done with Padilla and it was done with al-Marri, and although they were eventually tried in a criminal justice process, they were held in a military facility for a period of some considerable time while they went through the process of being questioned to intervene”

Interviewer

So were they Mirandized after that process, then? Is that what happened?

Michael Chertoff

I think they were. I think when they went into that process they were not given Miranda warnings.

Interviewer

Right, but after the military questioning”essentially, what you”re doing is you”re saying there”s a reason for the public safety exception here.

Michael Chertoff

It”s not even a public safety exception, although you could use that, but what you”re really saying is that we will forego the benefit of their statements, from the prosecution”s standpoint, as long as we can get intelligence information.

Interviewer

I see.

Michael Chertoff

So the general understanding was if you take someone in the US, and you put him in military custody and you question him, chances are you”re not going to be able to use their statements. In both the case of Padilla and al-Marri, ultimately they used evidence that was not drawn from their statements to convict them”actually, al-Marri pled guilty, and Padilla was convicted based on other evidence. So what you”re doing is you”re sacrificing the evidential benefit of the questioning for the intelligence benefit.

Interviewer

Yeah, for the benefit of the intelligence.

Michael Chertoff

But at the end of the day, you know, you could take somebody like that, and you could try them in a civilian court, or if there was an insuperable impediment, you could try them in a military process. But the point is the presumption”if they”re caught in the US, I still think it ought to be that they”re tried in a civilian court. And frankly, the reason is this: understandably, we”re uncomfortable if we start to give Presidents a lot of authority to arrest people in the US without putting them in the ordinary process, and, you know, we start to worry about well, what happens if it”s not actually just an operative, but if it”s a financier, or if it”s somebody who”s given logistical support? And you

could start to see, you know, a hypothetical President taking a very broad view of the power to put people in military custody in the US, and that starting to impinge on some of our core civil liberties concerns.

Michael Chertoff

So because of the fact that we worry, frankly, more about civil liberties in the US than we do when we're operating overseas, I think it's still reasonable to presume that you know, whether it's a rebuttable presumption that when people are apprehended in the US, if they're going to be tried, they ought to be tried in a civilian court.

Blurring the Lines Between Crime and War
Interviewer

Does it also, though, go to the heart of let me ask you a hypothetical. So let's say, as happened here, let's say we're actually at war.

Michael Chertoff

Right.

Interviewer

And with an identifiable national enemy with a clear center of power, as there was, a clear line of authority, and two saboteurs are discovered on Long Island, as happened there. They're found here in the US, and they're perpetrating a crime, let's say I don't know whether they were really after the crime or they were just let's say this group is.

Michael Chertoff

Right.

Interviewer

Do they go through civil courts?

Michael Chertoff

Well, I think you can argue based on Quirin and Milligan in both propositions. I'd say Quirin probably is a stronger argument when you're literally catching an operative somebody that is here literally about to carry out a military-type mission. So if you had caught one of the hijackers, and they were about to board the plane, and you knew that they were going to take the plane over and hijack, you're probably pretty comfortable taking that into Quirin. If you're dealing with somebody who is a logistical supporter, maybe an aider and abettor, maybe someone who is financing, I think you'd have trouble applying Quirin. I think that would be a Milligan case, and then you pretty much have to take him to civilian court. But again, my general view is if you want to test which applies, and I'm a lawyer for the government, I want the strongest case before I go into Quirin.

Interviewer

But doesn't it go to the much larger question that is, is this a war or a series of crimes we're facing now? Because in the case of the hijackers, they're different than the case of the German saboteurs, right? I mean they're they had a

Michael Chertoff

Well, I mean probably sabotage is a crime, too. See, what I've resisted over the years is that you got to pick one or the other. To me, it's both, and this may be part of a longer discussion, but I think we've had a problem since the latter part of the last century by looking at the world of security as either being war or a crime. I think those days are gone, because of globalization of the technical capability of people, networks, to cause destruction. Those factors have really blurred the distinction, and when we deal with international terrorist networks, they are both committing crimes and they are at war, and I think that the idea that we have to choose one or the other forces us into a kind of a set of categorical debates that are unnecessary.

Michael Chertoff

I have a different view—my view is these are security risks that are both war but also criminal and the approach you ought to take is you ought to have all the tools, and you ought to pick the tool that fits best in the certain circumstance. But I don't think you got to pick one or the other—I think you have the range of tools you can apply.

Interviewer

But is it a drawback, the fact that a lot of the laws demonstrate there is a distinction? We have the laws of war, and one of the criticisms of the Bush administration was, of course, that if it was a war, are we following the Geneva Common Article Three, and are we doing all—are we following the rules that the civilized nations have applied since, well, I guess treaty-wise, since the '40s, but before that as well?

Interviewer

Or have we found that, without the change in the laws, without the sort of the law being caught up to the 21st century?

Michael Chertoff

Well, that's right, and that's my point. My point is what we need to do—and I've argued for this for years—is to look at the legal regime that we have, the architecture that we have, which, as you say, is now divided, divides security into two issues. And you get into these tortured arguments about which bucket you put the particular problem in—which is the more appropriate legal bucket. And you ought to say, "Look—let's maybe revise and reset the structure, and ask what are the things functionally we need to do, and what are the different kinds of concerns we have when we do these things?"

Michael Chertoff

So when we detain people, we can detain them on the field of battle, we can detain them in an American city, and they may be detained in another city in another part of the world—what is the appropriate legal regime we ought to use? And maybe the answer is depending on where we detain people we change the rules—we have more protections or less protections.

Michael Chertoff

But the point is we ought to make that decision as an affirmative decision, not based on trying to label something, but based on functionally looking at what are the kinds of things

we need to be able to do, and what are the civil liberties, Constitutional concerns, we want to protect? And then what you do is you fit the legal architecture to the circumstances you face—you don't try to force the circumstances into a legal architecture that was designed in a different era.

Interviewer

It makes it harder, though, finally, on judges, doesn't it, what the issues are brought

Michael Chertoff

Well, and it shouldn't be done by judges. I mean this, to me, is where Congress comes into it. I mean let's take a concrete example. You know, we worry a lot about what do we do when we have a dangerous terrorist, and we've apprehended them? We don't have the ability to try them as a criminal defendant. They may not have committed a crime, but they are, nevertheless, at war with us.

Michael Chertoff

So how do we detain them? Well, we know if we catch them in Afghanistan, you know, we can put them in a facility in Afghanistan and they can be held as a combatant there. Well, what if we catch them in let's say New York City? Now, if we don't have a criminal case, even though we may have plenty of good information that they are dangerous, how do we hold them—what's our authority? Well, we've done that, up to now, using the military authorities, and that's been upheld by the courts, but, you know, over a period of years, that may turn out to be an unsatisfactory way to hold them, and what the Supreme Court has already said is you've got to have, give them habeas corpus relief. But the Supreme Court has not been able to write a set of rules for what the burden of proof is, what the standard that has to be met is in order to hold somebody, and they've kind of thrown it open to the individual district courts to make that decision.

Interviewer

But the legislature should make it.

Michael Chertoff

Exactly. What Congress ought to do is they ought to say, "Look" what do we do when we have somebody in the US who we want to detain? What is the process of review? What is the burden of proof? What is the evidence? How often do you get reviewed? What are the conditions of confinement? And then if Congress legislates, the court will review that and see if it meets Constitutional standards, but at a minimum, then you have—at least you've kind of designed something that is fit for the purpose that you are trying to use it for, instead of trying to take a new set of facts and a new problem and put it into a legal architecture that was really not designed with that set of facts in mind.

Interviewer

And this is the problem with our functioning system at the moment, right, that the legislatures don't step up to create the rules, the laws, so the judges have to become more activist in the way they rule on laws that actually don't apply to a lot of situations, but they have to sort of force them into. And then they get accused of being activist judges, so it's a vicious circle here.

Michael Chertoff

Right. In other words, I mean if you wantâ€”I mean I think judges should be deferential to the legislature, and should be very cautious, and as Chief Justice Roberts is, very modest in their role.

Michael Chertoff

But historically, if Congress abdicates and says, â€œI donâ€™t want to deal with the issue,â€”â€”cause itâ€™s difficult or itâ€™s politically unpalatable, thereâ€™s going to be a vacuum, and someone is going to step into the vacuum. Now, the executive branch stepped in in the initial period after 9/11, and I think thatâ€™s historically always been the case, because the executive branch has the responsibility and the energy to do that. But over a period of time, if Congress does not fill the void and create a more sustainable architecture, the courts will, and thatâ€™s likely to be less than a satisfactory resolution, because the courts donâ€™t have the tools to really design a complicated architecture. They have only a blunt set of tools.

Michael Chertoff

And then what you wind up with is what we have now, which is the courts striking down things the executive does, and the executiveâ€™s trying to figure out what the courts want, and the courtâ€™s trying to figure out what they want. And the people who have the most authority to literally write a detailed set of rules are sitting on the sidelines and looking like the spectators at a tennis match.

Interviewer

Right, which makes the courtâ€™s decisions feel illegitimate, actuallyâ€”

Michael Chertoff

Correct.

Interviewer

Because they donâ€™t have the imprimatur â€”

Michael Chertoff

Right.

Inelegant Legality in the Age of Terror

Interviewer

Of the people as the public branch, political branches do. So letâ€™s go back to Moussaoui. What went right, what went wrong, what surprised you? How deeply involved were you in the prosecution, and just give me kind of a blow-by-blow of that case?

Michael Chertoff

You know, I think generally if you look at the outcome, you have to say it was an inelegant outcome, but it achieved the purpose that was necessary, which was to convict him. He did not get the death penalty, but that was submitted to a jury, and the jury decided that it didnâ€™t want to execute him. But he did wind up getting convicted. Now, it was complicated by the fact that he did not want to play by the rules, so he rejected his lawyers, he filed a lot of crazy motionsâ€”he really taxed the ability of the court system to manage a litigation. He also presented a lot of serious discovery problems, because he was seeking

to get access to witnesses who he claimed would be helpful to himâ€”I donâ€™t think they really wouldâ€™ve been helpfulâ€”but who were other terrorists being held in custody, and that posed a threat to our ability to maintain their custodial circumstance and to protect intelligence that we were gathering from them.

Interviewer

Thatâ€™s an inherent problem, then, of the civil process.

Michael Chertoff

And thatâ€™s an inherent problem of the process.

Interviewer

Of the civil processâ€”

Michael Chertoff

Civil process, yes, but itâ€™s also an inherent problem of the military process, because the military is also going to want a balance what discovery you get and, you know, what discovery is denied. Now, in the end, and I think, you know, the resolution of Moussaoui was to give Moussaoui the benefit of whatever helpful information he would get, but not direct accessâ€”he would get it in a refined form.

Michael Chertoff

And I think thatâ€™s probably a pretty reasonable compromise that established the principle that you can find a workable way to prosecute these cases in a civilian court, most of the timeâ€”not 100 percent of the time. And there are times when the military process has the advantage of being a little bit more flexible on some of the technical rules that apply in an ordinary criminal case. For example, the Sixth Amendment in a criminal case requires that you have literally direct, face to face contact with your witness against you, and thatâ€™s a technical requirement. And maybe in a military context, you can use video or you can use hearsay in a way that is still fair, but maybe gives a little bit less, is a little bit less disruptive to the intelligence requirements of the government.

Michael Chertoff

So thatâ€™s why I say the military process may be useful even for domestic cases in some subset of cases where the technical requirements of the Constitution make it very hard to take a case to criminal court. But I think Moussaoui, and subsequent cases, have generally established the proposition that in the majority of instances where someone is apprehended in the US it will be possible to prosecute them in civilian court. Now, I think thatâ€™s not true when you catch people overseas, because in that instance the evidence is largely not in the custody of the United States. Youâ€™re dealing with foreign rules and foreign governments which make it much more complicated, and thatâ€™s where my presumption is when you catch someone overseas you do that in a military process.

Interviewer

Now, how involved were you in the Moussaoui prosecution?

Michael Chertoff

I mean I was involved then in a kind of a high level of supervision. I wasnâ€™t in the nitty-

grittyâ€”I mean I did argue one of the appeals in the Fourth Circuit, but most of the day-to-day work was done by the lawyers.

Interviewer

And there was a problem at one point with the tampering of theâ€” sharing of some testimony, wasnâ€™t there? Can you think of it, Steveâ€”I discussed it with you last night.

Interviewer

Oh, the problem of using things from his interrogation that would normally be allowed.

Interviewer

No, no, it wasâ€”well, Iâ€™ll come back to it. Iâ€™ll find it later after we turn the camera off and talk to you about it. But letâ€™s go to actually the interrogation question. I think I was thinking before about something Judge Brinkemaâ€”is that how you pronounce the name?

Michael Chertoff

Brinkema.

Interviewer

Brinkema objected toâ€”a transportation lawyer, maybe, who had â€”who had shared some of the testimony about himâ€”

Michael Chertoff

I think thatâ€™s after my timeâ€”I think that occurred after I left, so.

Interviewer

So weâ€™ll skip over that. During your time at DOJ, the other issue that came up for discussion, has come up for discussion since, has been the proper role for interrogation and methods of interrogation, particularly for CIA agents. Can you speak to the discussions within the administration about that?

Michael Chertoff

Yeah, I was not reallyâ€”I mean thatâ€™s not really in ourâ€”it was not within my domain, and I think itâ€™s been publicly reported in an IG report, an OPR reportâ€”

Michael Chertoff

Right.

Michael Chertoff

That there was a point in time that I wasâ€”

Interviewer

That you were advising some of this.

Michael Chertoff

Asked whether there was some way to immunize that, and I said, "No, there's no immunity for doing that kind of thing" for doing anything illegal as a means of interrogation. And then there were opinions written by the OLC which have been the subject of an enormous amount of back and forth, and I don't want to revisit that.

Interviewer

Sure.

Michael Chertoff

But "except to say that I think that the people who wrote the opinions, whom I know, were doing their level best to try to figure out what is permitted and what's not permitted under a statute that had never been litigated, which was the torture statute.

Michael Chertoff

And, you know, there's a line somewhere under that statute, and the question is how do you draw that line, and what the legal rules are in drawing that line, and there have been gallons of ink spilled on this question, and I don't know there's much more to be said about it.

Interviewer

So any "you weren't" during your years at DOJ, wasn't there some waterboarding that went on?

Michael Chertoff

Well, I mean this is "but this is not under our domain in the division. We didn't supervise the CIA.

Professional Roots in the Big Leagues

Interviewer

I see. Okay, we talked about the "oh, I actually want to go back and look at your personal background, if that's alright. So tell me your family's history "you're from a Russian Jewish family, is that right?

Michael Chertoff

Well, my father's father was born in Russia, mother in Austria, and my mother was born in Poland.

Interviewer

And I've read that your father was born in Czarist Russia "is that right?

Michael Chertoff

No, my father was born in Rochester, New York.

Interviewer

Grandfather "sorry "grandfather was born in Czarist "

Michael Chertoff

Yeah, he escaped from the Czarâ€” yeah.

Interviewer

So did you grow up hearing stories of Czarist Russia from your grandfather?

Michael Chertoff

Not really.

Interviewer

You didnâ€™t? When did you decide that you wanted to become a lawyer?

Michael Chertoff

I think I was in collegeâ€”I was not quite sure what I was going to do next. Law school seemed like an obvious, you know, next step, for want of any other clear idea of what I wanted to do, so I went to law school. And I actually discovered when I was in law school that I really enjoyed it.

Interviewer

And did you know what kind of lawyer you wanted to be immediately?

Michael Chertoff

No. I think, you knowâ€”I think when I was in schoolâ€”and itâ€™s probably not uncommonâ€”I thought itâ€™d be fun to be a lawyer who argues in the Supreme Court or courts of appeals. But when I got out into practice and I was in a private firm for a couple of years, I had the opportunity to try a couple of cases in district court, and then I thought it might be interesting to tryâ€”

Interviewer

Was the district court district in New York City, orâ€”

Michael Chertoff

No, I think I tried one in California and one in Arkansas. I was just a junior lawyer, so I was playing a minor role, but I thought that might turn out to be very interesting, so I applied to the US Attorneyâ€™s officeâ€”actually, a number of US Attorneyâ€™s offices. I got accepted by Rudy Giuliani, who was about to become US Attorney in Manhattan, and I started out as an assistant US attorney. I discovered I loved being a prosecutor, and I loved trying criminal cases, so thatâ€™s what I decided I wanted to do.

Interviewer

So you knew Giuliani back when he was building his reputation as a prosecutor, then.

Michael Chertoff

Correct. I mean I think I was his first hire when he was US Attorney.

Interviewer

Is that right?

Michael Chertoff

Yeah.

Interviewer

So this wouldâ€™ve been the early â€™80s, lâ€™m thinking?

Michael Chertoff

â€™83.

Interviewer

â€™83. And tell me about Giulianiâ€™what kind of a man he was.

Michael Chertoff

He was a great US attorneyâ€™very energetic, smart, active, not afraid to do controversial and difficult things and I think he really was a great energizer for the US attorneyâ€™s office.

Interviewer

And a lot of the high profile cases that he was doing back then involved organized crime.

Michael Chertoff

Correct, and I in 1985, after lâ€™d been in the office for a couple years, he decided he wanted to bring a case against the ruling body of the La Cosa Nostraâ€™the American Mafia. And itâ€™s a body called â€œthe commission,â€ and he had gotten the idea about this from a book that Joe Bonanno wrote, where he talked about the history of the commission and how he had been on the commission as a, you know, decades before. So Rudy asked me to come and kind of help put the case togetherâ€™he was going to try the case, I was going to assist him. We put the case togetherâ€™I did most of the putting togetherâ€™for about a year, and then in the summer of â€™86, after weâ€™d indicted the case, he wound up deciding he was going to try a different case, which was the Bronx Democratic Party leaderâ€™

Interviewer

Right.

Michael Chertoff

Who was Stanley Friedman, and so I then became the first chair or the lead prosecutor for the commission case, and I had two other lawyers who worked with me, you know, as the second and third chair. And so I actually wound up trying that case, which I did in the fall of â€™86, and convicted the bosses of the families of the commission, and then they all got 100 years in prison.

Interviewer

And what did you learn in that, â€™cause itâ€™s beenâ€™this had been tried for many years and neverâ€™nothing was resolved?

Michael Chertoff

Well, this was a greatâ€”you know, this was an investigation which also a lot of people worked with me on this. We had the New York Police Department, the FBI, two other prosecutorsâ€”but it was about the patient assembling of facts in order to put together a persuasive understanding of what the facts of the case were.

Michael Chertoff

And this was a case that spanned events that went back to literally the â€˜40s. You know, itâ€™s been like 30-40 years of evidence to go through. And in many ways, it was a great training for using intelligence, because much of what we did was rely on informationâ€”intelligence, so to speakâ€”not the CIA type of intelligence, but the kind that the FBI collectsâ€”to target where you might find evidence, and target people that might be useful as witnesses or even as defendants, and then to use that to build a case. And the lessons you learned from that process are how to evaluate intelligence, how to check its reliability. You know, one thing you learn when you try a case in a courtroom is youâ€™d better kick the tires before you take the car out for a test drive, because if things arenâ€™t really solid in the courtroom, they fall apart very quickly.

Michael Chertoff

So it teaches you not only how to collect and analyze intelligence, but how to be rigorous about evaluating it and testing it. And I think that actually served me well in some of the things I did when I was dealing with counterterrorism activities at the Department of Justice.

Michael Chertoff

Correct.

Interviewer

And how to prosecute syndicates.

Michael Chertoff

Right, and how to put together very complicated pictures of literally multi-decade conspiracies, and understand how they operate, and then be able to explain how they operate to a jury or to a judge.

Michael Chertoff

Right, then I became the first assistant US attorney in New Jersey, and I got hired for that because of a young lawyer whoâ€™d just become US attorney named Samuel Alito who was looking for someone who had experience trying cases as his first assistant. He knew somebody in New Yorkâ€”that person knew meâ€”they put us in touch. Sam interviewed me, we hit it off, and he asked me to come over and be his first assistant, and I was his first assistant for three years, and then when he became a judge, I went on to the job of US attorney. I had President Bush forty-oneâ€”

Interviewer

So you went from there to the US prosecutor in New Jersey.

Interviewer

When you wentâ€”I justâ€”when you were on the Third Circuit, he was there also, right?

Michael Chertoff

Correct.

Interviewer

So you sat togetherâ€”

Michael Chertoff

Yeah, we sat together in Third Circuit.

Interviewer

So what kind of cases did you try in New Jersey?

Michael Chertoff

I did a couple of cases. I did a big corruption case against a man named David Friedland, who had been a state senator and had defrauded a pension fund, and had faked his own death in a boating accident and fled to the Maldiv Islands in the Indian Ocean, and had ultimately surfaced. And we got him expelled from the Maldiv Islands, brought back to the US, and I tried him and convicted him in New Jersey in federal court. And then I tried a longâ€”

Interviewer

And now heâ€™s in federal prison?

Michael Chertoff

I think heâ€™s out by now, actually. And then I tried a long organized crime case involving the Genovese family, which went on for four months, involved various murders and murder conspiracies. And then as US attorney I tried Crazy Eddie Antar, the electronics mogul, for securities fraud, and he was convicted in the early 1990s.

Interviewer

Then Third Circuit after that.

Michael Chertoff

No, noâ€”then I went to private practice, and I was in private practice for close to ten years at a big law firm. I opened up the New Jersey officeâ€”I tried a lot of criminal cases, white-collar cases involving, you know, business people, politicians, things of that sort, and then in 2001, when President Bush was putting together his administration, they asked me to come on board as head of the criminal division.

Interviewer

So that was your first job administratively in government that was with the criminal division.

Michael Chertoff

Well, actually, US attorney was actually my first, back in the early â€™90s.

Interviewer

And what does the director of the criminal division doâ€”forgetting, for the moment, 9/11 and the terrorism?

Michael Chertoff

Well, the head of the criminal division supervises all the prosecutors in the criminal division, who are responsible for a series of different kinds of criminal prosecutions.

Michael Chertoff

Now, you have the US attorneys in the various 94 districts around the countryâ€”they are different than the criminal division, and theyâ€”in almost kind of a parallel systemâ€”and they report to the deputy attorney general. So you have kind of Washington-based prosecutors in the criminal divisionâ€”you have locally-based federal prosecutors in the US attorneysâ€™ offices, and then the US assistant attorney general in charge of the criminal division has some statutory responsibility for supervising certain kinds of cases when theyâ€™re brought by the US attorneys, like racketeering cases or things of that sort. So itâ€™s kind of a complicated matrix, where you have federal prosecutors in the field, federal prosecutors in Washington, and a kind of a mix of responsibilities.

Interviewer

Well, it also gave you an opportunity to find how to prosecute conspiracyâ€”

A Former Judgeâ€™s Objectivist Philosophy

Interviewer

And then from there you went to the Third Circuit.

Michael Chertoff

Correct. Yeah, in 2003, I went to the Third Circuit, was nominated and confirmed in June of 2003, and then I did that until the President asked me to come on board as the head of the Department of Homeland Security, February 2005.

Interviewer

But now youâ€™ve never been a judge before up â€˜til that.

Michael Chertoff

Correct.

Interviewer

How did it feel being on the other side of the bench?

Michael Chertoff

Well, you know, I tried a lot of cases, so I mean I was familiar with the courtroomâ€”I knew how to argue cases in a court of appealsâ€”but itâ€™s certainly an adjustment, and it took a little while for me to learn not to call the other judges â€œyour honor,â€” which I was [Inaudible] kind of silly. But you know, you pick it up pretty quickly, and having had the experience of having been a law clerk and a trial lawyer, it was not hard for me to make

that adjustment. It is a different rhythm, thoughâ€”I mean youâ€™re much more passive. Youâ€™re not picking your own casesâ€”the cases really pick you, so to speak, and so you learnâ€”what makes a good judge is not being active. Itâ€™s beingâ€”as John Roberts has beenâ€”kind of a neutral umpire, and applying the rules without having a preference for one outcome or another outcome. And thatâ€™s a different experience than being a lawyer, where youâ€™re an advocateâ€”but it wasnâ€™t actually that hard for me to make the adjustment.

Interviewer

Because a lot of citizens, about the courtsâ€”the articles you read about courts these daysâ€”that there are no neutral principles, and that theyâ€™reâ€”

Michael Chertoff

Yeah, I think thatâ€™s misplaced. I will tell you that, you know, my experience as a judge, and I did it for a little less than two years, is actually that there are neutral principles. That if youâ€™reâ€”now, can a person be dishonest, and not apply them? Sure, you can be dishonest as an accountant or as a lawyer or as anything. But if you are acting in good faith, in the vast majority of cases, itâ€™s not hard to discern what the right answer is, and what the law is.

Michael Chertoff

And I found, for example, there were times I decided cases, and I personally disliked the outcome of the case. A couple of times, for example, I granted habeas petitions to defendants where I personally knew they were guilty from looking at the record, but there was a legal problem with the case and I had to grant the habeas petition, and it was not my personal preference to do, but being intellectually honest, I understood it was the right thing to do. So, you know, my experienceâ€”

Interviewer

Do you think your colleagues did that too?

Michael Chertoff

Yeah, absolutely. My experience is that the vast majority of judges are perfectly capable of being neutral in their decision-making, and that the tendency of outside observers to believe everybody is manipulating the process to achieve a result, thatâ€™s only the very rare judge does that. I think most judges really do try to be neutral, and that they can be neutral.

Michael Chertoff

And now, thatâ€™s not to say there arenâ€™t closed cases where there are differences of opinion, and, you know, obviously there are hard cases, but the idea that there are no neutral principles and that the whole process is a masquerade for your personal preferences I think is a wildly, wildly misstated criticism of the courts.

Interviewer

Well, you know, it seems to me that the popular understanding is that the courts are another political institution, and then the more that forces both the understanding of the courtsâ€™ decisions as politically or policy oriented rather than based upon neutral principles, the war has become a self-fulfilling prophecy, because then you would have

judges nominated who are aimed at fulfilling a political agenda. Isn't that partly where this idea comes from?

Michael Chertoff

I think part of it is that, you know, I hate to blame the press, but the press often does popularize the idea that these things are driven by politics. For example, you rarely read an article about the courts where they don't tell you who appointed the judge.

Michael Chertoff

But I can tell you from having sat with judges who were appointed by Republicans and Democrats, that was not a very accurate way of predicting how judges were going to rule on things. You know, obviously, judges do have different philosophies, and you'd be unrealistic if you didn't say that a Stephen Breyer and a Nino Scalia look at cases differently, but it's not based on personal preference politics—it is their particular philosophy of law. But in both cases, they have neutral principles. You can argue about what the right principles are, but it's not a matter of them just putting their personal preferences into the process.

Interviewer

Let's go to speaking of justices who were appointed by Presidents that you would not have expected them to be appointed by, let's go to who you worked for when you were at the Supreme Court

Michael Chertoff

Right.

Interviewer

Which is William Brennan, appointed by President Eisenhower, and I think the famous quote was someone asking Eisenhower if he ever made a mistake when he was President, he said, "Two of them, and they're both in the Supreme Court," meaning Brennan and Chief Justice Earl Warren. Given your career path, one would not have expected you to be working for one of the more liberal justices of the Warren era. Tell me about that period, and what you thought about Brennan as a justice and learned from him.

Michael Chertoff

Well, first of all, I was actually in law school, so I was 25, 24-25 when I was hired, and I was probably among the most conservative clerks that, you know, William Brennan had, although he didn't really interview you, and I don't think he cared very much what your politics were when he hired you. And, you know, my understanding of my role as a law clerk was not to be the judge, but was to faithfully carry out his wishes and his decisions in terms of research and writing, things of that sort.

Michael Chertoff

So I didn't have any problem working for him because I understood what my role was, and when I hired clerks as a judge, I didn't worry about what their politics were because I understood I was going to make the decision, and their job was to faithfully carry out, you know, what my intent was in drafting something or in researching something. And I didn't mind getting pushback, you know, and having them argue with me, 'cause

that's fine, but in the end, you know, I knew what I wanted to do as a judge, and I mean Brennan knew what he wanted to do as a judge. He was a delightful, wonderful man—one of the nicest men you could ever want to meet—very humble. Not a guy who despite his being a Supreme Court justice was, you know, arrogant or, you know, carried himself as if he was some kind of a special character, but a real down-to-earth individual who was warm and friendly, and probably in a different life would've made a very successful politician, 'cause he had a good touch with people.

Interviewer

Well, he'd been a state politician, hadn't he, and

Michael Chertoff

I don't think he'd been involved in state politics, but I don't think he'd ever been an elected politician.

Interviewer

Oh, is that right?

Michael Chertoff

Yeah.

Interviewer

But he's known as a politician of the court during that time.

Michael Chertoff

But he was very good at interacting with the other judges, and

Interviewer

And building majorities, is that right?

Michael Chertoff

Building majorities, and you know, one of the things I learned from him when I was a judge was a judge can on an appellate court, multi-member court, you can take two attitudes to your role. One attitude can be, 'I'm going to write what I want to write and vote how I want to vote, irrespective of anybody else, and it's my way or the highway. If nobody else agrees with me, that's fine—I'm still going to write the opinion my way.' That's a great way to write a lot of separate opinions. The other way is to say, 'Look, I'm trying to—my job here is to give answers to legal issues, and I can't do that if I'm by myself—I've got to at least get one, or in the case of the Supreme Court, four other judges to agree with me.'

Michael Chertoff

So without sacrificing my principles, if I can find a way to write an opinion that brings other people in to join me, we can reach common ground on what the right answer is, then I'm actually helping the lawyers and the judges on the lower courts, because I'm giving them guidance—I'm giving them an answer. And sometimes that's a matter of being incremental or modest in terms of what you write—you know, you

don't try to write the answer to everything, you just answer the question in front of you, and it's easier to get common ground that way.

Michael Chertoff

And sometimes, frankly, it's just your interpersonal style. I mean it'd be nice to feel that judges are not human beings, and they're, you know, not swayed by human considerations, but the fact is, if someone is difficult to deal with as a person, it's likely to be harder for them to bring a consensus together than if they are easy to deal with, and if someone is able to engage in talk and discuss and work with another judge to come up with what is an opinion that will satisfy his principles and your own principles, I think that's likely to be a judge who's going to have more impact than someone whose attitude is, "Here's my view. You're either with me or you're not with me, and I'm not going to engage with you on it."

Interviewer

But you were there with "what years were that?"

Michael Chertoff

'79 to '80.

Interviewer

'79 to '80" and important cases or landmark cases that were considered at the time?

Michael Chertoff

You know, probably the most important case during my term as a law clerk was *Richmond Newspapers v. Virginia*, which established that the First Amendment gives the press some right of access to courts and proceedings and things of that sort, independent of what the parties want.

Interviewer

I take it that Justice Brennan was on "

Michael Chertoff

Yeah, he was in favor of right of access, and he wrote a separate opinion, but if you look at the opinion, you know, he was not "contrary to public impression" a completely unreconstructed liberal. There's a footnote in that concurrent opinion that talks about how in the case of national security, there might be some requirement to be able to close some proceedings off, so he had, you know, some ability to balance when you dealt with issues of national security.

Interviewer

Who else clerked with you when you were there? Did anyone else go on to a public career?

Michael Chertoff

Well, let's see "I'm trying to think of anybody" well, Cass Sunstein actually

clerked for Marshall.

Interviewer

Oh, is that right?

Michael Chertoff

Yeah. He was actually my roommate in college.

Interviewer

Is that right—that's an interesting combination.

Michael Chertoff

Yeah.

Interviewer

Are you still in touch with him then?

Michael Chertoff

Actually, I haven't spoken to him in years.

The President Would Like to See You Today

Interviewer

Now let's move on to homeland security, then. So the first Secretary of Homeland Security was Tom Ridge.

Michael Chertoff

Right.

Interviewer

Establishing a brand new department, bringing pieces of other departments, essentially, together. I guess I should ask first, did you think it was a wise decision to create a whole new cabinet Department for Homeland Security?

Michael Chertoff

You know, I don't know if at the time it was done, I was at the Department of Justice.

Interviewer

Right.

Michael Chertoff

I don't know that I gave it a lot of consideration—again, it wasn't my domain. It didn't affect my, you know, criminal division, so I was more of a spectator than that.

Interviewer

Retrospectively, when you look back—

Michael Chertoff

I think based on what I know now it made a lot of sense. I think that the ability to bring together all of the agencies that deal with protecting our borders—air, sea, and land—and our infrastructure in the country, and dealing with prevention and response, I think makes a lot of sense. And I think, you know, the ability of a single cabinet secretary to control all those levers once you’ve integrated them actually is an efficient way to achieve good results.

Interviewer

Is there the potential for sort of too many hands on the levers because the subordinates here have their own agencies, right, that are already, where they already are chiefs, and they’re going to have some conflicts of authority?

Michael Chertoff

Yeah, but it’s much less than if all these agencies are in different departments, because I, at least, never found I had a problem, you know—once I made a decision, I never had a problem having it executed.

Interviewer

Now, tell me how the process evolved. I know Tom Ridge resigned—then Bernard Kerik was the first nominee put—

Michael Chertoff

Yeah. I think Tom was actually resigning at the end of ’04, was going to leave I think January 30—again, from the newspapers, I know Kerik was—I don’t know if he was nominated or he was just identified that they were going to nominate. I don’t know if he actually got to the nomination, and then he pulled out for reasons which I think in retrospect probably have to do with not just problems with his nanny, but some issues and presumption of going to jail. So then I got a call from the White House and White House personnel asking if I would be willing to consider—

Interviewer

To reconsider?

Michael Chertoff

To consider—

Interviewer

Oh, to consider.

Michael Chertoff

Being Secretary if the President wanted to appoint me.

Interviewer

That call comes from whom, by the way?

Michael Chertoff

It came from someone in the White House personnel, and so I called my wife and I said, “Wow, you’d better sit down. This call has just come in.” And this is in January 2005, and we talked about it. I called back the next day, I said, “Yeah, I’d be willing.”

Interviewer

You were on the court at this point.

Michael Chertoff

I was on the Third Circuit, and I said, “Sure, I’d be willing to be considered.” I remember I said, you know, “I’m sitting next week” “we have a court sitting next week, but maybe when it’s over I can come down and talk to you,” and they said, “No, we want you to come down today.” I said, “Well, I’m not dressed, actually,” “cause, you know, I was in my casual clothes cause I didn’t go to chambers in a suit. So I said, “I’ll come” “we arranged I’ll come down tomorrow, which was Friday, so I hopped a train Friday morning, went down, met with Andy Card, who was the chief of staff, and Dina Powell, who was the head of personnel. They talked a little bit about the job. I talked about, you know, my feelings about it and kind of my view of it. I think at the end of it, I said “the President was traveling” I said, “I’ve really got to go back and talk to my family” in particular my kids” before I do anything, cause I don’t want to meet with the President and not have, you know, made a decision, not prepared to”

Interviewer

How old are your kids”how old were they then?

Michael Chertoff

They were teenagers, young teenagers. So I went back on the train, and I got a call on my cell phone. “The President” “he’d like you to come in.” I said, “Well, I actually can’t physically get there in a minute, because I’m practically home.” So they said, “Well, could you come tomorrow morning, Saturday morning?” So I said, “I’ll come Saturday morning.” So I went home, discussed it with the family, flew in early Saturday morning”

Interviewer

The family said “yes,” I take it.

Michael Chertoff

They were” accepted it”and met with the President that morning, flew back home, and then on Sunday the President called me up and said that he wanted to offer me the position, and I said I was honored and would be delighted to accept”which I had told him on the previous day”and then it was announced a couple of days later.

Interviewer

Now, going back to where you were at that moment in your life, you’re a Third Circuit judge only two years.

Michael Chertoff

Correct.

The Emotional and Intellectual Manifestation of September 11
Interviewer

Were you happy to leave the court? Were you thinking you were going to be there the long haulâ€”judges usually do stick with it?

Michael Chertoff

Yeah, I had assumed that I was going to be on the court, you know, for the rest of my life, so I wasnâ€™t looking to leaveâ€”I mean I was perfectly happy where I was. But you know, this was a unique opportunity, but more than a unique opportunity, I mean 9/11 was a huge life-transforming event for meâ€”it was the biggest event of my lifetime, to start with, and it changed the way I looked at the world. I got very deeply involved in the period of time I was at the criminal division in dealing with just the entire new architecture of the world we found ourselves in, soâ€”

Interviewer

Talk for a second about that, â€˜cause I want to understand that a little bit better. Tell me what you mean by thatâ€”that it changed your whole world view.

Michael Chertoff

Yeah, it didâ€”it made everything else that I had done professionally pale in significance. This was an act of war, andâ€”but more than that, it was the real maybe not the opening chapter, but the first really big chapter in what was going to be just a completely different world from a security standpoint. We were never going to go back to the days when we had a benign environment, and we could kind of turn our back on the world. This is the first time in American history, since maybe the War of 1812 that the outside world came and found us, and we didnâ€™t have a choice in the matter. And that was a transformative event on a professional levelâ€”

Interviewer

And on a personal level.

Michael Chertoff

And on a personal level. You know, I had to callâ€”on September 11, I had to call Ted Olson, andâ€”â€˜cause his wife had called himâ€”and said, â€œTed, would you mindâ€”â€ you know, obviously, I felt horrible about this. You know, we told him how deeply upset we were with this.

Interviewer

Ted Olson was then solicitor general?

Michael Chertoff

Right. What happened to Barbaraâ€”

Interviewer

And his wife had died on the plane coming in to the Pentagon.

Michael Chertoff

To the Pentagon. I had to, how deeply upset we were by this, but at the same time, it was important that he, if he was willing, tell what he knew to the FBI, so they could understand what Barbara had told him, so we could help get that picture of whatâ€” you know, who had been on the plane, and help us assemble that general picture of what the group was that had carried out this attack. And I had had dinner with them the previous Saturday night, soâ€”

Interviewer

With the two of them.

Michael Chertoff

In a larger group, soâ€”and my wife had, too. So I mean this wasâ€”9/11 changed my view of what was important in terms of my professional and personal life. So, you know, if the President had come to me and said, â€œI want you to be Secretary of Education,â€ I might well have said, â€œNo, you know, I really donâ€™t like being in charge.â€ But to be involved in the security world was, to me, the most important thing you could do. Itâ€™s like in World War II, how would you not want to be part of the war effort?

Interviewer

Did it change your world view pessimistically? I mean are you optimistic about our ability to fend off this enemy?

Michael Chertoff

Iâ€™m realistic about it. I mean I donâ€™t think thereâ€™s ever going to be a moment when the problems of the world go away, and, you know, it was nice after the Cold War to say, â€œWow, the Berlin Wall came down, and now everythingâ€™s going to be wonderful.â€ Peace dividend, you know, the end of history â€”thatâ€™s foolish. Thereâ€™s no end of history. And you know, the bad newsâ€”

Interviewer

Did you think it was foolish then?

Michael Chertoff

I probably wasnâ€™t focused on it at the time, but I would say that globalization and technology are only going to intensify the ability of small groups of people to do enormous damage, and thatâ€™s a security environment in which weâ€™re going to live for the rest of human existence, so weâ€™re going to have to get adapted to it. And itâ€™s not going to be something that we can resolve with a single battle or a single policy decisionâ€”itâ€™s going to be something weâ€™re going to have to manage from a security standpoint throughout my lifetime and the lifetime of our children and grandchildren. So thatâ€™s what I mean about being realistic.

Michael Chertoff

In many ways, itâ€™s like having cancerâ€”you know, you may not cure it, youâ€™re going to have to manage it. Now, do I think we can manage it? Yes. Do I think itâ€™s going

to require some changes in the legal architecture? As I've said previously, I think the answer to that is "yes." Is it going to affect the way we live? The answer is "yes." Is it going to make our lives miserable? The answer is "no." It does not have to make our lives miserable, but we do have to treat it as a persistent problem.

Michael Chertoff

Now, some people don't like that, and they get angry when you talk about that, and they tell us, "it's overblown, and you're exaggerating it, and it's fear-mongering, and security fever." And that's wishful thinking that people who wish it were not true. They wish the world were not this way. But nothing I've seen about the world tells me this problem's going to go away. I mean even if bin Laden disappeared tomorrow, and even if al-Qaeda disappeared tomorrow, there would be other groups with grievances that don't like it."

Interviewer

This is the nature of globalization.

Michael Chertoff

This is globalization, and it's technology, and what that means is that the ability of people to create weapons of mass destruction will continue to be more and more widely distributed, and we're going to have to get better and better at responding and preventing those things, but we're not going to have the ability to say at some point, "We're done, and everything is taken care of" we don't have any more problems."

Interviewer

And how much more complicated is it in the era of globalization, the power of the non-state actor as"

Michael Chertoff

Well, that's"

Michael Chertoff

"Cause the nation-state is in decline, people say.

Michael Chertoff

Right. Well, it's not in decline, I think, but what's happened is the power has now distributed over non, into non-state areas as well, and that means both non-state areas that are within the domains of countries, but countries that are weak and can't govern themselves"like in parts of Pakistan or Afghanistan or Somalia"or virtual networks that operate over the internet, and where people are in different countries, like in Europe and Asia and even in the US, and they're communicating over the internet. So all of this has reduced the difference between the nation-state and the non-nation-state actor, and then the second huge development is technology. I mean the kind of destruction that in the old days required a national government now can be achieved by a network or even a small group.

Michael Chertoff

Soâ€”and thereâ€™s nothing that tells me that that trend is going reverse itself, so that comes back to my original point about the legal architecture. We can argue till weâ€™re blue in the face about whatâ€™s a war and whatâ€™s a crime, but in a day in which a small group can do more damage than the Germans did in World War II, thatâ€™s a foolish distinction. Weâ€™re going to have to look at security threats as an entire spectrum, and whether we use the tools of the criminal justice system or military tools or both is going to have to depend on a much more refined analysis of what the threat is and what the circumstances are and what our civil liberties concerns are than just trying to find a box and putting something in a box.

Reflecting on the Lessons of Katrina
Interviewer

Now, one of the threats to homeland security that happened while you were Secretary of Homeland Security was Katrina.

Michael Chertoff

Right.

Interviewer

Which had to have come out of left field for youâ€”it wasnâ€™t the kind of issue dealt with, or probably thought about dealing with, until you became Secretary. Can you relate that episode in American history and your part in it?

Michael Chertoff

Yeah. Well, I mean thatâ€”now thatâ€™s, of course, as we look back on it, was not a hurricane as much as it was the failure of the levy system, and the hurricaneâ€”which was a powerful hurricane, but not extraordinary by the standard of some other hurricanesâ€”was really the straw that broke the camelâ€™s back.

Michael Chertoff

In the weekend before Katrina, which I believe was the 27th-28th of August, 2005, you know, the hurricane was tracked, it hit Florida, went across the panhandle, went into the Gulf, and as of Saturday, they began to predict it might hit in the vicinity of New Orleans. Without getting too bogged down in detail, the mayor and the governor were hesitant to order an evacuation, and didnâ€™t do it until Sunday the 28th. And as a consequence of that, and as a consequence of the fact that there was no real plan that they had for a mass evacuation of New Orleans, the city did not fully evacuate. A lot of people did evacuate, but there were a lot of people who either didnâ€™t or couldnâ€™t evacuate.

Michael Chertoff

When the storm hit on Monday the 29th, it actually didnâ€™t hit New Orleansâ€”it hit east. I think Pass Christian was kind of the center where the storm hit, and it was a very powerful storm with a powerful surge, but in and of itself, it probably would not have caused the degree of flooding that you had in New Orleans. That occurred when the water on Lake Pontchartrain, which had been pushed by the hurricane, flowed back towards the city, funneled into the 17th Street Canal, and then the water pressure forced a failure in the wall of a canal, and then the water, basically, from the lake drained into a good deal of the city, and thatâ€™s where most of the flooding was. Parenthetically, the reason the water flowed in the canals, there was no gate at the mouth of the canal, and there is now a gate in the

canal, and in 2008 we used that gate to drop and prevent the water from flowing back into the canal after Hurricane Gustav. The reason there was no gate on the canal in 2005 is because the people who lived along the lake didn't want a gate, because they felt it would spoil the view and the aesthetics of their community, and without a gate, of course, the water had nothing to block it from coming back in.

Michael Chertoff

Over the period of that day, Monday, and then overnight, New Orleans flooded like a bowl, and at that point, the people who had not been evacuated were in peril of life and limb. The buses which would have been normally used were underwater—those were school buses—and so we had to build from scratch a capability to evacuate all those people. And it was probably the greatest mass migration in American history, after the Dust Bowl, but unlike the Dust Bowl, which took place over months and years, this was a matter of two or three days.

Michael Chertoff

So much of what went on over the next week had to do with how do you build from scratch, okay, the ability to evacuate these people and find a place to put them? And with the state and city not capable or unable to carry that, it fell to the federal government, and I think that my take-away from that was the absence of a plan, a contingency plan, for stepping in when the state and locals can't be first responders really hampered our ability to respond appropriately. Now, I do have to say, you know, although it got little notice, or less notice than it should have, the Coast Guard—which is part of the department—did a magnificent job. I think they did 30,000-plus evacuations. But it still was a very, very difficult circumstance over the next few days.

Interviewer

Did you see that in retrospect as a lesson to learn for a more a less natural and more man-made disaster, in terms of the kind of terrorism acts we're talking about?

Michael Chertoff

It was a great lesson—maybe the most fundamental lesson of my tenure—about the importance of planning for incident management at the federal level. I don't mean just nominally saying we're going to manage an incident—

Michael Chertoff

I mean actually building a civilian planning capability that's comparable to what the military has, because up until 2005, the civilian government really did not have a robust interagency planning capability. I mean in theory, we had plans, but in practice, they were not really well developed, and they were not well resourced, and a lot of what we did during 2005 and 2008 was to build the beginning of a planning process and a capabilities-based process for the civilian government, to be used both in natural disasters and terrorism. And you saw some of the benefit of that in 2009 when we had that flu, and they used the avian flu plan as a template for responding. So that was really the great take-away of Katrina.

Interviewer

What else did you learn as the Secretary of Homeland Security—what would you have done differently, and would you recommend to your successor?

Michael Chertoff

Well, I mean as I said, the big, great lesson was of course the importance of planning and resourcing for the remote contingency, like the catastrophic contingency. You know, you learn a lot of different things. You learn the importance of how you roll out a new initiative, and the importance of laying the groundwork, both in terms of stakeholder groups and publicly, before you do something. You know, a classic example of that was Dubai Ports, where a perfectly benign transaction involving the purchase of terminal machinery at ports by Dubai World, Ports World became a huge flack because it had not been properly rolled out. The people who did the transaction didn't kind of give a heads-up to everybody who might be relevant and explain that the transaction was a perfectly benign transaction, and so when it first

Michael Chertoff

So for my viewers, what happened here was that Dubai was

Michael Chertoff

This was "it was a company based in Dubai, in the UAE" they bought a company, port terminal company, and right away it hit the airwaves as the, you know, Arab countries buying our ports, and our port security is threatened, and they're going to be bringing in people from the Arab Gulf to man our ports. Now, there was no truth to that "in fact, the people who were going to operate the machinery were the very same longshoremen, unionized longshoremen, who have always done it.

Michael Chertoff

But because they didn't prepare the groundwork and explain in advance what the transaction, who's buying it, what's being bought, what is the plan going forward, and because people were caught by surprise, the public relations element became a debacle. And then the reality never caught up to it, so in the end, the transaction occurred, but they wound up selling the US operations to another company. So that's a small example of one of the lessons you learn, which is how do you "how you roll out an initiative, and how you prepare, and how you explain it has a great deal of operational significance in terms of your ability to succeed in carrying the initiative out.

Interviewer

What role does the Army have, or should it have, or can it have, particularly given our historical concerns about a standing army, in homeland security?

Michael Chertoff

Well, I mean Katrina's a great example of this. We've had a very constrained role, from a legal standpoint, for the military in dealing with domestic matters, and one of the big issues in the first week of Katrina was when the state did not have the capability to execute what it needed to execute, what was the ability of the President either to take over the National Guard or to bring Title X military forces into play? And it was enormous dispute about that, and legal uncertainty, and a hesitancy on the part of the Pentagon to take that step, and the governor was very reluctant to ask for those troops to come in, and it wasn't 'til Saturday when the President finally decided in a limited way to send troops in, and that, again, was after a lot of legal wrestling.

Interviewer

Explain a little bit about the legal wrestling so that the

Michael Chertoff

There are a set of laws that basically prevent military—particularly the Army—military forces from engaging in law enforcement or security activities in the United States. That's part of our traditional reluctance from a civil liberties standpoint—except in a couple of narrow cases where there's insurrection or a civil rights issue.

Michael Chertoff

Like as a part of the riots in the '60s and that case, right.

Michael Chertoff

Right. And in the case of a natural disaster, that doesn't fit within that template, so whether the President has the right to bring those troops in is a serious open question. Now, you could argue what the President should've done is bring the troops in and then let the consequences sort themselves out afterwards. This was a case where the President was actually reluctant to test the bounds of legality and overstep, and it took several days before everybody became comfortable that the President could bring the troops in for a limited purpose. It may be that the take-away lesson is that one should be as vigorous in responding to a natural disaster as you are to an attack, because the effect, in many ways, is the same, and you know, it's the same kind of Lincoln moment, where Lincoln says, you know, "I'm going to disobey some of the laws in order to make sure that I preserve the greater good." [BKGM31]

Michael Chertoff

Interestingly, after Katrina there was an effort made to broaden the President's power to bring troops in in an emergency, and it passed Congress in 2006, but then it was repealed the next year, because the governors hated the idea of the President having that authority.

Interviewer

For that traditional fear of federal authority being moved in on states.

Michael Chertoff

Correct, because they wanted to preserve their primacy in responding, and the truth is that most of the time, that works very well. The problem is the experience we've had in both 9/11 and Katrina is that rare, but nevertheless catastrophic, instance where what usually works doesn't work, and that's the kind of remote but extreme contingency—what some people call a "black swan"—that you have to be prepared for.

Interviewer

I think you're

Michael Chertoff

Can I take a break for a second?

Interviewer

I think weâ€™™ll stop here, actually, â€™cause we got inâ€™”we have to move off theâ€™”thank you.

Michael Chertoff
Yeahâ€™”