



NATIONAL SECURITY LAW REPORT

SPECIAL ISSUE: Advice for the Next Administration and Congress

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A Running Start: Getting “Law Ready” During a Presidential Transition

By James E. Baker

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I. Introduction

A. Opportunities and Risks

We are headed for our first wartime Presidential transition in forty years. The good news is that this has prompted uncommon attention to the process of transition. The bad news is that transitions are difficult in the best of circumstances; forewarned does not always equal prepared. The image most frequently invoked to describe a transition is that of passing a relay baton, but this is a political baton passed across teams and without practice. The Standing Committee on Law and National Security asked how might an incoming administration get a running start in the areas of national security law and Presidential process?

The United States handles transitions well on a strategic level. Strategic continuity is found in the Constitution. Many of the provisions in Articles I and II, for example, address transitional issues such as the qualifications for office and the process of election before they address the enumerated powers of the branches. As importantly, electoral transition is in the DNA of national expectation. The public expects a smooth transition, even when there is a bitter election.

Transition is also part of the rhythm of government. The intelligence community, for example, has a sound tradition of briefing candidates and Presidents-elect. Secretary Gates and Secretary Chertoff have initiated detailed transition planning. Admiral Mullen has emphasized the need for a seamless transition, while at the same time invoking the non-partisan professional ethos of the U.S. military.

However, there is tactical vulnerability. An outgoing administration may hesitate to initiate all but the essential acts of force or to make policy commitments. Alternatively, an administration on its last legs runs the risk that policy initiatives will be short-lived, or that relevant actors will wait the administration out. An incoming administration may not have developed its policy framework or crisis templates; campaign rhetoric may not have adjusted to ground truth and the nuance of governance.

There is procedural vulnerability as well. When a new administration comes into the White House there is little in the way of guidance. In many cases, safes are literally empty. Phone lists do not exist; sometimes, phones do not either. Most importantly, personnel may not be in place. This is evident with respect to officials subject to Senate confirmation. It is also true at intermediate levels of government where facts are gathered, intelligence analyzed, and policy choices framed. In the following pages I offer some suggestions that might help the next team get a running start and mitigate transitional risks.

B. Mitigate Risks by Acknowledging Them

Mitigation starts with recognition of these transitional risks and the tools to address them. There is risk that the new team flush with victory will disregard the policies and procedures of the old team, without distinguishing between what has worked and what has not. Abiding mechanisms remain in place, like the military chain of command. The civil service is also a source of continuity, provided there are clear demarcations as to which matters need to go up an evolving policy chain of command and which do not.

Friends and allies need to appreciate the challenges of transition as well. Other governments then need to determine how to effectively and timely engage the new bureaucracy and to know when and where they have received a meaningful level of agreement, or for that matter, disagreement. It is important to recognize where gaps in authority or process might occur, but also important not to wait for those gaps to fill before pressing toward decision.

C. Maintain Policy Contact

It is also important to maintain contact with the issues at hand and not sweep them out of hand as concerns of the last administration. In tactics, if you lose contact with the enemy, you lose capacity to predict where and when he will attack. Even if a new team intends to change policy, they should not walk away from issues

on the table. It may be months or even years before a new policy is in place.

D. Install Circuit Breakers in the Swing Positions

For the President, the most important transitional safeguard may be the appointment of seasoned officials to the critical swing positions on the White House staff, including the Chief of Staff, the National Security Advisor, and the Counsel to the President. These officials are not subject to confirmation and therefore can immediately begin advising the President-elect in their intended capacities.

It is natural and appropriate to appoint persons to these positions who helped win election; political appointees also bring fresh energy and ideas to government and are well suited to translate and implement Presidential intent. On the other hand, one cannot underestimate the importance of having persons in these positions with the knowledge and experience to serve as policy, process, and legal circuit breakers and who can calm the crisis as George Marshall did by saying: "I have seen worse."

E. Decide What You Can in Advance

The incoming team should also limit the number of decisions that must be made in the first days in office by getting "law ready" in advance. "Law ready" means: (1) learning the law and process and setting a strategic legal framework in advance; (2) making critical process decisions in December and recording those decisions in Presidential directives to be issued on the first day in office; and, (3) Setting the six-month legal policy agenda, to include decisions about who is in charge and when the Deputies and Principals Committees will meet to discuss the results. These preparatory principals are considered below.

II. Law Ready: Understand the Law and Process Before the Crisis

As Justice Jackson noted in *Youngstown*, during times of crisis the executive branch tends to focus on the immediate rather than the enduring consequences of legal policies. One way to address this tendency is for the President-elect to understand the law and its context in advance of crisis, which means before January 20. By example, the long-term policy benefits of enjoining meaningful congressional consultation are easier to appreciate in the abstract than when considered at moments of urgency or opposition. By further example, a two-hour intelligence window is a bad time to explain to the President and his advisors why faithful adherence to the law of armed conflict enhances security even as it sometimes limits choice.

Among other things, a good Presidential brief should help set the Administration's legal outlook and agenda. How do the principal legal actors in the administration view the law? Do they see law alone as a threshold, comprising permits and prohibitions? Or, do they see law as a form of strategic communication or "soft power," that reflects a nation's values in how it exercises hard power? In this construct, legal policy, as well as law, informs decision. Once set, personnel actors can better select lawyers suited to implement the President's framework.

Law is not an abstraction, but an essential tool that helps to ensure that we provide for our security and uphold and advance our values in doing so. Therefore, a legal framework should address the security context. There are three immediate threats. First, there is the threat of WMD terrorism, in particular, the possibility of nuclear terrorism. Second, in responding to terrorism we may lose sight of our legal values, degrade the way we govern, and diminish the freedom that defines our lives. Third, we may become so focused – perhaps obsessed – with the first two threats that we lose sight of the other certain perils of our century, or the will and the capacity to address them.

III. When effectively crafted and wielded, national security law and process serves three purposes

First, law provides substantive authority to act. Where the law is clear, and clearly invoked, operators are more likely to take risks in the field. They do so because they will be (more) confident that they will not be second guessed or accused of unlawful conduct after the fact. Law is also important in sustaining policy continuity and commitment between administrations and during fluctuations in public perceptions of threat.

Second, law including executive directives can embed elements of critical process in decision-making. In a new administration new actors will know, at least as a normative matter, where to send decisions. Process in law also helps to prevent the twin pathologies of secrecy and speed from overwhelming the capacity to reach informed decisions. However, process is a neutral term. One can have good process – timely, efficient and thorough. And, one can have bad process -- slow and diluted. Finally, good process designates responsibility for taking action and for achieving results; policy-makers are better at making decisions than appraising the impact of decisions. Therefore, a

meaningful decision process includes ongoing internal and external appraisal to ensure that U.S. actions are both lawful and effective.

Third, law and process serve as independent policy values. If law defines who we are, it also defines how we are seen, especially in contrast to terrorists. In few other conflicts has the reaction of other states and peoples been so important. To start, the United States is dependent on intelligence gathered at the ground level and through liaison partnerships. The United States also depends on access to foreign territory, or alternatively, credible local assistance. And, finally, the enemy relies on the cycle of action-and-reaction to U.S. policy as a recruiting and propaganda mechanism. In this context, the application of legal values leads to better security results.

IV. Law Ready: Address Use of Force, Establish Processes and Develop a Six-Month Policy Agenda

Three substantive issues warrant consideration before the inauguration: (1) the threshold for resorting to force and the methods and means of using force; (2) whether there should be a Homeland Security Council (HSC) as well as a National Security Council (NSC); and, (3) designation of the Administration's six-month legal policy agenda.

A. Law Ready: Anticipatory Self-Defense and the Problem of WMD Imminence

At least since 9/11, the United States and the international community have debated the threshold for resorting to force against non-state actors intent on obtaining and using weapons of mass destruction. Whether framed as law or policy, as anticipatory self-defense or preemption, the question is rooted in the concepts of imminence and necessity. First, how imminent must a threat of attack be to give rise to a right of anticipatory self-defense? Second, what parameters define necessity in a post-nuclear context?

These are urgent questions for the next President, especially if you believe the maxim that "bad facts can make bad law." It is important that the President and his advisors consider these questions in a deliberate manner outside the context of crisis *and* before he assumes responsibility as commander in chief. A good approach will (1) define the threat; (2) recognize the necessity for action regarding WMD's; (3) indicate the special burdens of anticipatory self defense. These points are explained below.

1. Define the threat

This will clarify whether subsequent debate is about the law, the policy, or the facts predicate to particular U.S. actions.

2. Recognize that where WMD are at stake, the President must act to protect the United States

The question is whether he will do so pursuant to a framework that maximizes authority but also upholds our legal values and garners the international support necessary to contain this threat. The debate did not start with President Bush and the now inconclusive efforts to define a preemption doctrine. (See for example the August 1998 strike on the Al-Shifa plant in Sudan.) The next President should focus on preferred outcomes, not doctrinal efforts to demonstrate contrast or continuity with a prior administration.

3. Indicate that anticipatory self-defense places special burdens on intelligence

Therefore, a good process of decision-making would have lawyers work with analysts in advance of a decision and would include debate on what can and cannot be disclosed in making the case. If the case is not made, the U.S. may find itself isolated in a century that requires allies. Presentation of a solid factual case will also mitigate the risks of mimicry and doctrinal malleability.

B. Law Ready: Draft Essential Procedural Directives in Advance

The incoming President's staff should also debate and draft those directives the President should issue on the first day in office including a directive on White House contacts with the Justice Department. However, no directive is more important than that establishing the President's normative decisional process(es).

At the Presidential level, decisions are generally made using one of three mechanisms: the National Security Council process, the Homeland Security Council process, and the military chain of command. Specialized processes or ad hoc processes, of course, also come into play. Much, if not most, deliberation and decision-making is informal -- over the telephone and in one-on-one meetings, for example. But these are the three normative processes of Presidential decision.

Among other things, the President-elect must designate the normative membership of his Principals and

Deputies Committees. The President will also have to decide on a normative role for the Secretary of Energy, designated a statutory member of the NSC in late 2007. More immediately, the President-elect will need to decide whether to sustain one or two decisional processes for national security and homeland security; will there be a National Security Council and a Homeland Security Council, or just an NSC? Here are some of the pros and cons of each decisional arrangement, as well as some general truths about Presidential process.

Attributes of an NSC Only Decisional Model:

- Intelligence Fusion – one process reduces the risk of intelligence seams and traps between parallel processes.
- Unity of Command – one process is more likely to result in policy and message clarity.
- Presidential Efficiency – one process will result in fewer meetings, but also less competition for staff time on the President’s calendar.
- Time Tested – the NSC process is embedded in bureaucratic practice and has been tested in crisis and in calm.

Attributes of an NSC - HSC Decisional Model

- Status – an HSC framework gives homeland security an advocate and a process in the White House.
- Expertise – homeland security requires a different set of functional and bureaucratic skills; this is true of the Principals as well as the immediate staff advising and assisting the President.
- Work Sets – it also requires a different set of work sets, including the necessity for intrastate travel and outreach.
- Crisis Management – dual processes doubles up the crisis coping mechanisms at the White House.
- The APNSA chokepoint – the homeland security function would likely get short-changed if placed in the same staffing pattern and meeting/memo queue with the National Security Advisor’s traditional portfolio.

Regardless of the model the President chooses, some key general truths about Presidential process must be considered. First, the President gets the process he tolerates or desires, including a process that either meaningfully applies the law or does not. Second, the President’s directives will set a normative base and create expectations; however, the nature and efficacy of informal process is as important as formal process. Where there is deviation from the normative process there should be good cause for doing so and, on Presidential decisions, the President should be informed so that he might consciously opt in or out. Third, good leadership and personality can overcome bad process; however, good process can rarely overcome bad leadership, although it may help to identify its existence. Where there are problems, look first to lead and then to law; the normative NSC framework is sound if used. Finally, “Intelligence reform” and the DNI notwithstanding, the President (with his immediate proxies) is the DNI. He alone has the legal, moral, and bureaucratic wherewithal to resolve interagency conflict and to fuse all sources of intelligence.

C. Law Ready: Set the Six Month Agenda

At least six legal policy issues warrant immediate attention. Therefore, the President-elect should set a six-month agenda to review these issues, including designation of the agency or officer responsible for leading the review and the dates of the corresponding Deputies and Principals meetings. Otherwise the agenda may succumb to crisis and the crush of the daily in box. Below are the key issues which the legal agenda should encompass.

1. The Nonproliferation Legal Regime

No policy problem is more central to U.S. national security than the proliferation and potential proliferation of WMD into state and non-state hands. However, the substance and process of U.S. policy and law do not always reflect this importance. Is the law cohesive? Does the Proliferation Security Initiative (PSI) offer an effective process for the rapid identification and inter-state adjudication of proliferation threats? Does the President have the necessary tools to ensure that political undertakings by like-minded states to control proliferation are in fact undertaken? Are we maximizing the positive benefits of international law?

2. Intelligence Process

On July 30, 2008 the President substantially revised E.O. 12333 (“United States Intelligence Activities,” 4 December 1981). However, one can be sure that tough issues will linger. Procedures will also need drafting, inviting agencies to revisit old issues. Now the hard part starts -- implementation. The next President cannot afford to lose contact with this issue or fail to harness momentum generated by the revised order. Two other areas also warrant an immediate process of review. First, where FISA surveillance has received considerable attention,

data mining as a discipline has not received enough. Data mining as a tool is neither inherently good nor bad; but it is an essential intelligence mechanism. There are urgent questions: Are we doing enough, and is the absence of a framework statute or express authorization causing operators to curtail their reach or, perhaps, are operators reaching too far? Second, are the watch lists uniform and do they effectively transmit between agencies and across national borders? If not, why not? What changes in policy, process, personality, or law are required?

3. Homeland Security

In the area of homeland security three threshold issues of process and substance make the agenda: (1) When may/will/must the federal government act?; (2) When may/will/must the military act?; (3) When may/will/should/must the private sector take the lead in response? These questions present some of the most sensitive issues in U.S. constitutional history and law, involving federalism and civil-military affairs. But as Hurricane Katrina demonstrated, if left unresolved, delay will cost lives.

4. Relief and Stabilization Operations

The next President will need to assess on an ongoing basis how best to integrate the budgetary and programmatic capacities of the Defense and State Departments, as Secretary Gates has eloquently sought to do. One aspect of this process, relief operations, requires immediate attention. What can the law do better to help the United States provide relief quickly and efficiently? Among other things, such a review should ask whether the Response Readiness Corps and the Office of the Coordinator for Reconstruction and Stabilization have adequate manpower, money, and authority or, whether they are part of the solution at all. If so, both would benefit from direct and sustained Presidential interest between crises.

5. Detainees

A change in administration gives the next President an opportunity to evaluate detainee policies. Indeed, opportunity is necessity, where U.S. and international actors may well “hold in place” pending a clear statement as to whether the President intends continuity or change. Looking forward, the question is: Can we do better? That is not a statement about the past, but rather a statement about the necessity of always looking to improve in light of the enduring, evolving, and potentially catastrophic nature of the threat.

We are more likely to answer this question in a lasting manner if we render the Gordian Guantanamo knot into its constituent parts – capture, interrogation, status adjudication, conduct adjudication, detention, and release. There are only obvious answers if one believes the threat is not enduring and potentially catastrophic, or if one discounts the importance of legal values in addressing terrorism. A meaningful review must honestly account for six realities: (1) Detainees can and have provided valuable intelligence; (2) The United States has, will, and must detain persons who have as a goal wanton killing including through mass casualty events; (3) there have been and will be persons detained by the United States who are not in fact lawful or unlawful combatants; (4) Some detainees who have been released from U.S. custody have returned to the conflict and been captured a second time; others, no doubt, are at large; (5) Closing Guantanamo may be wise, but it is a symptom not a solution. Detainees will still be taken, they must still be interrogated, and their status and conduct adjudicated. Then, if appropriate, they must be detained, somewhere; (6) The less the United States takes the lead in these areas the more likely it will by necessity employ third-country alternatives including through the process of ordinary and extraordinary rendition.

6. Rendition

Rendition is an important security tool. It is a faster and more secure means than extradition or deportation to transfer suspects. Rendition allows states that are either unwilling or unable to transfer subjects publicly to do so secretly. Rendition also raises the prospect of gathering intelligence and making further arrests before a subject’s colleagues are aware of his capture. The prospect, accurate or otherwise, of third-party rendition may also induce subjects to cooperate.

Rendition is also subject to mistake and misuse. Advantages in secrecy and speed create risk. Persons rendered to certain third countries may be subjected to unlawful practices. Further, in the absence of the procedural safeguards applicable to extradition, subjects may be misidentified, or where correctly identified may be transferred based on information that is not subject to adjudication or independent validation through judicial and media oversight. Moreover, secrecy and speed can result in an internal process that minimizes the ordinary cross-checking that occurs when decisions are sent up the chain of command.

For some, the United States’ commitment to the rule of law is judged by rendition practice, or better said, by real or perceived failures in practice. Where the United States is perceived to act outside the law, or its legal

values, security may be damaged, and not just in intangible ways. Officials may be banned or placed at greater risk when operating overseas. Foreign governments may hesitate to act, share, or transfer suspects at the critical moment when an attack might be averted. U.S. flight clearances may be denied.

For these reasons, the next administration should review the process for authorizing and conducting extraordinary renditions, not to judge past practice, but rather to ask, can we do better. A good rendition process is secret and fast, but also meaningfully considers the predicate for rendition; the range of alternatives for displacing the subject and the U.S. experience with each alternative; the opportunities available to garner intelligence from the subject; the relative merits of prosecution in the United States or a third state; and the actual and potential positive and negative repercussions of each rendition. A good process also includes meaningful legal review and establishes a chain of responsibility for confirming identity, vetting operational details and, where applicable, obtaining and verifying meaningful assurances from third countries. Finally, a good process will double back, and once beyond the moment of necessity, consider whether the results were morally and legally sound and the security benefit validated.

V. Conclusion

In some cases “better is the enemy of good enough.” Not so in transition. We must do better; we cannot risk less at a time when U.S. armed forces are committed to combat, WMD terrorism is a realistic prospect, and pandemic disease incubates. In the relay race analogy there are only two runners in the pass box. But this is a busy box. And this is not an ordinary race. The next athlete just ran a marathon; he is now expected to run a four or eight year steeplechase. There is only one chance at a clean hand-off and a running start.

The President-elect can improve the odds of a good pass if his team is “law ready” as well as policy ready. That means that he is familiar with national security law and process, he has defined a strategic framework in which he expects Executive lawyers to apply the law, he has set the normative processes of decision and has reduced the number of legal and process decisions he needs to make on January 20, and he has set the legal policy agenda for the first six months. If so, not only will he clear the first hurdle, he should do so at a sprint.

Homeland Security Reform Priorities for the Next Administration and Congress **By Clark Kent Ervin**

(Director of the Homeland Security Program, The Aspen Institute)

I. Introduction

When asked recently to reflect upon what went wrong in Iraq, President Bush demurred, adding that there are no “do overs” in his business. Well, to paraphrase *Gershwin’s Porgy and Bess*, it ain’t necessarily so. The next President will, indeed, have an opportunity to “do over” the Department of Homeland Security (DHS). And, given how dysfunctional and ineffectual the department has been, and how critical its mission is, “doing it over” is exactly what should be done. Indeed, there is so much to be “done over” when it comes to homeland security that the President-elect’s biggest challenge in this area will surely be deciding what to do over first.

II. Increase the DHS Budget and Budget Controls

Several things, though, are clear. First, if the department is to be more successful going forward, it needs more money, a lot more money. When it was created, the White House insisted that DHS’ budget not exceed the total of its components’ budgets. Those with private sector experience know that mergers and acquisitions, at least initially, cost money. It is many years down the road, if ever, that any savings are realized. The chief reason that there remain so many gaping holes in America’s counterterrorism defenses is that plugging these holes costs a lot more money than DHS has to spend.

Of course, it does not help matters that the department has been a poor steward of the money it does have to spend. There are numerous examples of its squandering precious resources – the unused trailers and other supplies at FEMA meant for Hurricane Katrina victims; the costly “next generation” radiation detection monitors that are no better at distinguishing deadly emissions from harmless ones than existing machines; the continuing cost-overruns and sub-par performance in the multi-billion dollar, multi-year “Deepwater” Coast Guard fleet modernization project – to name but three. So, any increase in DHS’ budget would have to be accompanied by

rigorous controls to minimize waste, inefficiency, and ineffectiveness. For example, no-bid contracts should be forbidden. Every contract should contain incentives for effective and timely performance, and dis-incentives for ineffective and untimely performance. The number of contract procurement professionals should be increased still more so that DHS has the in-house expertise to ensure that the taxpayer's interests are protected.

But, even with due controls in place, a new Administration should not merely throw money at the department. There must first be an in-depth assessment of where and how the nation remains vulnerable to terrorism. That assessment should be coupled with an assessment as to what the consequences, in terms of death, injury, and economic damage, would be from attacks that exploit these vulnerabilities. Given these assessments, a judgment can be made as to what the priorities should be in terms of closing security gaps. Once the priorities are set, homeland security dollars can be allocated accordingly.

III. Focus on Leadership

Another thing that should be clear is that the Department of Homeland Security needs competent leadership. This would seem to go without saying, but competent leadership has consistently been lacking at the department. The next DHS leadership team should include at the top an expert in counterterrorism and an expert in managing large complex bureaucracies and integrating mergers and acquisitions. An ideal Secretary would be a police chief in a major terror target like New York or Los Angeles who has devised and implemented an effective counterterrorism strategy for his city, or a senior military leader with a demonstrated record of accomplishing tough battlefield missions, especially those related to terrorism and counterinsurgencies. An ideal Deputy Secretary would be the Chief Operating Officer of a Fortune 500 company or a senior partner at a major management consulting firm. No regard should be given to the leadership's politics; indeed, it would be a good thing if the President were to choose someone from the other major party to serve as Secretary or Deputy Secretary. If there is any national issue that should have nothing to do with partisan politics, it is homeland security. Indeed, the number of political appointments in this department should be dramatically reduced, and efforts made to create, over time, a cadre of career homeland security professionals, who, like their counterparts at State, the Pentagon, or the CIA are cross-trained in a variety of disciplines and activities spanning the gamut of the department's responsibilities.

IV. Increase Openness and Accountability

It should be clear that the department needs what I have called a "culture of openness and accountability." Openness and accountability have hardly been watchwords of the Bush Administration generally, but they have been conspicuously absent in the Department of Homeland Security. When confronted with security gaps, the department's tendency has been to insist that there are no such gaps, or the gaps have been closed, or the gaps are being closed, whether they are or not. A classic example from my time as DHS Inspector General is the reaction of the then head of TSA to the results of our undercover tests of airport screeners' ability to spot concealed weapons. When told that a given airport's screeners failed tests 40% of the time, his response was to question why that result was not categorized positively as a "pass" rate of 60%. So, rather than working to make bad results better, the DHS response was to try to make bad results *sound* better. This mindset continues to this day. To continue with the screener example, screeners continue to perform poorly on covert tests, according to numerous media, Government Accountability Office, and Department of Homeland Security Inspector General reports. TSA's response is invariably to downplay these results, insisting that the checkpoint is but one link in a security chain. But, to continue the chain metaphor, the chain as a whole is only as strong as its weakest link.

V. Further Define the DHS Mission

A threshold question that the next President will have to answer for himself is exactly what DHS' mission should be. The department has taken an "all-hazards" approach in its initial years, meaning that it focuses on both terror attacks and natural disasters. It is time for this approach to be re-thought. There is certainly some overlap between responding to the consequences of terror attacks and natural disasters. In both instances, there can be large numbers of deaths and injuries. Large numbers of people may need food, water, medical attention, and temporary housing. There may need to be evacuation plans or, depending upon the circumstances, plans to "shelter in place." A clear chain of command among federal, state, and local officials is necessary in both cases, and likewise, the need for interoperable communications among first responders.

But, the similarities stop there. Terror attacks and natural disasters are fundamentally different things. There is no overlap with regard to prevention, and minimal overlap with regard to deterrence or mitigation. A key reason why the department has been a conspicuous failure is that it has incompatible missions. Trying to be both a counterterrorism agency and a natural disaster preparedness and relief agency results in the department's performing both missions badly.

While this is too radical a step to take early in his tenure, the new President should begin to lay the groundwork for downsizing the department by the end of his term, focusing it on only one mission, that of counterterrorism. In practice, this would mean that the department would consist of its intelligence unit, its "science and technology" research and development unit; TSA, Customs and Border Protection, and slimmed down versions of Immigration and Customs Enforcement, the Coast Guard, and FEMA, containing just those elements of each such component that deal uniquely with counterterrorism.

VI. Consolidate Congressional Overseers

And, then, there is the problem of Congress. At its inception, 88 congressional committees and subcommittees claimed some jurisdiction over one or another aspect of homeland security. After five years, the number has been whittled down to 86. This results not just in lost productivity from the time it takes DHS managers to prepare for and respond to congressional inquiries. It also undermines the department by giving it duplicative or conflicting mandates and priorities. Ideally, congressional oversight would be housed in a single committee in each house, with both authorizing and appropriations power. Congress being Congress, the ideal is a non-starter. But, the next Congress, in partnership with a new President who himself will be a creature of Congress, can make a priority of significantly reducing the number of committees and subcommittees with homeland security jurisdiction. In practice, excessive oversight is too little oversight, ironically enough.

VII. Set the National Tone

An over arching challenge for the next President will be setting the right tone for the nation as regards homeland security. As time has gone by without another terror attack, Americans are going back to sleep. We are beginning to think that 9/11 was a one-off, exceptional thing that can never be repeated. The "failure of imagination" that the 9/11 Commission aptly used to describe the nation's pre-9/11 mindset is back. Repeated warnings from political leaders have come to be dismissed as partisan politics, or the proverbial "boy crying wolf" syndrome, or "cya." According to a July 2008 CNN poll, the percentage of Americans who believe that an imminent terror attack is likely is down to 35%, the lowest percentage recorded since the 9/11 attacks.

But, as Henry Kissinger famously put it in the Nixon era, even paranoids have real enemies. Terrorism remains a real and present danger to our nation. If anything, the terror threat is rising. With our national security apparatus distracted by the protracted fight in Iraq, Al Qaeda is back in business in the Afghan/Pakistani badlands. Anti-Americanism is roiling the Muslim world to a degree never before seen in history. And, meanwhile, we have not used the intervening years since 9/11 to close those security gaps that can be closed.

On the other hand, the President must not and should not do the terrorists' work for them by terrorizing the nation himself. He must admit that we can never make ourselves invulnerable to terrorism. There will surely be attempted attacks in the future, and some of them will probably succeed. But, he must assure us that he will do everything within his power, and the wise restraints of our constitutional system of legal checks and balances, to prevent terror attacks and to minimize the effects of those that cannot be prevented, especially attacks that would have the greatest human and material impact.

JAMES CARAFANO RESPONDS

There are clearly points where Clark and I agree completely. I want to note two in particular: (1) Don't throw more money at the department, and (2) Pick a new secretary of homeland security based on their ability to be a leader and a manager not politics.

I think what we are spending on homeland security is about right. Our investments, however, are often out of whack because of the tendency of Congress to focus on pet projects and causes that please constituencies or stakeholders. Congress often fails to "walk the walk" when it comes to actually implementing risk-based programs that fairly weigh threats, criticality, and vulnerability and invest judiciously and appropriately to get Americans the "biggest

bang” for their security buck. The most egregious example is the Congressional mandate requiring scanning 100 percent of shipping containers bound for the United States.

A DHS report recently concluded the requirement was unworkable—not to mention there is no realistic threat that justifies this effort and that there are far better and more effective ways to protect maritime commerce.

Clark, is also spot on in describing the attributes of the next secretary. DHS has significant challenges, particularly in the areas of professional development of its workforce and process engineering. Addressing them will take a leader who understands the job of building a world-class organization.

Where he is completely off-base is in his suggestion that the department be restructured. DHS has already suffered too much from excessive reorganization. The pain of more is not worth the gain. In addition, focusing myopically on the department is wrongheaded. The fixation of Congress and many others on the department as the solution for solving all the nation’s homeland security challenges is unwarranted. While DHS budget accounts for about half of all federal domestic security expenditures, the homeland security budgets of the Departments of Defense, Health and Human Services, Justice, Energy, and State are also significant. And while together these departments comprise the lion’s share of federal homeland security spending, virtually every federal agency has some homeland security responsibility. Coordinating all these activities is Washington’s most important task. Furthermore, homeland security responsibilities extend far beyond Washington’s purview. Protecting the homeland is a national mission that requires the concerted effort of the nation including state and local governments, the private sector and non-governmental organizations, local communities, families, and individuals. At the same time, virtually every aspect of domestic security from securing the border to disaster response has an international dimension requiring the cooperation of friends and allies around the world. Therefore, we should be focusing our efforts on building the homeland security enterprise overall—not playing with the DHS wiring diagram.

Homeland Security Reform Priorities for the Next Administration and Congress

By James Carafano

(Assistant Director, Kathryn and Shelby Cullom Davis Institute for International Studies and Senior Research Fellow, Douglas and Sarah Allison Center for Foreign Policy Studies, The Heritage Foundation)

I. Introduction

With the new administration and congress will come an opportunity to tackle the many challenges faced by the Department of Homeland Security. There are three immediate priorities that Congress should begin to tackle as soon as possible, as well as two long term challenges that should be among the first priorities of the next administration. The three immediate priorities are: (1) Consolidating Congressional oversight of the Department of Homeland Security (DHS); (2) Passing homeland security authorization legislation to better structure the department’s oversight role; and (3) Restraining further major organizational changes within the department.

Two long-term projects for Congress and the next administration to undertake must include: (1) Establishing the national homeland security enterprise; and (2) Improving federal interagency operations.

II. Immediate Priorities

A. Put First Things First--Consolidate Congressional Oversight of the Department of Homeland Security

Arguably, many of the most significant challenges in effectively managing DHS have resulted from disparate and, at times, contradictory direction from Congress. This has resulted in a plethora of unrealistic mandates and endless tinkering by various Congressional committees, which offer conflicting and competing guidance. Congress still has not consolidated jurisdiction of DHS under one committee in each chamber, as recommended by the 9/11 Commission Report. Therefore, the first and most productive objective should be to address the lack of effective Congressional leadership.

B. Pass a Homeland Security Authorization Bill

Congress not only needs to reform the structure of its oversight but its form as well. Next to defense, arguably the most important congressional responsibility is ensuring that the federal government has the resources and guidance needed to fulfill its domestic security role. Congress created the Department of Homeland Security in 2002; however, it has yet to pass a homeland security authorization bill--an inexcusable shortfall.

1. Build a State-Based Regional Response Network

An authorization bill could well begin by addressing fundamental requirements for DHS first established in its enabling legislation. One area in which Congress could speak is on the lack of DHS follow-through in establishing a cooperative state-based regional response network. Such a network is an essential next step in building the kind of national security enterprise the nation needs.

A network of this kind would facilitate better planning at a regional level, and could prevent shortfalls in disaster response. Such efforts should take the form of state-based regional programs that focus on ensuring that states are prepared to sustain themselves when faced with catastrophic disasters. Programs would also facilitate cooperation among federal, state, and local efforts. When catastrophic disasters overwhelm state and local governments at the outset, as in the aftermath of Hurricane Katrina, any delays in a coordinated federal, state, and local response have serious consequences. Through such programs, states can also learn the capabilities of their partnering states and quickly merge resources as needed.

2. Establish an Undersecretary for Homeland Security

Chief among the findings in the Second Stage Review was the importance of establishing a secretariat with the capacity of overseeing the department's many activities. One of the most important requirements identified in the review remains unfulfilled--establishing an Undersecretary for Policy and Planning.

Since the Department of Homeland Security was created, many have come to recognize that the agency needs a high-level, high-powered office to develop policies that bind the more than 22 federal entities consolidated within the department, to coordinate with other federal agencies, and to manage international affairs for the department. The Department has experienced a major shortfall in its ability to execute vital policy and planning, and yet Congress has not authorized an undersecretary for the department to supervise these activities.

3. Rethink Container Security Mandate

Finally, Congress should begin to systematically review some of its most impractical mandates. In 2006, Congress mandated the Secured Freight Initiative to test the efficacy of inspecting 100 percent of shipping containers coming from overseas for terrorist threats. The current system, set by the Container Security Initiative, scans only "high-risk" containers. In 2007, Congress proceeded to mandate 100 percent inspection even before the tests had started. Congress should establish an independent, bipartisan commission to study the results of the Secure Freight Initiative and the mandate for 100 percent screening of shipping containers and air cargo. The commission should report its findings after the 2008 presidential elections, so that Congress can return to the issue in early 2009 with the politics of the election behind it. Congress should then modify the 100 percent mandate so that U.S. policy bolsters security and prosperity equally well.

C. End Unwarranted Restructuring

One of the most troubling practices of Congress has been to periodically impose reorganization mandates on DHS. The constant turmoil imposed on the Department of Homeland Security has adversely affected operations, distracted the leadership, and slowed the process of establishing effective processes and procedures. The first priority of Congress should be to end unwarranted tinkering. A moratorium on restructuring or rethinking the department's roles and missions should be imposed until after the department delivers and Congress deliberates on the first Quadrennial Security Review.

Beyond the short term priorities of consolidating Congressional jurisdiction; establishing authorization legislation; and refraining from restructuring the department, Congress should begin to look to the long-term demands of homeland security. Here there are two areas worthy of attention: 1) establishing a national homeland security enterprise; and 2) improving interagency operations.

III. Long Term Projects

A. Homeland Security 3.0: The National Homeland Security Enterprise

For future improvements to homeland security, Congress should increasingly turn its attention to the national homeland security enterprise, which includes every level of government, every community, and the private sector. Working together with the Center for Strategic and International Studies (CSIS), the Heritage Foundation has convened a working group to examine the priorities for improving the overall state of homeland security. We have identified five areas that require particular attention. They include:

1. Domestic Intelligence

Six years after 9/11, the United States has yet to fully articulate a concept for domestic intelligence that completely addresses 21st century threats; the promise of modern technology; and the demands of protecting the rights of our citizens.

2. Human Capital

The nation needs a corps of individuals with the skills, knowledge, and attributes required to fulfill the complex duties associated with ensuring domestic security, facilitating economic growth, and protecting individual liberty.

3. Community Preparedness

The best preparation for disasters is facilitating a culture of preparedness that empowers and enables individuals and communities to take care of themselves during disaster rather than becoming increasingly dependent on Washington for direction and resources.

4. Resiliency

Critical infrastructure protection has become an increasingly expensive and unsuitable concept for ensuring the continued delivery of goods and services in the face of terrorist threats. U.S. policies would be better served by moving toward a strategy relying on counterterrorism measures to thwart attacks, while focusing on the resiliency of infrastructure, and the capacity to continue to provide services or quickly recover in the event of a terrorist attack.

5. International Cooperation

Homeland security is a global mission. From securing the border to protecting global supply chains, virtually every aspect of preventing terrorist attacks has an international dimension that requires the United States to work effectively with friends and allies.

B. Team Washington; Repeating History

In meeting complex challenges that transcend the core competencies of a single department, government does a mediocre job in marshalling all the resources required and running interagency operations. Washington can do better and homeland security would be a good place for the next administration to start. Washington's efforts at pulling together routinely fall short for the same repeated reasons.

Reason 1: Government undervalues individuals.

Throughout its history, Washington has paid scant attention to recruiting, training, exercising, and educating people to conduct interagency operations. Thus, at crucial moments, success or failure often turns on happenstance--whether the right people with the right talents just happen to be at the right job.

Reason 2: Washington lacks the lifeline of a guiding idea.

Good doctrine does not tell people what to think, but it guides them in how to think--particularly in how to address complex, ambiguous, and unanticipated challenges when time and resources are both hard pressed. Unfortunately, throughout our nation's history, government has seldom bothered to exercise anything worthy of being called interagency doctrine.

Reason 3: Process cannot replace people.

At the highest levels of government, no organizational design, institutional procedures, or legislative remedy has proved adequate to overcome poor leadership and combative personalities. Presidential leadership is particularly crucial to the conduct of interagency operations, as is leadership from Congress, especially from the Committee Chairs. There is no way to gerrymander the authorities of the committees to eliminate the necessity of competent, bipartisan leadership that puts the needs of the nation over politics and personal interest.

And, in the end, no government reform can replace the responsibility of the people to elect officials who can build trust and confidence in government, select qualified leaders to run the government, and demonstrate courage, character, and competence in crisis.

All three of these problems currently contribute to the shortfall in interagency-cooperation. In order to improve operations, they each will need to be addressed, and doing so will require the leadership of the next administration and congress.

C. Goldwater-Nichols

A generation ago, the U.S. military faced similar professional development challenges in building a cadre of

joint leaders--officers competent in leading and executing multi-service operations. The Goldwater-Nichols Act of 1986 mandated a solution that required officers to have a mix of joint education, assignments, and board accreditation to become eligible for promotion to general officer rank. This requirement is widely credited with the successes in joint military operations from Desert Storm to the War on Terrorism, and the recipe can be repeated to develop professionals for critical interagency national security initiatives. Doing so will require a new set of professional schools specifically designed to teach interagency skills, and as none exist at this time, it will fall to the government to establish them.

The Clock Is Ticking

In Washington the important is often sacrificed for the urgent. The important, like reforming the interagency process, is put off until later, but later never comes. The next administration should aim to address these important DHS issues before the "urgent" distracts its attention.

CLARK KENT ERVIN RESPONDS

When two homeland security experts from differing ends of the ideological spectrum agree on so much, as James Carafano and I do, there is cause for celebration and room for hope. A key part of the reason that our nation has been less successful in meeting the post 9/11 threat of terrorism than we were in meeting the post-World War II threat of communism is the degree to which partisan politics and left-right battles have intruded in the last twenty years or so into the previously off-limits space of national security.

But, of course, we do not agree on everything. I am enthusiastically supportive of the push to scan 100% of incoming cargo containers for radiation, and for doing so as soon as possible. Nearly every expert agrees that the biggest threat facing this nation is the threat of nuclear terrorism. Many experts agree that, since some 11-12 million cargo containers come into our seaports each year, and since radioactive material in containers can be shielded in such a way as to make detection next to impossible, a likely way for terrorists to try to smuggle a nuclear weapon into this country would be in one of those containers. After much prodding from some in Congress and some experts, and much resistance from the Administration and industry, DHS is beginning to screen all incoming containers, but, as I noted in my initial comments, neither the present technology nor "next generation" technology can distinguish between deadly radiation and harmless radiation, if, indeed, the radiation is detected at all. Since the consequences of a nuclear attack would make 9/11 pale in comparison, even if there were a miniscule chance of a terrorist's slipping a nuclear weapon into a container, there should be no greater homeland security priority than developing the necessary technology and then deploying it to scan every incoming container. Of course, we must try as best we can to facilitate commerce. But, where the security of the nation and commercial interests are irreconcilable, it is government's obligation to put security first, as one would have thought a conservative like Dr. Carafano would be especially quick to acknowledge.

The other big area of disagreement is whether the Department of Homeland Security, to be successful, should ultimately, repeat ultimately, be restructured. I made a point of saying that the new President should not rush into doing this, and that the goal should be to affect a restructuring by the end of his first term. But, restructure the department we must. The Secretary of Homeland Security cannot be expected to fight terrorists and tornadoes. It is odd that a conservative would object to the notion of downsizing government, forcing it to set priorities among competing missions, and making its top priority protecting the nation from attack.

A National Security System for the 21st Century

By Jeff Greene

(Deputy Director, Legal Working Group, Project on National Security Reform)

For the first time since the passage of the landmark 1947 National Security Act, the prospect of transformative national security reform is very real. All of the elements necessary for such reform – beginning with a new National Security Act – are falling into place: there is a growing awareness that our nation's national security system is in need of a major overhaul; interest in such reform is high in the Congress; both major party Presidential candidates recognize the need for national security reform; and a group of distinguished Americans from across the political spectrum have come together to conceptualize a national security system for the 21st century.

The Cold War world that gave rise to our current national security system ended almost two decades ago. And though there have been incremental changes in the years since the attacks of 9/11 – most notably the Department of

Homeland Security and the Office of the Director of National Intelligence – there has been no holistic adjustment of the system to align its structures to the myriad emerging threats of the world today. To name just a few, we are faced with new non-state and individual actors capable of exerting global influence, proliferation of unconventional weapons, and renewed competition for natural resources – all of which is covered by an ever-expanding number of media outlets in an endless news cycle.

Simply put, our nation is not well served by a system built for a world that no longer exists. Instead, we need a system conceived from the ground up to deal with both the threats of today and the risks of the future. This is where the Project on National Security Reform (PNSR) comes in – it was established to assist in reforming the national security system to meet 21st Century challenges.

Initiated in September 2006, PNSR is a bipartisan, private-public partnership sponsored by the Center for the Study of the Presidency. PNSR has engaged over 300 national security experts from the private sector and government departments, and has methodically studied the current system to identify its organizational problems, their causes, and their consequences. This summer, PNSR completed a rigorous analysis of the existing system, including 37 major and 63 mini case studies, and released a preliminary report. Key findings include:

- Departments are generally proficient at the capabilities within their mandates, but the system cannot rapidly develop new capabilities or combine capabilities from multiple departments for new missions. Accordingly, capabilities that fall outside the core mandate of a department suffer.
- No consistently effective mechanism exists for delegating Presidential national security authority or integrating inter-agency efforts. The most common mechanism is the designation of a “lead agency,” but this structure is generally ineffective when missions cross agency lines. In response, Presidents sometimes designate lead individuals, or “czars,” but this too has proven ineffective.
- Presidents are often forced to intervene personally to compensate for the systemic inability to integrate missions. This centralizes issue management and burdens the White House, leaving it even less able to manage the national security system.

In the fall, PNSR will issue a report, which will propose an integrated set of recommendations for reforming the national security system. The report will also include a legal framework for how these recommendations can be implemented.

An efficient, integrated, and flexible national security system is within our reach. Indeed, there is no constitutional barrier to greater executive branch integration, for the checks and balances of our Constitution are inter-branch, not intra-branch. Moreover, some long-standing customs in place between the legislative and executive branches are rooted in tradition and past practice, not the Constitution. For instance, when appropriating funds, Congress *could* provide the executive branch with significant flexibility in how those funds can be expended. Similarly, there is no constitutional barrier to the President engaging Congress early in the policy-making process or to facilitating better oversight of policy implementation.

Of course, Congress cannot delegate a core constitutional responsibility to the executive branch - for instance, the power to raise revenue or to appropriate funds. Nor should the President offer his or her closest advisers for regular congressional scrutiny. But Congress can provide the executive branch with greater flexibility in shifting funds and internally restructuring itself to meet crises or grasp opportunities in the world environment. And the President can be more open to congressional oversight of and insight into the National Security Council process. The willingness to take such steps and alter some accepted practices is a question of political will, not of constitutional doctrine.

Successful national security reform, whether enacted by statute or by executive order, will require ownership by both the executive and the legislative branches. Congressionally mandated reform will fail if the President refuses to implement it aggressively or in spirit. And a displeased Congress can just as surely undermine presidentially mandated executive branch reform through statutory reversal or withheld funding.

The instruments of national security reform are three-fold: legislation, presidential directives, and congressional resolutions. Which tool to use for which task will require careful consideration. For example, presidential directives, legislation, or both can be used to shape the National Security Council (NSC), the NSC staff structure, and the NSC process. Using a presidential directive to structure the NSC process has several benefits: it can be done on January 21, 2009; the structure can be easily modified; and it allows each President to design his or her own process. But presidential directives have their downside: some authority that a President may want to provide to the National Security Advisor or the NSC staff may require statutory changes; even an effective structure would be subject to overhaul by new administrations; and an over-delegation of authority could inadvertently make the National Security

Advisor a constitutional “Officer” of the United States, subject to Senate confirmation.

PNSR is mindful of both the difficulty and of the importance of this undertaking. Our world is dangerous, and more than ever is in a constant state of flux. We need a national security system that can adapt to emerging threats while still taking advantage of developing opportunities. And this must be done within the hard constraints of the Constitution and the soft constraints of the political realities of Washington, D.C. By rigorously examining the failings of the current system, developing innovative solutions, and proposing a combination of carefully crafted instruments, PNSR believes this can be accomplished in a manner that transcends partisanship and puts our national interests first.

Advice to the Next Administration Regarding Coercive Interrogation

By Michael Posner

(President of Human Rights First)

Last August, the ABA House of Delegates overwhelmingly adopted a resolution urging Congress to bring the CIA’s interrogation practices within the law. Specifically the resolution asks Congress to override a July 2007 Executive Order which in effect allows the CIA to continue to use so-called “enhanced interrogation techniques,” a euphemism for torture and official cruelty.

Earlier this year, Congress acted on the ABA’s advice. It adopted an amendment to the Intelligence Authorization bill for 2008, requiring the CIA to follow the Army Field Manual on Interrogations. Unfortunately President Bush vetoed the bill saying: “It is vitally important that the Central Intelligence Agency (CIA) be allowed to maintain a separate and classified interrogation program.” The President assured, as he had in the past, that “the United States opposes torture.”

As we approach the seventh anniversary of the 9/11 attacks, perhaps no issue has stirred as much controversy as the administration’s insistence on using coercive interrogation techniques as an element of U.S. intelligence gathering. And no aspect of the administration’s counter-terrorism program has been more damaging, not only to our own internal commitment as a nation to uphold the rule of law, but also to America’s standing in the world.

The genesis of these misguided policies is well documented. In 2002, the Counsel to the President, Alberto Gonzales, sought guidance from the Justice Department on the legal limits on the use of coercion. In August 2002, he received a memo from the Office of Legal Counsel, the so-called Yoo-Bybee memo, which defined torture in a highly problematic way. Most notably the memo said that for an act to constitute torture “it must inflict pain that is difficult to endure ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”

The intent of this memo and subsequent documents generated by senior lawyers in the administration was clearly to provide legal justification and cover for coercive interrogation practices that go far beyond the scope of established detainee treatment. The new rules gave U.S. officials the green light to use a range of coercive interrogation techniques that the President termed “an alternative set of procedures.” These techniques included placing detainees in painful stress positions for prolonged periods, exposing them to hypothermia and extreme temperatures, the use of dogs to terrorize them, sexual humiliation and forced nakedness, sleep deprivation, violent shaking and beatings, and “water-boarding,” which is the pouring of water over the mouth and nose to create the sensation of drowning.

The combination of these techniques and holding prisoners in secret detention centers has led to serious abuses. Though the photographs of the Abu Ghraib prison in Bagdad, released in 2004, have become the iconic images of official cruelty, the problem actually runs much deeper. Human Rights First has documented more than 100 cases where people have died in U.S. custody since 2002. The Pentagon has classified 34 of these cases as suspected or confirmed homicides. None of these 34 deaths occurred at Guantanamo and only one at Abu Ghraib. Human Rights First has identified another eleven cases in which facts suggest death as a result of physical abuse or harsh detention conditions.

Both Congress and the courts have sought to bring these abuses to an end. In the fall of 2005, Congress overwhelmingly passed the Detainee Treatment Act, which includes a provision explicitly prohibiting the cruel, inhuman or degrading treatment of detainees in U.S. custody. While the President signed this provision into law, he added a signing statement that said he would apply this prohibition only to the extent it is consistent with his interpretation of what is in the U.S. national security interest.

The Supreme Court added its voice in *Hamdan v. Rumsfeld* in June 2006. In that case, the Court held that the humane treatment provisions of Common Article 3 of the Geneva Conventions apply to all individuals in U.S. custody,

regardless of their status. The administration sought to circumvent the Court's clear finding by attempting to have Congress reinterpret Common Article 3 as part of the Military Commissions Act. Again, Congress said no, thereby reaffirming the sanctity of the Common Article 3 standard.

In fact, members of Congress were so concerned about the administration's continued determination to sanction official cruelty that they included within the Military Commissions Act a requirement that the President promulgate an Executive Order elaborating on the meaning of the Common Article 3 standard with respect to the CIA's current interrogation program. This led to the July 2007 Executive Order mentioned above.

While the Executive Order asserts that the CIA program "fully complies" with Common Article 3, it significantly limits the circumstances in which coercive interrogation techniques are prohibited. Commenting on this, Retired Marine Commandant P.X. Kelley and Professor Robert Turner wrote: "[A]s long as the intent of the abuse is to gather intelligence or to prevent future attacks, and the abuse is not 'done for the purpose of humiliating or degrading the individual' - even if that is an inevitable consequence- the President has given the CIA carte blanche to engage in 'willful and outrageous acts of personal abuse.'"

Many uniform military leaders have made a concerted effort to distance themselves from these policies. From the outset military lawyers, including The Judge Advocate Generals (TJAGs) have been strong internal critics of any legal justifications for official cruelty. Their position has been endorsed by many military senior officers and by Secretary Gates since his appointment. In September 2006, the Army also issued a new Field Manual on Intelligence Interrogations – FM 2-22.3(FM 34-52). It embraces the Geneva Conventions humane treatment standard.

The military's resistance to the use of torture and cruelty reflects a long tradition dating back to the American Revolution. In the battle of Trenton in 1776, General Washington implored his troops to treat British soldiers "with humanity." He said: "[L]et them have no reason to complain of our copying the brutal example of the British Army."

During the Civil War, Lincoln directed the military to develop the Lieber Code, which set minimum standards for U.S. soldiers. The code required U.S. soldiers to treat captured soldiers "with humanity." The Lieber Code helped lay the foundation for the development of the law of armed conflict, which the U.S. military took a lead role in developing on the international stage.

In 1950, Defense Secretary George Marshall reaffirmed this commitment in a book entitled *The Armed Forces Officer*. He wrote that "the United States abides by the laws of war." And he went on to emphasize that "respect for the reign of law, as that term is understood in the United States, is expected to follow the flag wherever it goes."

In the spring of 2007, General David Petraeus wrote an open letter to all U.S. troops stationed in Iraq. He summed up the traditional military view in these words: "Some may argue that we would be more effective if we sanctioned torture and other expedient methods to obtain information from the enemy. They would be wrong. Beyond the basic fact that such claims are illegal, history shows that they are also frequently neither useful nor necessary."

Senators McCain and Obama have both taken strong public positions denouncing torture and official cruelty, a critical first step to bringing our house back into order. On inauguration day, it will be important for the new President to proclaim a commitment to taking all necessary steps to reinstating a single interrogation standard for everyone in U.S. custody, a standard based on the golden rule. Thus no US official should engage in any conduct with respect to the treatment of detainees that we would not expect for an American who is captured by our adversaries. As American lawyers, rooted in the rule of law, we should demand nothing less.

MICHAEL LEWIS RESPONDS

Like most of those engaged in this debate over interrogations, Posner does little to get beyond the subjectivity found in the definitions of torture or cruel, inhuman and degrading treatment found in the Convention Against Torture and Common Article 3. He supports laudable, but inherently subjective standards that call for "humane treatment" and states that our policy should be guided by "the golden rule" which he views as meaning that we should treat our detainees as we expect Americans to be treated.

The standard which I propose, that we may only do to detainees what we actually do to our own trainees, is Posner's golden rule, although it is unlikely that he will recognize it as such. This is because Posner's standard is actually based upon how we *hope* American prisoners will be treated, not how we expect them to be treated. This difference is made apparent by Posner's objection to the use of sleep deprivation, temperature variations, stress positions, forced nakedness, shakings and "water-boarding" even though these are all techniques that we not only expect to be

used on Americans, but that we put our own trainees through in anticipation of such treatment. It is this divide between the aspirational and the actual that my standard hopes to bridge.

To be clear, my standard is not based upon reciprocity. It does not allow Americans to mistreat detainees just because American captives are mistreated, nor does it vary detainee treatment based upon the treatment that Americans receive. It would not have excused many of the excesses that occurred at Abu Ghraib and Guantanamo and it is not based on a belief that coercive interrogation is the preferred method of extracting information.

What it is based upon is an understanding that, in exceptional circumstances, coercive methods can be more effective (and more expedient where time is short) than rapport building. Coercion should be used infrequently. (It is worth noting that the often criticized technique of “waterboarding” that thousands of US service members have been through has been used only three times in seven years against al Qaeda). However, coercion should not be prohibited entirely if appropriate safeguards are established. My proposal provides a clear and realistic guideline for how detainees may be interrogated without jeopardizing their long-term physical well being, while preserving some important interrogation tools, the most valuable of which is uncertainty.

Posner proposes that the limits on interrogation techniques be publicly disclosed (such as those described in the Army Field Manual). This step eliminates uncertainty for captives that have received training in resisting interrogations, as many al Qaeda have, resulting in them being confident and defiant during interrogations whose limitations they already understand.

When confronted with such informed intransigence American servicemen are left with difficult choices. Should they go beyond the rules because something important is at stake? If so, how far can they go? In a not uncommon scenario, Lt. Col. Allen West confronted an Iraqi who indicated that he knew the limitations on American interrogators and they refused to provide any information about an ambush that was set for West’s men. West threw the man to the ground and discharged his sidearm next to his head. The Iraqi then gave him the details of the ambush, which was averted, and two insurgents were captured.

West’s conduct, perhaps necessitated by the lack of clear alternatives and certainly galvanized by the Iraqi’s knowledge of our interrogation standards, was judged to have crossed the line. Some commentators went so far as to call West a “torturer.” Although he was not court-martialed, West was fined, removed from command and forced to resign from the service.

When the enemy knows your limitations he will exploit them; and when good people are required to make life and death decisions they will benefit from clear guidance. Let us adopt a standard that maintains some uncertainty in the minds of our enemies while clearly establishing lines that our people may not cross.

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Advice to the Next Administration Regarding Coercive Interrogation

By Michael Lewis

(Associate Professor of Law, Ohio Northern University Pettit College of Law. Prior to graduating cum laude from Harvard Law School he flew F-14's for the U.S. Navy and graduated from the Navy's Topgun Fighter Weapons School in 1992.)

What limitations should the next Administration place on the use of coercive interrogation techniques by US armed forces and other government agencies in the continuing conflict with al Qaeda? The answer to this question must account not only for the national security interest in obtaining vital information from captured terrorists but also for the humanity of those detained. Any satisfactory answer must begin by clearly defining torture and ensuring that the line drawn is not crossed by Americans. This is particularly important because the definition of torture is currently broken.

While torture is a universally condemned evil that is prohibited by numerous international treaties and conventions it has never been defined with sufficient clarity. Only the UN Convention Against Torture (CAT) actually attempts to define the term as: *any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed.*

The greatest problem with CAT's definition of torture is its vagueness and inherent subjectivity. What constitutes "severe pain or suffering"? During the post-9/11 debate in this country, commentators and government officials proposed definitions ranging from extraordinarily restrictive to shockingly permissive. On the one hand, there have been numerous articles that seek to define torture so broadly that the legality of even long term detention might be called into question. At the other end of the spectrum, a standard proposed by Bybee and Yoo and adopted (at least temporarily) by the Administration defined severe pain and suffering as that pain and suffering which is the equivalent of organ failure or death. (This standard has since been rightly rejected as being far too permissive of ill treatment). Still others have argued that it is wrong to clearly define torture because doing so will only encourage states to approach the line drawn.

This broad range of disagreement on the definition results in torture being defined by a personal "I know it when I see it" standard. An illustration of this approach to defining torture was the confirmation hearings for Attorney General Mukasey. A central issue in the hearings was whether Mukasey believed that waterboarding constituted torture. The Senators questioning Mukasey relied on testimony from experts in law, intelligence and military affairs who described their qualifications for rendering an "expert" opinion on what constituted torture. The experts then said they were familiar with waterboarding and that the practice constituted torture because they knew it when they saw it, and this was torture.

While the law has famously utilized an "I know it when I see it" standard in the past, torture is far too important a definition to be left to the eye of the beholder. This is particularly true when the perspective of the beholder is carefully considered. A nation's leaders generally regard the protection of their population as their paramount responsibility. Invariably these leaders are asked to interpret the vague and subjective "severe pain and suffering" standard at precisely the time when portions of the civilian population have been threatened or killed and pressures are greatest to define this term most expansively. While it may be disappointing that the United States at least temporarily adopted the "organ failure or death" standard, it should hardly be surprising. Historically, even liberal democracies when threatened by terrorism have resorted to detention and interrogation measures that were sharply criticized by human rights organizations. The United Kingdom (responding to the IRA in the 1970's and al Qaeda in 2005), Italy (the Red Brigades), Spain (the ETA and al Qaeda in 2003), Germany (the Baader-Meinhof Red Army Faction) and Israel (PLO, Hamas and Hezbollah) were all criticized for the detention and interrogation measures used in response to these threats.

To constrain future abuses of the subjectivity inherent in the definition of torture, it is imperative that the next Administration develop a standard that provides clear guidance for interrogators without completely barring coercive techniques in exceptional situations. The best way to do this is to define the limits on interrogation techniques by referencing pre-existing limits on conduct that is unrelated to interrogations. This limitation can be found in the non-punitive conditions to which we subject our own trainees. Simply put, we may not subject detainees to any techniques or stresses that we do not apply to our own people. This standard would include all of the medical safeguards that we provide for our own people to protect them from any treatment that may cause lasting harm. It would also require that

interrogators utilizing coercive techniques would be properly trained in their application, a situation notably absent at Abu Ghraib.

In addition to clarity, another major benefit of this definition would be the internal checks that it encourages. Most soldiers are aware that torture is illegal but they are no more likely to have a clear understanding of what constitutes “severe pain and suffering” than anyone else. So when they are ordered to utilize coercive interrogation techniques they assume that these techniques have been properly approved. Even if the soldiers are uneasy about these techniques, the hierarchical structure of the military makes it very difficult for them to ask their superiors if they are being ordered to commit a war crime. That question is, in most circumstances, just too difficult to ask because it directly challenges both the judgment and morality of the superior. On the other hand, if the standard for interrogation techniques is simply “we will only do to others what we do to our own people” then the question becomes much easier to ask. “Do we really do this to our own people?” The answer is either a simple yes or no, and the question is not one that directly attacks the judgment or morality of the superior. The ease of asking such questions, and the need for officers to provide an accurate answer would push incidents of misconduct, such as those that occurred at Abu Ghraib, into the light much sooner.

Although this standard has not been formally proposed, there has been humanitarian criticism of the fact that techniques used on American servicemen during SERE training were used at Guantanamo, thus implying that such a standard would be insufficient. It is argued that the mentality of training is vastly different from that of captivity and that referencing training conditions to limit interrogation techniques cannot guarantee the psychological well-being of the captive. While this is certainly true, it should be noted that nothing can guarantee this. Long-term captivity itself may lead to psychological trauma and while efforts to limit some adverse psychological effects can be undertaken others are inherent in conflict. The depression and self-recrimination felt by a captive who has provided information that would be helpful to his captors is not an adverse effect that we can (or should) be worried about preventing. Any attempt to guarantee the psychological well being of detainees is aspirational at best and will inherently perpetuate the vagueness and subjectivity that have made the current definition of torture ineffective.

MICHAEL POSNER RESPONDS

Professor Lewis’s article is based on two flawed premises: first, that current law barring torture and cruel treatment of detainees lacks clarity; and second, that in reformulating these standards in the future, the U.S. government should look to the U.S. military’s SERE (Survival, Evasion, Resistance, Escape) training program. These premises are wrong, both in law and policy.

The Bush Administration’s problem with the current law on interrogations is not a lack of clarity but just the opposite. Both U.S. and international law prohibits interrogation methods that the administration wants the CIA to use. Since 2002, the administration has sought to circumvent these laws and create a legal justification for the CIA’s coercive methods such as sleep deprivation, forced nudity and the use of dogs. Its efforts to do so have been met with strong resistance from Congress and the courts precisely because they are at odds with the law. Jane Mayer describes the genesis of these policies in her new book, *The Dark Side*. As she concludes, these policies were not the result of an attempt to clarify what was ambiguous; rather, they were based on a determination to change the rules of interrogation as part of a broader effort to expand presidential power. Her book should be required reading for senior officials in a new administration and members of Congress.

In the context of local law enforcement, few believe that laws regulating interrogations are not clear. Using the Eighth Amendment’s “cruel and unusual treatment” standard has constrained the interrogation of criminal suspects by federal and state authorities and has prevented torture and abuse. If a local policeman or FBI agent puts a suspect in a freezing room or makes him stand in a painful stress position, few would question that they have crossed the line, and authorities would act to end these practices.

In a national security context, the U.S. military also prohibits interrogators from relying on coercive methods. The Army spells out authorized interrogation techniques in its Field Manual on Intelligence Interrogations. Re-issued in September 2006, it serves as the standard for the entire military. In announcing these standards Lt. Gen. John F. Kimmons, Army deputy chief of staff for intelligence, outlined the rationale for the new army field manual. He said that “no good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tells us that.” Supporting this statement, Gen. David Petraeus wrote in an open letter to all U.S. troops in Iraq in May 2007 that “interrogation standards laid out in the Army Field Manual ... work effectively and humanely in eliciting information from detainees.”

Senior administration officials, including the President, have tried to make the case that the CIA needs a separate set of “enhanced interrogation techniques” to obtain information from senior Al Qaeda operatives. But they have refused to divulge the techniques they wish to authorize, even as they seek to reassure the public that these techniques are legal. As a nation of laws, it is unwise and even dangerous to leave decisions of this magnitude solely to the President’s discretion. The Bush Administration’s track record over the last seven years underscores these dangers.

It would be equally unwise to model future interrogation laws and policies on the SERE training program, as Professor Lewis suggests. The SERE program is intended to prepare members of the military in high risk situations for the possibility of capture. Its use of extreme techniques, like waterboarding, is administered under carefully controlled circumstances. Those undertaking this training do so voluntarily, because they have both signed up for military service and then opted for further, riskier training. Most importantly, those undergoing this training do so with the confidence that their instructors will stop before doing permanent harm.

Prisoners in enemy custody have no such assurance, whether they are prisoners captured by U.S. forces on the battlefields of Iraq or Afghanistan, or U.S. soldiers captured by our enemies. For these detainees, we must continue to abide by the golden rule, applying a standard of humane treatment prescribed by law.

The Four Freedoms as Good Law and Grand Strategy

Mark R. Shulman

(Assistant Dean for Graduate Programs and International Affairs and an adjunct professor at Pace Law School. A more complete treatment of this topic appears in the Fordham Law Review. Please address any comments to MarkRShulman@gmail.com.)

The next President and Congress should work together to end the “Global War on Terror” and pursue instead a grand strategy animated by Franklin Roosevelt’s Four Freedoms. FDR first articulated them as undergirding his vision for a stable and secure post-war world. Read together – rather than as a list from which to select one value above others – they provide a flexible and yet principled framework for crafting a policy of security, prosperity and justice. Two generations later, they continue to represent meaningful values that have been incorporated into international law.

People have commonly misinterpreted the Four Freedoms as a menu from which to choose. In fact, FDR did not intend any one freedom to trump the others. They must be treated like legs of a table. If one were missing or even shorter than the others, the table would be unstable. FDR presented them during his January 6, 1941 address to Congress: “In the future days which we seek to make secure, we look forward to a world founded upon four essential human freedoms.” Roosevelt described them as a set, enumerating them one by one. “The first is freedom of speech and expression – everywhere in the world. The second is freedom of every person to worship God in his own way – everywhere in the world.” Clearly, FDR adopted these first two freedoms from the First Amendment. For the third, he drew on his own New Deal economic programs and signaled the need for international cooperation in order to achieve their objectives globally. “The third is freedom from want, which translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants – everywhere in the world.”

Finally, and most famously, Roosevelt addressed what he viewed as the immediate circumstances necessitating his new policy – the specter of another world war. “The fourth is freedom from fear.” Achieving this freedom required not only respect for the first three freedoms but also “a world-wide reduction in armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor – anywhere in the world.”

Over the years that followed, the Four Freedoms were incorporated into the fundamental documents of international law. The 1945 Charter of the new United Nations organization included them as basic principles. And following FDR’s death, Eleanor Roosevelt picked up her husband’s theme with vigor and determination. Under her leadership, the new UN General Assembly proclaimed the Universal Declaration of Human Rights in 1948, adopting the Four Freedoms in the preamble. “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.” Numerous international conventions have similarly embraced them in the decades that followed. Sadly, policymakers have lost sight of their value, drawing on the Four Freedoms only when it appeared expedient to claim one or another.

Restored to their proper place at the center of U.S. policy, the Four Freedoms promise a more principled and more effective grand strategy than the open-ended and alienating “Global War on Terrorism.” The notion of a global war carries misguided and unhelpful connotations of start and stop dates, a special paradigm of constraints on conduct (*jus in bello*), and a strong bias toward military solutions. Moreover, the GWOT skews decision-making by privileging war objectives over unrelated priorities (such as dealing with a decaying infrastructure, widespread hunger and disease, climate change and emerging great power rivalries) that are also essential to the nation’s long-term security. In a complex, fast-changing world, the United States should not be waging open-ended war. Instead, it should be pursuing principled decision-making that allocates the nation’s resources most effectively to meet long-term challenges and opportunities. Historian Paul Kennedy explains, “The crux of grand strategy lies therefore in policy, that is, in the capacity of the nation’s leaders to bring together all of the elements, both military and nonmilitary, for the preservation and enhancement of the nation’s long-term (that is, in wartime and peacetime) best interests.”

Justice Stephen Breyer’s method of interpreting the Constitution is also helpful in explaining how to apply the Four Freedoms. In *Active Liberty*, Breyer examines six constitutional doctrines as they relate to the Constitution’s essential purpose as an instrument of democracy. By articulating the Constitution’s fundamental objective, Breyer offers a coherent intellectual framework for resolving the ambiguities, tensions, and conflicts in its text. For Breyer, this method of interpretation leads to decisions that advance the people’s will.

Similarly, Kennedy explains that the formation of grand strategy “is full of imponderables and unforeseen ‘frictions.’ It is not mathematical science in the Jominian tradition but an art in the Clausewitzian sense – and a difficult art at that, since it operates at various levels, political, strategic, operational, tactical, all interacting with each other to advance (or retard) the primary aim.” For Kennedy and Breyer, wise policymakers practice an art that is best informed by a clear statement of the values they seek to achieve.

The Four Freedoms offer that statement and should be employed similarly. They point the way to long-term security. To do so, they offer a concise statement of the values and aspirations against which policies should be evaluated. In some instances, one or more of the Four Freedoms will also offer clear guidance to consider the systemic effects of a given policy. For instance, they cannot be reconciled with wars of choice that will destabilize international order and stir up wide-spread resentment among friends and potential enemies. Nor would they sanction a policy to employ torture which would almost inevitably lead to a rise in intimidation and repression around the world. The Four Freedoms inform practice of the Clausewitzian art by reminding policy-makers of the wider context in which they practice it.

The next administration will draft a new national security doctrine. Typically, these documents pay lip service to the nation’s values but fail to build those values into the priority setting process. This disjunction has enabled administrations to employ despicable means that have frequently backfired. Witness, for example, regime changes forced upon Iran and the Congo in the fifties and Iraq more recently. If, however, a president and Congress expressly evaluate policies in light of the Four Freedoms, they would make more enlightened choices that increase the likelihood of long-term security gains. That might result, for instance, in more foreign aid and less military assistance.

A grand strategy based on the Four Freedoms does not imply aerial assaults to protect free speech or naval bombardment of those suffering from want. Instead the U.S. should promote values that have received near universal acclaim and that are embodied in international law. The Four Freedoms have just these qualities. Individually, they derive from a U.S.-framed consensus of enlightenment values. And they were adopted as part and parcel of the international bill of rights. Restoring them as the centerpiece of national security strategy would be a big step toward returning the United States to its position as a leader of an increasingly free and secure world.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAW AND NATIONAL SECURITY

The Center for National Security Law at the University of Virginia School of Law; the American Bar Association Standing Committee on Law and National Security and the Center on Law, Ethics and National Security at Duke University School of Law proudly announce:

***The 18th Annual Review of the Field of
National Security Law Conference***

“National Security and the Law-- Issues for the New Administration”

**November 6 and 7, 2008
Renaissance Washington DC Hotel, 999 Ninth Street NW**

Dinner Keynote Address by **Admiral Michael Mullen**, Chairman of the Joint Chiefs of Staff

Thursday luncheon keynote address by **Senator Sheldon Whitehouse**, (RI) member, Senate Select Committee on Intelligence and Judiciary Subcommittee on Human Rights and the Law

Friday luncheon keynote address by **Judge David Sentelle**
Chief Judge, US Court of Appeals for the DC Circuit
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MCLE Credit will again be offered, including Ethics Credit – possibly 14.75 CLE credit hours and of that, 2.00 Ethics CLE – in some states, a full year’s worth of credit!

Complimentary Reception – Wednesday, November 5 at the Renaissance – 6:00 – 7:30 p.m.

Registration, program, and details – go to www.abanet.org/natsecurity

**“National Security and the Law- Issues for the New Administration”
AGENDA**

Thursday, November 6, 2008

- 7:30 a.m.
Registration and Continental Breakfast
- 8:30 - 9:15 a.m.
PANEL I: The Nature, Scope and Scale of National Security Threats Inside and Outside the United States
- 9:15 - 10:45 a.m.
PANEL II: Managing the Intelligence Enterprise
- 11:00 a.m. - 12:30 p.m.
PANEL III: A Sustainable Legal Regime for Foreign and Domestic Intelligence
- 12:30 - 2:00 p.m.
Luncheon – Keynote Speaker: Senator Sheldon Whitehouse, RI
- 2:15 - 4:00 p.m.
Panel IV: The War in Georgia and the Future of U.S./Russian Relations
- 4:15 - 5:30 p.m.
PANEL V: Challenges for the Private Sector in National Security
- 5:30 p.m.
Reception/Dinner Keynote Address: Admiral Michael Mullen, USN, Chairman of the Joint Chiefs of Staff

Friday, November 7, 2008

- 7:45 a.m.
Continental Breakfast
- 8:10 a.m.
Welcome
- 8:30 - 10:15 a.m.
Panel VI: Due Process and Issues Surrounding Detention: Considerations for the New Administration
- 10:30 - 12:15 p.m.
Panel VII: Prosecution by Military Commission: A Question for the Next Administration
- 12:30-2:15 p.m.
Luncheon – Keynote Speaker:
The Honorable David B. Sentelle
Chief Judge, United States Court of Appeals for the District of Columbia Circuit
- 2:30-4:30 p.m.
Panel VIII: Ethical Issues for National Security Lawyers
- 4:30 p.m.
Adjourn

THE ABA NATIONAL SECURITY LAW REPORT
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In Case You Missed It ...

Staying current in the field of national security law is never easy. Every week there are significant new opinions, statutes, indictments, reports, articles, and any number of other developments. In an effort to assist practitioners and scholars in keeping up to date with these events – and in particular to provide ready access to primary sources in electronic format – Professor Robert Chesney of Wake Forest University School of Law maintains a listserv for professionals and academics working in this area. Those interested in subscribing to the listserv may do so by contacting Professor Chesney at robert.chesney@wfu.edu.

“In Case You Missed It...,” featuring selected posts from Professor Chesney’s listserv, is a recurring feature of The National Security Law Report.

- *United States v. Prospero* (D. Mass. Aug. 29, 2008). A very interesting but largely unnoticed opinion by the District of Massachusetts (Stearns, J.) concerning whether the U.S. is “at war” for purposes of the Wartime Suspension of Limitations Act (WSLA) in connection with fraud prosecutions arising out of the Big Dig in Boston. The court concluded that the statute had been triggered both by the conflicts in Afghanistan and Iraq. But the three-year extended limitations period created by the statute begins to run upon “termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.”
- *Boumediene v. Bush* (D.D.C. Aug. 27, 2008) Judge Leon issued a case-management order in connection with the handful of GTMO habeas petitions pending before him (including Lakhdar Boumediene’s), resolving some though not all of the critical procedural questions the federal courts have confronted in the aftermath of Boumediene’s determination that the Constitution requires habeas review of military detention for those held at GTMO.

Key points:

1. Discovery in general: The court will consider discovery requests on a case by case basis.
2. “Brady”-style disclosure of exculpatory evidence: The government is under a continuing obligation to disclose any evidence that tends to materially undermine the basis for detention. This obligation does not extend to all information in the government’s possession; it applies only to information the government reviews in the course of preparing its factual return or in preparation for the habeas hearing that follows.
3. Burden of proof at the hearing: the government must establish eligibility for detention by a preponderance of the evidence.
4. Presumptions: the court will consider on an item-by-item basis whether to presume the authenticity and accuracy of the government’s evidence. Any such presumption will be rebuttable, however. Note that substantial disputes are certain to arise under this heading, particularly as the government produces documents reflecting statements made during interrogations.
5. Hearsay: There is no rule against hearsay; evidence must be “relevant and material,” but no Rule 802-type objections to admissibility.
6. Presence of detainee: Detainees will not appear live at these proceedings. Judge Leon says he will make efforts to let them participate in the unclassified portion of the proceedings by telephone. The order concludes by noting that attorneys will be given at least one phone call with their clients prior to the hearing.