

6/12 1600 draft

## Elements of Possible Initiative

### Introduction

The United States has had to adapt in many ways to a new kind of global war. As we learn more from experience, the President has offered a vision of new institutions to sustain our effort for years to come.

A new Department of Homeland Security, a transformed Department of Defense, a refocused and restructured Intelligence Community, a different kind of FBI – these are just some examples of the way our government has been adjusting to a new era in world politics. With presidential leadership, America's strategies and institutions continue to evolve. In coming weeks and months we will be describing a fresh approach to our overall strategy, including the role of transformational diplomacy, so that we can build up constructive alternatives to violent extremism.

One of the issues in this new kind of war is what to do with the suspected terrorists captured by our side, including our allies. In the weeks after the mass murder of Americans on 9/11, the U.S. government quickly devised some initial procedures to support urgent military operations in Afghanistan and the intelligence and law enforcement efforts we were making around the world. Other governments around the world are now also struggling to cope with this challenge.

The dilemmas are not easy. The individuals come from many countries and are often captured far from their original homes. Some of them are effectively stateless, owing allegiance only to the extremist cause of a transnational terrorist movement. Some are extremely dangerous. Some have information that may save lives, perhaps even thousands of lives.

They do not fit readily into any existing system of criminal or military justice. And, while balancing the danger these individuals may present, they must be treated humanely, consistent with our values and the values of the free world.

Learning from experience, the U.S. will now lead in designing an international system for handling captured combatants in this new kind of global conflict.

## **Outcomes**

An effective system for handling terrorists and terrorist suspects captured in this global war, those who cannot properly be accommodated in the usual criminal process, must be durable – politically, legally, and within the coalition joining us in the fight. It should therefore aim at the following outcomes:

- Hold the detainees who pose a high risk of returning to the war and killing innocents and interrogate detainees who may have significant, life-saving, intelligence.
- Bring to justice those detainees who have committed war crimes – crimes against humanity, like the mass murder of innocents.
- Gain broad, sustainable understanding and acceptance from the American people and from the nations that join us in the worldwide coalition against violent extremism.
- Pass muster for years to come under American law and relevant standards of international law.
- Give workable, clear, and unambiguous guidelines for the professional and humane conduct expected from those who will operate the system.

## **Necessities of a New Kind of War**

In briefly summarizing how the current system evolved, it is important to convey the dilemmas the government faced in conducting the necessary combat, intelligence, and law enforcement operations after 9/11.

- The standard system for criminal justice does not fit.
- The traditional formal system for Prisoners of War does not apply.
- The potential dangers of follow-on attacks were – and are -- very real.

But, thanks in part to the successes of the first phases in this global war, we have now learned more about the enemy and can refine our approach. For example, hundreds of those originally detained at Guantanamo have been returned to their home countries, where some of them have been released.

- The U.S. has instituted procedures to review every case and narrow down the number of individuals who must be detained either by us or others.
- Wherever possible, we are returning individuals to their home country. Some of these countries, though, like the U.S., are still struggling to design legal arrangements that can adapt to this challenge.
- As in the civilian world of parole for violent criminals, the U.S. is accepting some risk in the process of transfer and release. Some of those released have already returned to the fight.
- Nevertheless, the U.S. will hold only those individuals who present a high risk and will not or cannot be held by anyone else.

### **Common Values, Common Standards**

The new kind of war forced the United States to develop new procedures. As other nations face this challenge too, the U.S. will work with its key allies in this war to develop common approaches.

- Each nation will have its own specific procedures. A foreign terrorist fighting in Afghanistan could be captured by Afghans, Americans, Australians, Italians, or forces from a dozen other countries. Regardless of such chance elements, the treatment of a prisoner

should be built on **a foundation of common values and basic standards** – a system that is reasonably ‘interoperable.’

**The President will therefore appoint a special board (which could be his existing Foreign Intelligence Advisory Board) with the following charge:**

- **Recommend a policy and legal foundation to the President that he can propose to the Congress as a basis for any needed legislation and that he can also use as a basis for international discussion.**
- **Review general U.S. government detainee policy and operations. Evaluate issues of effectiveness and intelligence value. Recommend a balanced path for detention and treatment that will achieve the long-term outcomes listed above.**

The policies of government agencies other than DOD cannot be walled off. That wall will inevitably be broken anyway, probably soon. It is better that this administration do it, and do it early in the second term, so that the review is constructive and forward-looking and form part of this President’s worldwide strategy against violent extremism.

The U.S. will thus work with its key allies to agree upon a common international foundation for national practice.

**In the interim, while a lasting foundation is being developed, the U.S. needs clear guidelines, applicable and interoperable worldwide, for detention and treatment of captured enemy combatants in this global war.**

- **As an interim approach, the U.S. will choose – as a matter of policy – to treat such captives, once they move into the regular detention system, as if they were civilian detainees under the law of war. This is the system generally being used by our forces in Iraq. We thus accept the applicability of the baseline Article 3 that appears in all four of the Geneva Conventions on the Law of War. We would thus also draw upon the standards in the Fourth Geneva Convention on the Law of War.**

- WE ARE NOT SAYING THAT THESE DETAINEES ARE NECESSARILY ENTITLED TO THIS STATUS. TO BE CLEAR: WE ARE GIVING THEM A TEMPORARY STATUS THEY DO NOT DESERVE. BUT WE ARE NOT DOING THIS FOR THEM. WE ARE DOING IT FOR US.
- Adopting this interim approach allows us to handle the detainees on a well understood basis that gives our forces clear, unambiguous guidelines for conduct. We are already applying these standards in our deadliest counterterrorism fight today.
- The effective significance of the change is relatively modest, given our experience and the procedures that have already evolved for screening, custody, interrogation, and disposition in Guantanamo, Afghanistan, and Iraq. But the impact of the change, and the clear alignment with Geneva, could be far-reaching.
- By harmonizing these systems we will be better able to explain what we are already doing – combatant status review tribunals, administrative review boards, etc.
- This interim approach also is one that civilian courts are more likely to understand. They will no longer feel they must intervene to fill a legal vacuum. Instead they will see an established framework to which civilian courts have traditionally deferred.
- This interim approach also is one that Americans and the world are more likely to understand and accept as reasonable.

This interim approach allows our military and intelligence officials to conduct immediate post-capture interrogations on a special basis. In every country, individuals are held temporarily, away from public scrutiny, often after just after they are apprehended, in order to conduct humane but effective questioning and gather information while it is most current and operations – on both sides – are still ongoing.

- This post-capture intelligence system will continue in a small number of selected cases. It will last for a defined period -- measured in days or weeks, not months or years – in a manner authorized and reviewed

by senior civilian officials designated for this purpose by the President.

- There is a risk that some intelligence may be lost when enemy captives are ultimately placed in a less coercive regular detention system. As in our prior wars, this risk should be recognized, but accepted as necessary to maintain the integrity of the system and our common, fundamental values.
- The post-capture intelligence system may actually be more sustainable, over the long-haul, if it includes an appropriate transition stage so that people can be moved on to a durable detention system.

**As part of this interim system, and as the number of detainees goes down, the U.S. will no longer need to maintain a detention facility in Guantanamo. That facility will close and we expect to transfer remaining detainees to a facility in the United States.**

### **Training and Accountability**

The U.S. entered this new kind of war without large numbers of experts trained in the custody and interrogation of terrorists captured from across the world. Since then the U.S. has learned from experience and has developed much stronger and more effective professional standards for the conduct of effective interrogations.

- The U.S. will establish stronger baselines of common training, across the military departments, across different federal agencies, and reaching out to allies that share our interest in conducting effective, humane interrogations of dangerous suspects.

Abuses have occurred in detention and interrogations. The U.S. believes in holding those who have acted improperly accountable for their misconduct. That process is already well underway:

- One general officer has been relieved of command and demoted;
- 15 individuals have been convicted by court martial;

- 35 more have been referred to trial by court martial;
- 84 more have received non-judicial punishments; and
- 44 more have been reprimanded or discharged.

Hundreds of criminal investigations have either been completed or are continuing. There have been at least ten major reviews, assessments, inspections, and investigations of detention and interrogation operations.

Nonetheless we recognize the interest in an investigation conducted outside of the departments and agencies involved. **The presidential board described above will therefore also be asked to assess past and ongoing department and agency investigations to insure their completeness and accuracy and to recommend processes for the future.**

## **Transparency**

If the U.S. acts as if it has something to hide, Americans and the world will assume it does.

A durable system for handling captured terrorist suspects will be conducted in a manner that can withstand outside scrutiny. Further, the mystery can be dispelled in a way that builds understanding for the system, and for the dilemmas each country must face if it joins in fighting these violent, transnational organizations.

Once individuals move into the longer-term detention system, the system should be accessible to outside visits by properly organized representatives of relevant international institutions, the press, and foreign governments.

## **Justice**

Some individuals detained by the United States have committed war crimes – crimes against humanity. These individuals should finally be brought to justice.

- Military commissions should be limited to major criminals clearly guilty of war crimes. We should stop using the system to try small fry. Otherwise the coinage is debased; we trivialize the meaning of 'war crimes.'
- Massive work has already occurred to prepare for a trial of conspirators in the 9/11 attack. This information has been gathered by the FBI, by the CIA and other intelligence agencies, by the Moussaoui prosecution team, and by the 9/11 Commission – among others.
- **Khalid Sheikh Mohammed and others in custody should be brought to trial by military commission.**
- **The President's Military Commission Order should be revised in various ways, already being worked on by the interagency process, to learn from experience and stand up under the kind of attention these trials will receive.**

As these individuals are brought to trial, aspects of their detention and interrogation will come to light. This is a fact. It must be faced. Better to face it now, and by this administration.

- These individuals should be brought to justice. We should not assume they can just be secretly detained for the rest of their lives without trial.
- Visible justice for the worst crime in American history cannot both begin and end with the strange case of Zacarias Moussaoui.
- We place war criminals on trial not just for their benefit, but for the larger purposes of our own society and civilization.
- **The basic facts about the treatment of some of these high value detainees are already known.** Despite any initial publicity, placing them on trial is ultimately the surest way of keeping these individuals from becoming objects of sympathy, and reminding the world of what these people did.

Again, the American people will understand the need to hold individuals temporarily under special circumstances. Our intelligence system can continue. But that intelligence system should allow genuine war criminals to receive the justice they deserve.