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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.