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WHY GTMO?¹

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National Security Strategy Process

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¹ GTMO is the accepted abbreviation for the U.S. Naval Station located at Guantanamo Bay, Cuba.

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WHY GTMO?²

INTRODUCTION.

Policymaking, bureaucratic decision-making, and the interagency process are always subject to criticism. They are often described as too slow, too political, too complex, or too much a product of compromise. All of this is true, but this criticism ignores the most relevant and significant fact – the process works. And not only does it work, but also it ensures that decisions take into consideration all relevant factors and that they are the best possible decisions at the time they are made. The purpose of this paper is to outline the interagency decision process that selected the U.S. Naval Station, Guantanamo Bay, Cuba, as the location to detain the “illegal combatants” from the Global War on Terrorism.

STATEMENT OF THE PROBLEM.

Shortly after the tragic events of September 11, 2001, the President launched the Global War on Terrorism (GWOT). His first announcement of his intent to launch the GWOT can be found in his statement to the Nation on September 11 when he said, “Make no mistake: The United States will hunt down and punish those responsible for these cowardly acts.” In the very next month, the bombs started falling in Afghanistan.³

As the planning for the war in Afghanistan continued, it became apparent a facility would be needed to detain captured personnel. A number of agencies shared an interest in where

² Many of the discussions and much of the information related to this decision process was classified and other parts of the process touched on politically sensitive topics. This information was excluded from the paper, which remains unclassified. Regardless, the paper illustrates how, when necessary, an interagency decision on an issue of significance in the national security arena can be made in a timely manner.

³ George W. Bush, Address to the Nation, September 11, 2001
<<http://www.whitehouse.gov/news/releases/2001/09/20010911-1.html>

such a facility would be located, and consequently, an interagency working group was established to address this problem.

THE PLAYERS.

The agencies included the Department of State, the Department of Defense, the Department of Justice (to include Main Justice and the Federal Bureau of Investigation), the Central Intelligence Agency, and the National Security Council. Although some of these agencies shared particular interests, each had their own priorities.

The primary interests of each agency in the location of the proposed detention facility were based on the immediate circumstances. These circumstances included the fact that the detention is the result of a foreign war, the applicability of international law and the potential applicability of the Law of War, the security risks created by the events of September 11, and the desperate need for information related to the GWOT and threats to domestic security.

The primary interests that emerged were international relations, law enforcement, intelligence gathering, security of the detention facility, and domestic security.

Consequently, within the agencies named above, personnel from the legal, law enforcement, and intelligence communities took the lead. A brief description of the particular interests of each agency follows.

Department of State (DOS). The primary interest of DOS was the impact of this decision on U.S. foreign relations. The war in Afghanistan was in progress and escalating daily. Successful prosecution of the war required creating a coalition of regional states to support combat operations -- a coalition that could be described as fragile at best. Several countries in the region were considered for the location, and DOS was responsible for assessing the

possibility of obtaining an agreement with any particular country and the potential negative impact on the coalition, regional security, and the security of U.S. global interests.⁴

Department of Defense (DOD). In broad terms, fighting the nation's wars is the responsibility of DOD. This carries with it the responsibility for POWs. Consequently, DOD had the lead in organizing the working group,⁵ and the ultimate decision on where the POW confinement facility would be located rested with the Secretary of Defense. Although DOD shared DOS's interest in the potential impact of the location on the ongoing war effort, DOD's primary interests were facility security, facility size, and logistics.

Department of Justice (DOJ). DOJ and its subordinate organization, the Federal Bureau of Investigation (FBI), had as their top priority domestic security and access to the facility. After the attacks of September 11, they were interested in the investigation and prosecution of those responsible and the prevention of future attacks. Where the facility was located became very important. Locations in the United States would threaten domestic security by raising the risks of new attacks, while remote locations outside the United States would impede investigations and possibly have an adverse impact on future prosecutions. Additionally, litigation risks were an important DOJ interest. The exact status of the detainees was undetermined. Were they criminals entitled to criminal due process or were they POWs protected by the Geneva Conventions? The Administration was not prepared to

⁴ The information concerning the foreign states discussed as potential sites is classified. The concern of DOS is easy to understand, however, if we imagine the impact of locating the POW facility in Israel on the region, on the coalition, on U.S. security, and on the GWOT.

⁵ Ms. Eliana Davidson, International Law Division, Office of the General Counsel, Office of the Secretary of Defense, was a key player within DOD. She provided insights into the interagency decision process in a personal interview on January 8, 2003.

address this issue;⁶ consequently, the litigation risks associated with the detainees' access to federal courts were another important interest of DOJ.

Central Intelligence Agency (CIA). As always, the primary interest of the CIA was intelligence; however, they shared several of the interests of the other agencies. For example, if location of the facility in a foreign country caused U.S. relations to suffer, there could be an adverse impact on CIA operations in that country. But based on their primary interest, ready access to the detainees for the purpose of intelligence gathering was their priority in selecting a location. The global reach of the CIA made any location workable, so their participation in the working group and input to the decision process was limited.

National Security Council (NSC). As noted above, the ultimate decision was within the purview of the Department of Defense. Consequently, the NSC role was primarily attendance at all interagency meetings with the purpose of keeping Dr. Condoleeza Rice, the National Security Advisor, informed. This allowed the NSC to monitor progress and to intervene if required by circumstances (e.g., a stalemate in the decision process or serious consideration of a decision known to be politically unacceptable to the Administration).

THE OPTIONS.

In general terms, the options considered included sites in several foreign countries, several locations within the United States, other locations within U.S. territory, and the U.S. Naval

⁶ This continues to be an issue today. In a letter to the American Bar Association, the DOD General Counsel repeatedly refers to the detainees as "enemy combatants" (See Encl 1). Current U.S. policy, however, states that neither Taliban nor al-Qaida detainees are entitled to POW status. (See Encl 2).

Station, Guantanamo Bay, Cuba. As each location was discussed, the following seven factors were considered to be the most significant:⁷

1. Impact on U.S. Foreign Relations. As noted above, this was the primary interest of DOS. Considering the ongoing war in Afghanistan and the expanding parameters of the GWOT, this was the major factor in considering any location outside the United States.

2. Impact on Domestic Security. After the attacks on September 11, this was the major factor to be considered in evaluating any location in the United States. Although not necessary because of the final decision, it was recognized that a location within the United States would require notification and perhaps coordination with Congress. It is a valid assumption that the Congressional representatives from any possible U.S. location would insist on being involved in any such decision considering the potential impact on their constituents.

3. Facility Security. The ability to secure the facility and control access to the surrounding area was a factor just as it is with any confinement facility; however, the nature of this enemy and their willingness to engage in suicidal acts made it a critical factor.

4. Facility Size. Initially, the number of POWs was manageable due to the flexibility DOD had for detention in the theater. On December 27, 2001, only 45 terrorists were under U.S. control in Afghanistan.⁸ Immediate needs were for a capability to detain limited numbers (less than 100), but the capability to expand operations was a requirement.

⁷ These factors and the specific locations considered by the working group were combined into a complex matrix that greatly aided both the discussions and the decision process. The matrix, of course, is classified, and the author was unable to get a copy or even see a copy!

⁸ Michael Hedges, "War captives Cuba-bound.", The Houston Chronicle, December 28, 2001, <http://web.lexis-nexis.com/universe/document?_m=202c3bded1834ea58eae37e17b98f810&...

5. Remoteness of the Location. A remote location was desirable in that it made security operations easier. However, ready access to the POWs for interrogation was a concern for CIA, FBI, and military intelligence and law enforcement personnel. Consequently, the remoteness of the location required balancing these two interests.

6. Litigation Risks. The litigation risk faced by DOJ was access to federal courts for the purpose of filing a writ of habeas corpus. Habeas corpus requires judicial review of the detention of a person to determine if the detention is lawful. An important factor in assessing this risk is that this only applies to citizens and foreign nationals if they are held within the United States.

7. Logistics. This factor generally includes all the costs of preparing, maintaining, and operating a detention facility (e.g., guards, utilities, construction, transportation, etc.). Obviously, as the responsibility for POWs rests with DOD, these costs would be a DOD responsibility. Although a supplemental budget was submitted and passed for the GWOT, DOD continued to have an interest in minimizing these costs.

Option 1 - Foreign Country.

Advantages. Location in a foreign country was the best alternative to minimize the threat to domestic security, an overwhelming concern after September 11. It also reduced concerns about facility security, size, and logistics to the extent all these responsibilities would be shared with another country. Litigation risks in U.S. courts would be eliminated, but the potential for litigation under local or international law could become a factor.⁹

⁹ If located in a country party to the Rome Treaty, the potentially illegal detention could be the basis for bringing a criminal case against national authorities from the detaining countries before the International Criminal Court.

Disadvantages. If located in a remote country, access to POWs by intelligence personnel would be limited by foreign authorities and transportation requirements, but these disadvantages could be overcome by planning and agreements with the foreign authorities. The major disadvantage, however, would be the risk to the coalition and U.S. foreign relations. Extraordinary efforts were required to quickly capture world support for our combat operations in Afghanistan. The Administration was unwilling to risk this support, so proposals for foreign locations were subject to intense scrutiny by DOS.

Option 2 - United States.

Advantages. Locations within the Federal Bureau of Prisons and military confinement facilities (e.g. Fort Leavenworth) were considered. These options eliminated risk to U.S. foreign relations and signaled U.S. resolve to accept the risks required in the GWOT. All agencies would have ready access to POWs for interrogation purposes. And, between the combined federal and military resources, concerns about facility security, size, and logistics could be managed.

Disadvantages. The risk to domestic security was the primary disadvantage. Detaining former members of the Taliban and al-Qaida near the homes of U.S. citizens created an unacceptable risk. In our open society, area security would be difficult, if not impossible. Additionally, litigation in federal court would be possible requiring DOJ to defend the detentions under the provisions of U.S. law.

Option 3 - U.S. Territory.

Advantages. Locations outside the U.S., but within U.S. territory were considered.¹⁰ Impact to foreign relations was minimized and impact on internal domestic security was

¹⁰ This discussion assumes a location like Guam.

reduced. Additionally, facility security was increased because of the remote nature of the locations and the ability to control access to the area.

Disadvantages. All such locations lacked suitable facilities, which would have required immediate construction in remote locations at an inflated cost. Construction would have allowed maximum flexibility in regard to size, but logistic costs would have escalated. Although the remote location benefited security, it would have impeded access on POWs for interrogation. Finally, as all U.S. territory is within the jurisdiction of federal courts, the litigation risk for DOJ would have continued.

Option 4 - U.S. Naval Station, Guantanamo Bay, Cuba (GTMO).

Advantages. GTMO is a unique piece of property owned by Cuba, but controlled by the U.S. under a perpetual lease.¹¹ It minimized foreign relations concerns¹² and domestic security concerns. Existing facilities were available for immediate requirements, and space for expansion was available. Location on a military installation provided adequate security and a pre-existing infrastructure for logistic support. The proximity to Florida made the facility readily accessible for intelligence and law enforcement personnel. Finally, since the property belonged to Cuba, DOJ assessed the litigation risk as minimal.

Disadvantages. Considering the strained foreign relations we have with Cuba, DOS assessed the minimal negative impact acceptable.

¹¹ Navy Supply Corps Newsletter, September/October 2002, "FISC Jax Detachment, Guantanamo Bay Cuba", p.1, available at www.navsup.navy.mil/lintest/so02/gtmo.htm

¹² The author asked if Cuban authorities were contacted during the decision process. The noncommittal response indicated that they may have been, but provided no indication of the nature of the contact.

THE PROCESS.

As with most interagency decisions, the process employed in this decision was complex and at times vexing. Formal meetings were the venue for the discussions that identified potential locations, assessed their relative merit, eliminated the unacceptable, and prioritized the remaining acceptable alternatives. Most of the work, however, was done in informal contacts between the members of the working group. Two factors that further complicated the process were the classified nature of the subject matter and the need for a quick decision. The classified nature of the subject matter restricted calls to secure phones; limited e-mail correspondence and document preparation to classified computers, and it limited the locations where discussions and meetings could be held. Each of these limitations slowed a process that demanded an answer. By November, the number of POWs was growing, and detention in the theater of operations was becoming increasingly difficult.

Intra-agency. Although the interagency process is most significant, the intra-agency process cannot be overlooked. All of the principal agencies in this process had subordinate organizations with interests in this decision. The ultimate agency position on each proposed location required tremendous coordination and cooperation within the agency. For example, within DOD, each interagency meeting was preceded by numerous meetings, informal conversations, and other contacts between interested parties. The Office of the General Counsel had the lead for DOD, but decisions and recommendations required coordination with the Office of the Chairman of the Joint Chiefs of Staff, applicable Combatant Commanders, various Undersecretaries of Defense, and the Secretaries of the Army and Navy when locations under their control were considered. Also, to further complicate matters, it must be recognized that there is a process within the bureaucracies of each of these

offices or departments. For example, within the Department of the Army, the Army position on any particular location required coordination with a number of military and civilian offices.¹³

Interagency. DOD had the lead for the interagency working group. The primary method was formal meetings held in the Pentagon. Meetings were called on an ad hoc basis, with each meeting closing with the scheduling of the next meeting based on each agencies estimate of the time required for intra-agency coordination. The growing urgency of the need for a location for the detainees gave these meetings a high priority, and subordinates would attend in place of principals when it was necessary. From October to December, formal meetings occurred approximately every seven to ten days.

THE DECISION.

As noted above, the final decision rested with the Secretary of Defense, and the discussion above explains the ultimate decision to hold the detainees at GTMO. Secretary Rumsfeld was presented with a matrix that summarized all the options in light of all the interests of the major players. The matrix was presented in a classified briefing attended by appropriate representatives from each agency in order to answer questions. At the end of the briefing, Secretary Rumsfeld selected GTMO, which he later described as “the least worst place”.¹⁴

CONCLUSION.

GTMO was not “the least worst place”; it was the “best possible place”. The interagency decision process is certainly fallible, but it is a process that is time tested and in use on a

¹³ Regular coordination occurred between representatives from the Office of the General Counsel, Office of The Judge Advocate General, G-3 (Operations), Office of Installation Management, Director of the Army Staff, Manpower and Reserve Affairs, Public Affairs, and Legislative Liaison.

daily basis. Complete agreement is not the goal – the goal is to ensure that all available and relevant information is considered. The process allows each interested party to participate, to articulate their interests, and to voice their concerns. Interagency working groups provide a venue where experienced personnel can assess and debate the relative merit of a variety of options. In almost all circumstances, the product is the best possible decision considering the information available at the time. In December 2001, GTMO was the best choice for the location of the POW confinement facility, and it continues to be the best location today. In the past 16 months, no significant issues have emerged that would call Secretary Rumsfeld’s decision into question.¹⁵ The interagency process worked.

¹⁴ DoD News Briefing – Secretary Rumsfeld and Gen. Myers, December 27, 2001 – 2:00 p.m. EST, <http://dod.gov/news/Dec2001/t12272001_11227sd.html

¹⁵ To date, DOJ’s assessment of the litigation risk was correct. Attorneys have filed writs of habeas corpus on behalf of several detainees, but a federal district court denied the writs. The case is currently on appeal to the U.S. Court of Appeals for the District of Columbia. A full discussion on the plaintiff’s case was published in the Washington Post, December 22, 2002, Outlook Section.