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Obama Made a Rash Decision on Gitmo

The president will soon realize that governing involves hard choices.

By **JOHN YOO**

During his first week as commander in chief, President Barack Obama ordered the closure of Guantanamo Bay and terminated the CIA's special authority to interrogate terrorists.

While these actions will certainly please his base -- gone are the cries of an "imperial presidency" -- they will also seriously handicap our intelligence agencies from preventing future terrorist attacks. In issuing these executive orders, Mr. Obama is returning America to the failed law enforcement approach to fighting terrorism that prevailed before Sept. 11, 2001. He's also drying up the most valuable sources of intelligence on al Qaeda, which, according to CIA Director Michael Hayden, has come largely out of the tough interrogation of high-level operatives during the early years of the war.

The question Mr. Obama should have asked right after the inaugural parade was: What will happen after we capture the next Khalid Sheikh Mohammed or Abu Zubaydah? Instead, he took action without a meeting of his full national security staff, and without a legal review of all the policy options available to meet the threats facing our country.

What such a review would have made clear is that the civilian law-enforcement system cannot prevent terrorist attacks. What is needed are the tools to gain vital intelligence, which is why, under President George W. Bush, the CIA could hold and interrogate high-value al Qaeda leaders. On the advice of his intelligence advisers, the president could have authorized coercive interrogation methods like those used by Israel and Great Britain in their antiterrorism campaigns. (He could even authorize waterboarding, which he did three times in the years after 9/11.)

Mr. Obama has also ordered that all military commission trials be stayed and that the case of Ali Saleh al-Marri, the only al Qaeda operative now held on U.S. soil, be reviewed. This seems a prelude to closing the military commissions down entirely and transferring the detainees' cases to U.S. civilian courts for prosecution under ordinary criminal law. Military commission trials have been used in most American wars, and their rules and procedures are designed around the need to protect intelligence sources and methods from revelation in open court.

It's also likely Mr. Obama will declare terrorists to be prisoners of war under the Geneva Conventions. The Bush administration classified terrorists -- well supported by legal and historical precedent -- like pirates, illegal combatants who do not fight on behalf of a nation and refuse to obey the laws of war.

The CIA must now conduct interrogations according to the rules of the Army Field Manual, which prohibits coercive techniques, threats and promises, and the good-cop bad-cop routines used in police stations throughout America. Mr. Obama has also ordered that al Qaeda leaders are to be protected from "outrages on personal dignity" and "humiliating and degrading treatment" in accord with the Geneva Conventions. His new order amounts to requiring -- on penalty of prosecution -- that CIA interrogators be polite. Coercive measures are unwisely banned with no

exceptions, regardless of the danger confronting the country.

Eliminating the Bush system will mean that we will get no more information from captured al Qaeda terrorists. Every prisoner will have the right to a lawyer (which they will surely demand), the right to remain silent, and the right to a speedy trial.

The first thing any lawyer will do is tell his clients to shut up. The KSMS or Abu Zubaydahs of the future will respond to no verbal questioning or trickery -- which is precisely why the Bush administration felt compelled to use more coercive measures in the first place. Our soldiers and agents in the field will have to run more risks as they must secure physical evidence at the point of capture and maintain a chain of custody that will stand up to the standards of a civilian court.

Relying on the civilian justice system not only robs us of the most effective intelligence tool to avert future attacks, it provides an opportunity for our enemies to obtain intelligence on us. If terrorists are now to be treated as ordinary criminals, their defense lawyers will insist that the government produce in open court all U.S. intelligence on their client along with the methods used by the CIA and NSA to get it. A defendant's constitutional right to demand the government's files often forces prosecutors to offer plea bargains to spies rather than risk disclosure of intelligence secrets.

Zacarias Moussaoui, the only member of the 9/11 cell arrested before the attack, turned his trial into a circus by making such demands. He was convicted after four years of pretrial wrangling only because he chose to plead guilty. Expect more of this, but with far more valuable intelligence at stake.

It is naïve to say, as Mr. Obama did in his inaugural speech, that we can "reject as false the choice between our safety and our ideals." That high-flying rhetoric means that we must give al Qaeda -- a hardened enemy committed to our destruction -- the same rights as garden-variety criminals at the cost of losing critical intelligence about real, future threats.

Government policy choices are all about trade-offs, which cannot simply be wished away by rhetoric. Mr. Obama seems to have respected these realities in his hesitation to end the NSA's electronic surveillance programs, or to stop the use of predator drones to target individual al Qaeda leaders.

But in his decisions taken so precipitously just two days after the inauguration, Mr. Obama may have opened the door to further terrorist acts on U.S. soil by shattering some of the nation's most critical defenses.

Mr. Yoo is a law professor at the University of California, Berkeley and a visiting professor at Chapman Law School. He was an official in the Justice Department from 2001-03 and is a visiting scholar at the American Enterprise Institute.

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