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The Scouting Report: Delays in Closing Guantánamo Bay

President Obama recently announced that his administration will need at least six more months to devise a long-term plan for detainees who cannot be tried but are considered too dangerous for release. Obama has not backed down from his promise to close the military detention facility at Guantánamo Bay, Cuba by January 2010, but delays in the process raise questions about whether or not this is still an attainable goal.

Brookings expert Benjamin Wittes, who supports the development of new legislation to govern indefinite detention inside the United States, joined Fred Barbash, senior editor at *Politico*, in a live web chat about the challenges the Obama administration faces in closing Guantánamo. The transcript of this web chat follows.

- **12:30 Fred Barbash moderator:** Hello and thanks for joining us. Today's topic: delays in closing the military detention facility at Guantanamo Bay. With us to answer your questions is Brookings senior fellow Benjamin Wittes. Thanks for being here, Ben.
- 12:30 Benjamin Wittes: Thanks for having me.
- **12:31 [Comment From Jason]** Do you think it was a mistake for President Obama to announce the closure of Guantanamo without addressing where current detainees would be transferred, as many in Congress have stated?
- 12:31 Benjamin Wittes: It was probably a mistake to announce a specific date for the closure of Guantánamo without a detailed sense of how to handle the myriad issues the closure would necessarily raise. (Several of us were warning about the difficulty of the project early on.) That said, I don't think it was a mistake to announce an intention to close the facility at the outset of the administration—and I think the deadline was a very forgivable error.
- **12:31 [Comment From Shawn]** Is it possible that Guantanamo Bay as a detention facility could remain open under different ground rules?
- **12:31 Benjamin Wittes:** I think it's pretty unlikely that Gitmo will remain open. Backing off the central promise to close it would be such a humiliating climb-down for the administration that I have to think the President's people will do everything possible to make the closure happen. Whether it happens on time is a different matter.
- **12:32 [Comment From Erin]** Can you explain the current delays the Obama Administration faces in closing the military detention facility at Guantanamo?

- **12:32 Benjamin Wittes:** The current delays have several distinct causes—all of them knowable and predictable in advance:
- 1) Turns out it's not so easy to resettle people one decides to release. Not a lot of countries are eager to resettle Guantánamo detainees, some of them cannot be sent to their home countries for fear of torture or other mistreatment, and Congress does not want them here.
- 2) Figuring out how to bring to trial those you want to try for crimes is very hard.
- 3) Nobody quite knows how to handle those the government does not believe it can put on trial (in either military commissions or federal courts) but also does not feel comfortable setting free.
- **12:33** [Comment From Mark Walker] What is the estimated number of detainees that would still be facing trial if Guantanamo is closed in early 2010?
- **12:33 Benjamin Wittes:** Nobody outside of the government knows precisely how many Guantánamo detainees might plausibly face criminal trial—as opposed to either release or continued detention based on some other authority (more on that later). That said, the number is probably not greater than around 50.
- **12:33** [Comment From Mark Walker] With an estimated 200 terror suspects/convict already in U.S. prisons on U.S. soil, is the concerns expressed by members of Congress regarding safety of the public, etc., a valid argument?
- **12:34 Benjamin Wittes:** Not as such. There is no doubt that the United States is capable of providing secure facilities—both military and civilian facilities—for the detention of hard core terrorists domestically. The one sense in which this point has merit is that bringing detainees stateside might increase the litigation risk of having to release a detainee into the United States. This is potentially serious problem, but it's not a problem with the security of facilities. It's a legal problem.
- **12:34 [Comment From Mark Walker]** What is the advisory panel's timeline? Are there any upcoming milestones?
- **12:34 Benjamin Wittes:** The detention policy task force was supposed to deliver its report this month. It sought and received a 6 month extension.
- **12:35** [Comment From gary] Do you think the delays the Guantanamo task forces are seeing represents a large problem in the Obama Administration and cooperation in Congress?
- **12:35 Benjamin Wittes:** Yes, Congress and the administration clearly do not see eye to eye on this problem, nor do all components of the administration or many of the different factions in Congress. This is going to be a big political problem going forward. In my opinion, only strong presidential leadership can hope to resolve it.
- **12:35** [Comment From Adrianna] Would closing Guantanamo actually solve more problems than it is creating?
- **12:36 Benjamin Wittes:** I am not sure closing Gitmo creates problems. Rather, it brings to the fore problems we have ignored so far to our detriment--problems like what our detention policy

should look like and how we want to try people. We should be addressing those questions anyway...

- **12:36** [Comment From Susan] What are trials by military commission?
- **12:37 Benjamin Wittes:** A military commission is a trial mechanism designed to handle allegations of war crimes. It is a military process that can be used in the field or can be used after conflicts. America has used them in many wars in the past. The Bush administration's efforts to revive them for modern counterterrorism met stiff political resistance and judicial rebuke.
- **12:37** [Comment From Carol] Given the announcement of the delay, do you think Obama will still be able to close the prison by January 2010?
- **12:37** Benjamin Wittes: I have long been skeptical that this deadline would be met.
- **12:37** [Comment From dave] have any former Guantanamo detainees been tried and convicted of crimes?
- **12:38 Benjamin Wittes:** Not many. There are a few detainees (three, I think) who have either been convicted in military commissions or pled guilty.
- **12:38** [Comment From Doug] Is there a distinction any longer between having been caught on a battlefield and caught somewhere else?
- **12:38 Benjamin Wittes:** This is an excellent and important question. Yes, there's still a distinction, I think, but it's a very difficult one to draw with any clarity.
- **12:38** [Comment From Joanna] Is The Hague is preferable over trying suspects in U.S. courts?
- **12:39 Benjamin Wittes:** In the long run, international tribunals may have a big role to play in global counterterrorism trials. In the short run, however, it's not going to happen. It will take a long time for those institutions to develop in a fashion that will permit this type of trial. Think of it as 20-year project at a minimum.
- **12:40** [Comment From Will (dc)] How would you envision trials in terms of what rules to use and how to prosecute suspects?
- **12:41 Benjamin Wittes:** I think the general rule should be that terrorism trials are as much as humanly possible like any other trials. The exceptions arise, in whatever forum you use, as a consequence of the sheer volume of intelligence data that makes its way into these cases, the security necessary for the proceedings, and the global nature of the investigations. Moreover, there has to be provision for handling material collected in military operations, not criminal investigations. It's a very complex undertaking. That said, the rules should only diverge from the normal trial rules to the extent absolutely necessary.
- **12:41 [Comment From Kenneth]** What kind of international pressure is the Obama administration facing in closing Gitmo?
- **12:42 Benjamin Wittes:** Totally contradictory pressure: Pressure to get Gitmo closed and general refusal to aid the process by helping resettle large numbers of detainees.

- **12:42 [Comment From Brian Beary]** How likely is it that Guantanamo detainees will end up in US prisons? How many of them?
- **12:43 Benjamin Wittes:** Some detainees certainly will. One, for example, has already been brought to the U.S. for trial. If convicted, he will end up in a U.S. prison. Any detainee brought here for trial will similarly. It's not clear what will happen to the others the administration chooses not to release.
- **12:43** [Comment From Donna] Is there a historical basis to compare what is happening now in the legal system with anything in the past?
- **12:43 Benjamin Wittes:** Fascinating question. I think one can compare it, at various analytical levels, to several things:
- **12:44 Benjamin Wittes**: 1) After every major conflict, the United States has had to figure out what to do with the people it captured: whom to release, whom to try for war crimes, whom to set free, etc... The novelty here is that we're doing this during the conflict, not after it.
- **12:45 Benjamin Wittes:** 2) One can also think of it as the delayed processing of large numbers of people whose cases we should have analyzed more carefully eight years ago.
- **12:46 Benjamin Wittes:** 3) One can also compare it to, I suppose, prior situations in which the United States found itself taking custody of large numbers of people it didn't quite know what to do with and had to sort that out over time: Think of Haitian boat migrants, in the 1990s, for example, as well as certain groups of Mariel Cubans whom we did not want to admit but could not send back to Cuba.
- **12:47 Benjamin Wittes:** There are critical differences in all cases, of course.
- **12:47** [Comment From mark, greenbelt, md] Where have the detainees who have already left gitmo gone? under what circumstances will other countries take them, and is that preferable to having them in the u.s.?
- **12:47 Benjamin Wittes:** Let me take these questions in sequence.
- **12:47 Benjamin Wittes:** Most have gone to their home countries. A small number have been resettled in third countries.
- **12:48 Benjamin Wittes:** Other countries have been willing to take Gitmo detainees when either (a) they are their own nationals, or (b) they are satisfied either that they pose no risk or that the risk they pose is small and manageable.
- **12:49 Benjamin Wittes:** In general, both the Bush administration and the Obama administration strongly prefers settling detainees in third countries or in their home countries, rather than bringing them here. And Congress, for its part, has erected significant legal obstacles to bringing them here.
- **12:49** [Comment From Manny] Do you know how the families of terrorist victims (like the family members of 9/11 victims) feel about the situation in quantanamo?

- **12:50 Benjamin Wittes:** There's a significant diversity of view, I think. Some of the victims' families, however, have lobbied against closing Gitmo and for the use of military commissions.
- **12:50** [Comment From Kenneth] Did the Bush administration do anything illegal in detaining some of these folks in the first place? Will international courts come a knockin'?
- **12:52 Benjamin Wittes:** This is a complicated question. The administration clearly (at least in my view) had the authority to detainee people fighting for the other side in a conflict authorized by Congress. They also clearly made some mistakes and detained some people who were cases of mistaken identity or just in the wrong place at the wrong time. These detentions are not authorized by the laws of war, and much of the task for sifting through this population has been figuring out who the wrongful detention cases are.
- **12:52** [Comment From Danielle] What are the costs of maintaining such a facility at Guantanamo Bay compared with maintaining a similar facility within the United States?
- **12:53 Benjamin Wittes:** Ironically, it will cost a significant amount of money to replace the rather good facilities at Gitmo with comparable ones in the U.S. The main costs of keeping Gitmo open are costs in international relations, America's image, and, now, the prestige of a president who (like his opponent in the 2008 race) pledged to close it.
- **12:53** [Comment From Danielle] What are the measures necessary to maintain the facility securely at Guantanamo Bay compared with maintaining a similar facility within the United States?
- **12:54 Benjamin Wittes:** Guantanamo is, in some ways, an attractive location for a detention facility. It is surrounded by water and a hostile country. It has no civilian population, and it is operationally secure. It is close enough to the U.S. to be functionally part of the U.S. but technically outside of it--which still has non-trivial legal implications. It is actually hard to replace.
- **12:54** [Comment From Brian Beary] How many Guantanamo inmates have been transferred or released since Obama became President? How many are left in the camp?
- **12:55 Benjamin Wittes:** Some round numbers: About 800 people have passed through Gitmo since it opened.
- **12:55** Benjamin Wittes: Of these, about 220 remain.
- **12:55 Benjamin Wittes:** Almost all of the transfers and released took place under the Bush administration--which deserves more credit than it generally receives for its part in closing Guantanamo.
- **12:56 Benjamin Wittes:** The process of closing Gitmo actually began in 2003 and 2004, which the military realized it didn't need to be holding all of the people brought to the facility and began sending people home.
- **12:56** [Comment From Barb] do you know of any cases where individuals have been mistakenly accused of crimes and held at guantanamo?
- **12:56 Benjamin Wittes:** There are definitely people who were held at Guantanamo mistakenly, yes. Nobody disputes this.

- **12:57** [Comment From Ginny S., Telluride, CO] I have seen your proposal for model legislation on how to treat detainees, and it seems to make a lot of sense, But I'm a little troubled that it would let the President put someone in custody for 14 days with no judicial overview or consent. Do you think the threat justifies that kind of power for the president?
- **12:57** Benjamin Wittes: Thanks for reading my proposal so carefully!
- **12:57** Benjamin Wittes: The 14 day detention period is much stricter than the current one.
- **12:58 Benjamin Wittes:** Under current rules, when the administration takes someone into military custody, they have (depending where they hold the person) months or even years of detention on the president's own authority without judicial oversight.
- **12:59 Benjamin Wittes:** Moreover, the military in Iraq takes up to 14 days to notify the Red Cross of a detention.
- **12:59 Benjamin Wittes:** So this is really a narrowing of current practice, not an expansive new authority for the president.
- **12:59** [Comment From mark] If Guantanamo is shuttered, where will future detainees/terror suspects be held?
- **12:59 Benjamin Wittes:** Nobody really knows. It's one of the critical questions this process still needs to address.
- 12:59 [Comment From mark] Is holding detainees on military bases or in military prison such as fort Leavenworth a good idea? The pentagon has toured bases such as camp Pendleton...do we know what they determined?
- **1:00** Benjamin Wittes: We don't know--or, at least, I don't. I think that ideally, one would want non-battlefield detentions civilianized. That said, I think detention in military bases is likely going to continue. But that's just a guess.
- **1:00 [Comment From James]** Do you think Gitmo is indicative of other secretive abuses by US Intel ops?
- **1:01 Benjamin Wittes:** I don't think Gitmo is indicative of anything. It thinks its a serendipitous event that sheds little light on anything except itself.
- **1:01 [Comment From Gwyn]** Is the argument to closing Guantanamo more of a symbolic or practical argument?
- **1:02 Benjamin Wittes:** It is both. It has huge symbolic importance, of course, but it also brings to the fore a series of practical questions:

What are we going to do with the 220 people still there?

What are we going to do with similar people in the future?

- **1:02 [Comment From Ines]** What about any parallels with Japanese internment camps in the American west?
- **1:04 Benjamin Wittes:** These parallels seem very false to me. The Japanese internment involved people the government conceded to be loyal and to have done nothing wrong. The Guantanamo detentions involve only people the government believed in good faith to be enemy fighters in a congressionally authorized war. The better analogy would be to Japanese soldiers during World War II if we caught several hundred all out of uniform and many claimed to be civilians and we had to figure out who was telling the truth. Mercifully, that didn't happen during WWII.
- **1:04 [Comment From Ron]** Shouldn't US intel be "smart" enough to know for sure whether or not someone is a terrorist??
- **1:05 Benjamin Wittes:** In an ideal world, sure. But the intelligence world doesn't work in certainties. It works in probabilities.
- **1:05 Benjamin Wittes**: In criminal justice, we ask for proof beyond a reasonable doubt using only certain types of admissible evidence before we make an adverse judgment against someone.
- **1:06 Benjamin Wittes:** In intelligence, we kill people based on likelihoods and confidence levels--and we don't exclude information that might be probative.
- **1:06 Benjamin Wittes:** One of the big problems in counterterrorism detentions is that the mismatch between the information we use (intelligence information) and the purposes for which we use it (keeping people locked up). There's no easy solution to this problem.
- 1:06 [Comment From mark] What is the difference between Guantanamo and the much less visible detention center at Bagram airfield in Afghanistan?
- **1:08 Benjamin Wittes:** One of the differences is the one you just identified: visibility. The other difference is a legal difference. The Supreme Court has decided to treat Guantanamo as part of the United States for purposes of habeas corpus law, meaning that detainees there can litigate over their cases. Bagram and all the detention facilities in Iraq are still, generally speaking, beyond the purview of U.S. courts--though whether that will last is an open question.
- **1:08** [Comment From Erica] How is Guantanamo kept so secure??
- **1:08** Benjamin Wittes: It's a military base with a hostile army on the other side of the lines.
- 1:08 [Comment From Kiana] It seems to me that if other countries were to agree to accept released detainees, they would demand information from the US possibly secret information about terrorist plots or other such things. Do you think this is the case and would the US be willing to share such intel?
- 1:09 Benjamin Wittes: Excellent question.
- **1:10 Benjamin Wittes:** The U.S. shares information extensively with countries it is relying on to keep track of detainees (Saudi Arabia, most significantly). The countries it doesn't trust with information and doesn't trust to keep track of released detainees--particularly Yemen--are much harder to release people to. The result is that almost all of the Saudis at Guantanamo have gone

home; very few of the Yemenis have. And we are now negotiating to release some Yemenis to Saudi Arabia.

- **1:10 [Comment From leslie]** Do you think the policies at Guantanamo have created more bad feeling against the United States, and perhaps more terrorists? Is there any way to undo the harm?
- **1:11 Benjamin Wittes:** Guantanamo has certainly created bad feeling toward the United States. There's no easy way to know whether it has created more terrorists--or how the number it has created, if any, compares to the number it has incapacitated.
- **1:12 Benjamin Wittes:** As to undoing the harm, I think the way to undo the harm is to design counterterrorism detention policies that we can be proud of and explain to the world as consistent with our values.
- **1:12** [Comment From Kenneth] What are the chances that the government will look to private firms to handle detainees on U.S. soil? They already handle a lot of aspects of our domestic prisons.
- **1:12 Benjamin Wittes:** I don't know the answer to this. I would hope that they would keep this in government hands, but you are correct that a lot of contractors work in a lot of domestic prisons.
- **1:12** [Comment From Teresa] In February, a Pentagon investigation declared that the conditions at Guantanamo were "humane" and in accord with the Geneva Convention. But human rights groups still argue that the conditions at the prison are inhumane and unacceptable. Who is right?
- **1:14 Benjamin Wittes:** The investigation to which you refer concluded that Pentagon operations at Gitmo are compliant with Common Article 3 of the Geneva conventions. Human rights groups object to this conclusion, arguing that forced feeding of hunger strikers and other policies still violate the terms of the conventions. There is no, as Al Gore might say, controlling legal authority on this question. The most we can say is that conditions comply fully with the U.S. understanding of the conventions (under the Obama administration) and the human rights groups take a more restrictive view. That's a healthy tension in my view.
- **1:15 [Comment From Brian Beary]** Can you envision ex-Guantanamo inmates being released onto US soil i.e. not just transferred there for trial or to serve a sentence?
- **1:15 Benjamin Wittes:** There was talk of releasing some Uighur detainees onto U.S. soil. At least for now, Congress has clearly squelched talk of releasing Gitmo detainees here.
- **1:15 [Comment From Warren]** Do you know if interrogation efforts at Guantanamo have resulted in the successful admission of important anti-terrorist information?
- **1:17 Benjamin Wittes:** The military has consistently insisted that interrogation operations at Guantanamo have been productive. Other intelligence officials have scoffed at this. I think it's fair to say, given who is there, that the government has probably learned a fair bit from Guantanamo detainees, though I don't think Guantanamo has been a particularly fruitful source of intelligence information. It's major value, I suspect, has been incapacitation.

- 1:17 [Comment From Fran (Ontario)] Pledging to close Guantanamo was a big deal for Obama and I think it helped him gain support with American people early on in his presidency. The delays here are a significant setback, I think. DO you think this situation could case Americans to doubt their new president?
- **1:19 Benjamin Wittes:** Sure. On his second day in office, he staked his credibility on the importance of this project. And unlike his predecessor, who said he would like to close, he said he was going to do it--and within a particular time frame. If he fails at that--or backs off the promise--I suspect it will raise doubts about him. Now, to be fair, Congress has not to date played a constructive role in this, nor have our allies (including Canada, btw). So it's possible he could fail because he has not had enough help.
- **1:19** [Comment From Teresa] I've even heard the prison compared to conditions in Nazi camps with prisoners going months without seeing sunlight.
- **1:20 Benjamin Wittes:** There is simply no comparison to be made between Gitmo and Nazi camps--or to the Gulag. Guantanamo is a professionally run detention facility. While it has its problems, they are precisely the problems one would expect to have holding large numbers of very hostile people in long-term detention.
- **1:21 [Comment From Paula]** What about everything we hear about false confessions? How can the US government knowingly coerce and accept these confessions?
- **1:22 Benjamin Wittes:** The issue of coerced statements is an important one and it has been a big problem in some cases. My guess, however, is that it is not the biggest problem for the government, either in detention cases or in criminal proceedings.
- **1:22 Benjamin Wittes:** And it is certainly not the only problem in assessing these cases. Others include:

Classified evidence

Not having enough evidence (What if you have enough evidence that you are pretty sure, but not completely sure that the guy is a terrorist?)

Inadmissible evidence

These issues probably plaque more cases, I suspect, than coerced evidence.

- **1:23 [Comment From Jim Chua]** Given the recent bombings in Indonesia, would the Obama administration be able to continue to deny access to detainees like Hambali?
- **1:24 Benjamin Wittes:** Hambali, one of the leaders of the Indonesian Al Qaeda affiliate that conducted these bombings, remains at Guantanamo. He was brought there from the CIA's secret prisons program in September 2006. His will be an interesting case to watch in the future.
- **1:25 [Comment From Mark Walker]** What prisons, military or civilian, would be appropriate to house detainees?
- **1:26 Benjamin Wittes: Detainees** convicted in civilian court will almost certainly be held in civilian prisons. The interesting question is what will happen to detainees either tried in military commissions or held without trial at all. I think that remains a very open question.

- **1:26 [Comment From Ron]** Which countries have been most willing to work with the U.S. to try and find permanent solutions resettling detainees?
- **1:28 Benjamin Wittes:** Well, Albania and Bermuda both took some of the Uighurs. Ireland just announced that it would take two Uzbeks. France took a Bosnian-Algerian. And a bunch of EU countries have expressed the desire to help and maybe take some people. But the pickings have been thin. No country has stepped up to the plate and agreed to take the sort of numbers that would make a real difference. And why would they?
- **1:28 [Comment From EM]** Your model legislation says that if an unclassified summary of critical classified evidence is inadequate, the proceeding will be terminated. Does this mean terrorist suspects could go free?
- 1:28 Benjamin Wittes: Yep.
- 1:28 [Comment From Kenneth] What would some examples of inadmissible evidence be?
- **1:28 Benjamin Wittes:** Consider the following situation (drawn from real life examples):
- **1:29 Benjamin Wittes:** U.S. forces raid a safe house in Afghanistan. They grab everything in sight that looks like it might be interesting--including a hard disk that contains, analysts later learn, a list of captured brothers.
- 1:30 Benjamin Wittes: A bunch of the names match aliases and names of people at Gitmo.
- **1:30 Benjamin Wittes:** If you're an analyst deciding whether to keep holding a particular detainee, this is a really interesting fact.
- **1:30 Benjamin Wittes:** Depending on the circumstances of raid, however, this might be nowhere near admissible in a criminal proceeding.
- **1:31 [Comment From Brian Beary]** How likely is it that the Obama administration will end up paying compensation to ex-inmates?
- **1:31** Benjamin Wittes: I think this is very unlikely.
- **1:31** Fred Barbash moderator: Ben, thanks so much for your time today. And thank you to our audience for all the great questions. We'll be back next week with Richard Bush to discuss North Korea.
- **1:31 Benjamin Wittes:** Many thanks for all the excellent questions. This has been a great pleasure.