

**The Scouting Report - Guantanamo Bay and Detainees (11/19/2008)**  
**Live Web Chat with *Politico* Senior Editor David Mark and Brookings Fellow Benjamin Wittes**  
**November 19, 2008**

**12:29 David Mark:** Good Afternoon - One of the thorniest issues President-elect Obama will face upon taking office will be over closing the Guantanamo Bay detention center and generally dealing with enemy combatants. We look forward to getting Ben Wittes' thoughts on these and other important legal issues confronting the new administration.

**12:30 David Mark:** Let's open this up with a question we received via e-mail asking how easy or difficult it will be for President-elect Obama to close Guantanamo.

**12:30 Benjamin Wittes:** It's not an easy process—unless he means to leave American detention policy largely unchanged and merely move it from Gitmo to some other combination of military detention facilities. That would not be profoundly difficult, but it would likely not satisfy the domestic and international clamor for change either. It would simply recreate Guantanamo at some other location. If he means to create a more systematic change in the policy itself, the challenges are very significant. I don't think they're insurmountable, but they will take time, energy, and creativity—and the solutions may prove disquieting to many people.

**12:32 David Mark:** What are the most difficult logistical issues the new administration will face, no matter how intent they may be on closing Guantanamo?

**12:32 Benjamin Wittes:** The first challenge is figuring out which of the current 250 or so detainees might plausibly face criminal charges and in what forum those charges should proceed.

**12:33 Benjamin Wittes:** The second is figuring out what to do with the approximately 60 detainees who have been cleared for release or transfer from Gitmo but who cannot be sent home for fear their own governments will mistreat or torture them.

**12:34 Benjamin Wittes:** The third challenge is figuring out what to do with people against whom prosecutors cannot bring a criminal case but who the military considers too dangerous to simply set free.

**12:34 Benjamin Wittes:** The fourth is what to do about the large number of Yemeni detainees, whose government has not been very effective about managing the danger posed by suspected terrorists.

**12:34 [Comment From William Sanchez]** I have a few questions on which I would like to hear Mr. Wittes' perspective. Will there still be "enemy combatants" under an Obama administration? Will they be granted POW status instead? Would they still need to be held in Guantanamo Bay? Would they be required to have a trial?

**12:36 Benjamin Wittes:** I think the question of whether Obama will continue holding people as enemy combatants is very much open. It's one possible means of handling the detainees who can neither face trial nor be released. But it also risks further litigation setbacks and the charge (both domestically and internationally) of adopting Bush administration policies.

**12:36 Benjamin Wittes:** They would not need to hold any combatants at Gitmo, in any event, and you can feel pretty confident that they will not.

**12:37 [Comment From Craig Adams]** Won't defense lawyers use the "evidence is inadmissible due to torture" in every instance? How will the government disprove it?

**12:38 Benjamin Wittes:** They likely will. The government's ability to prosecute these cases in court depends to a great extent on how much evidence they can muster that is "clean" of coercive interrogations and also involves evidence that is unclassified and collected in fashions a court will accept. How many such cases exist is not clear.

**12:39 [Comment From Paul Lindemann]** What other options exist for dealing with your fourth challenge, i.e. those detainees the military deems too dangerous to set free but whom prosecutors do not have sufficient evidence against to bring charges?

**12:40 Benjamin Wittes:** I think there are really only three possible approaches: (1) to assume the risk of their release, (2) to continue holding them as enemy combatants, or (3) to create some new detention system tailored for them and other detainees like them we might capture in the future.

**12:40 Benjamin Wittes:** Disclosure: I have argued for the latter approach.

**12:40 [Comment From Frank]** What do you think about Eric Holder as the attorney general? Do we know his views on detainees?

**12:43 Benjamin Wittes:** I don't know his views on detainees in particular. He has, however, been quite critical—as have many others—of the Bush administration's views on executive power. I think we can expect a fresh look at these issues from him, but it's important to understand that the needs of the U.S. government will not magically change because Bush is no longer president and

Obama is. Just as many people in the Bush administration felt constrained by circumstances, circumstances will also constrain Obama's administration.

**12:43 David Mark:** Do you expect Vice President Dick Cheney, former Defense Secretary Donald Rumsfeld and other Bush Administration officials to face civil lawsuits, or possibly even criminal prosecution, over torture/detainee and related policies, after Jan. 20, 2009?

**12:44 Poll to Readers**

**Do you think Barack Obama should close the detention facilities at Guantanamo Bay?**

Yes (80%)

No (20%)

**12:44 Benjamin Wittes:** I assume there will be civil lawsuits. It only takes one person to want to file a civil lawsuit for that to materialize. I don't believe senior officials in the Bush administration are likely to face criminal charges at the hands of the Obama administration. The wild card is whether some foreign magistrate might bring charges elsewhere. That, I think, is not an outlandish possibility.

**12:45 [Comment From David Risley]** You say the third option for dealing with detainees against whom criminal charges (which look back in time to past acts) may be impractical, but who pose an unacceptable threat of future terrorist acts, would be to "create some new detention system tailored for them and other detainees like them we might capture in the future." What do you propose?

**12:47 Benjamin Wittes:** I have proposed a system of preventive detention based on a hybrid of two models—somewhere between the detention of enemy combatants and the detention of the seriously mentally ill people who pose a danger to themselves or others. It would have a more serious judicial review mechanism than the one that exists now—and that review would take place earlier in the detentions. On the other hand, the government would a certain safe harbor in getting prior judicial approval (like a warrant) for someone's detention, rather than acting on its own authority subject to latter judicial second-guessing.

**12:47 [Comment From Gladys Spiegelman, NYC]** It was through coverage of Gitmo conditions that the topic of US torture of detainees (everywhere) came to prominence in the US media. Yet there seems to be no consensus over what constitutes torture. e.g. - Many say that water boarding is not torture, while any say it is.

**12:48 [Comment From Gladys Spiegelman, NYC]** Will there ever be a way to codify what is and what isn't torture?

**12:49 Benjamin Wittes:** One could draw the lines, which are now written in absolute but vague terms, more specifically. The approach that Congress used

with the military, however, was to simply require as a matter of law that Army personnel follow the policies laid out in the Army's field manual on interrogation. This lets the military be as specific as it wants to be and allows changes when necessary.

**12:50 Benjamin Wittes:** There are various proposals for similar approaches to the CIA—one of which would apply the Army Field Manual rules to the agency, another (mine) would require the CIA to promulgate its own Field Manual and bind it by law to those rules.

**12:51 [Comment From H. J. Wilton-Siegel]** Is there any consensus of the United States' allies in (1) Europe or (2) the Middle East regarding a preferred option for dealing with the detainees?

**12:53 Benjamin Wittes:** There's a pretty broad consensus abroad on a criminal justice approach to these questions. The trouble with that is that for the United States, some degree of hybridization is inevitable—because we have so many troops around the world. So defining the line between when a captive is a military detainee and when a criminal suspect is pretty hard, and it's not something most European countries have to deal with routinely.

**12:53 [Comment From Anna Oldmeadow]** How will approaches (2) and (3) to the 'difficult cases' above avoid the habeas arguments that we have seen in the string of Supreme Court enemy combatant cases? Is it just a case of the President needing to get better authorization from Congress this time around?

**12:55 Benjamin Wittes:** They won't. There's going to be habeas review no matter what the administration does. What a new system will—or may—do is create a regime in which the federal courts would repose more confidence than they have shown in the crude preventive detention system we have cobbled together to date. Done right, it would have the blessing of Congress, and cases would come before the court with a rigorous record and the early involvement of a federal judge. So it should command more respect.

**12:56 [Comment From Sally]** What do you think the odds are that Obama will appoint someone to the Supreme Court soon? What are the ramifications of that?

**12:58 Benjamin Wittes:** Just based on the age of the justices, the odds are pretty good. Justice Stevens is in his late 80s, and other justices are rumored to want to retire as well (rumors are always worth what you pay for them). That said, I don't think a resignation is likely to have a profound effect on Gitmo litigation, since it would be more likely to come from the liberal bloc of justice than the conservative bloc and it would tend to reinforce, in any event, an existing majority for strong judicial review on detention matters.

**12:59 David Mark:** As Ben says, there's no guarantee - or even a strong likelihood - of a Supreme Court vacancy during the upcoming presidential term. Justice Stevens seems to be in pretty good health. And recall that President Bush had to wait until his second term before making Supreme Court appointments.

**1:00 Benjamin Wittes:** Yes, that's exactly right.

**1:00 [Comment From Brian Beary]** What could Europe or Middle Eastern governments do concretely to help Obama close Gitmo?

**1:01 Poll to Readers**

**Should the Guantanamo Bay detainees be given trials in U.S. courts?**

Yes (76%)

No (24%)

**1:02 Benjamin Wittes:** Europe could play a big role if it so chose in helping to resettle the large group of detainees who are cleared for release but cannot go to their home countries. So far the European countries have been largely unwilling to take Gitmo detainees, regarding this as America's problem. The question is whether the Obama administration can leverage his enormous personal prestige to get European countries to play a more active role. One thing he might do to facilitate that is allow certain Guantanamo detainees—probably the ethnic Uighurs from China—to settle in the U.S.

**1:02 Benjamin Wittes:** In the long run, however, I don't think there's a Gitmo solution without substantial European help.

**1:02 [Comment From Mark, DC]** How much has Gitmo damaged our reputation in the world as a nation of laws and rights, and what's the best signal Obama can send to the world that change is here?

**1:03 David Mark:** I'd like to pose a similar question to our readers—do you think closing Guantanamo would significantly help repair the view other countries have of the U.S.?

**1:03 Benjamin Wittes:** It has done enormous damage—in part fairly, in part unfairly—to America's prestige. It is a punching bag for people who dislike America. And it dispirits those who would like to be allies.

**1:04 Benjamin Wittes:** The best thing Obama can do, I think, is to make his policy of closing Guantanamo very clear and explain as early as he can responsibly exactly what the process is going to look like.

**1:05 Benjamin Wittes:** Implementation will take some time, but as long as people have a sense of the endpoint and momentum towards it, he should get some latitude.

**1:05 [Comment From Craig Adams]** Since they don't wear uniforms, don't fly a flag or otherwise represent a nation and intentionally conduct operations in civilian areas, doesn't granting the combatants POW status subvert the original intent of the Geneva Conventions? Won't trials in U.S. courts, under existing law, ultimately all but guarantee the release of all of them?

**1:06 Benjamin Wittes:** Those are two different excellent questions. Let me answer them separately.

**1:06 David Mark:** We've also received an answer to our reader question....

**1:06 [Comment From Gladys Spiegelman, NYC]** I feel like closing Gitmo will speak volumes to the world and signify a rejection of the Bush administration's disregard for diplomacy

**1:07 Benjamin Wittes:** First, I agree with you that granting POW protections to people who are not entitled to it undermines the incentive structure of the laws of war—which reserve the considerable benefits of POW treatment to those who fight according to the laws of war.

**1:07 [Comment From K.F.]** In response to David's question: I don't think it will help significantly, but it will be one way to show good faith and that we are taking a step forward. But, I also think it's important to accompany the closing with a fair legal process to try the detainees to reinforce the US is a country founded in Justice.

**1:08 Benjamin Wittes:** Second, I don't think we know how many of the detainees can be tried in U.S. courts, how many could be tried in courts martial, how many could be tried in military commissions, or how many could be tried if we created a special tribunal for the purpose. It's a really important question if we're going to choose a trial regime than makes sense for the present purpose.

**1:09 [Comment From Ms. Loewenstein]** Would you recommend respecting the writ of habeas corpus for all detainees?

**1:10 Benjamin Wittes:** The Supreme Court has required that all detainees at Guantanamo have access to habeas review. The remaining question is whether detainees outside of the United States and outside of Gitmo do too. That question is very much open. I think you can expect lawyers for detainees to push for habeas review elsewhere and the government, even under Obama, to resist fiercely.

**1:10 [Comment From Alysse, DC]** Would closing Guantanamo Bay mean repealing the Military Commissions Act of 2006? Would Obama need to pass legislation to move the detainees from the base?

**1:11 Benjamin Wittes:** On your first question, no. The MCA does not require that anyone be held at Guantanamo.

**1:12 Benjamin Wittes:** On your second question, it depends on how he means to close Guantanamo. If he does not mean to change anyone's status, just try some people under existing law, release some people, and hold some other people in facilities in the U.S., he can probably do that without changing current law. If he means to create a new detention system, he will need legislation to do that.

**1:13 [Comment From Paul]** As an extension to Mr. Adams question, do you think there is benefit in the international community addressing the treatment of illegal combatants in some sort of treaty or another convention? If such a treaty/convention were concluded, how do you imagine the international community might/should decide to treat them in distinction to POWs?

**1:14 Benjamin Wittes:** This is a tremendously important question—one to which I cannot do justice in this forum. The short answer is if the international community treated the matter seriously, there would be a huge role for what you describe. The trouble is that every time the international community engages this subject, international law gets worse!

**1:15 Benjamin Wittes:** Some of the more recent amendments to the Geneva Conventions, for example, the United States never ratified because they gave more extensive POW protections to certain people who defied important aspects of the laws of war.

**1:16 Benjamin Wittes:** So I think American officials would have reason to fear that if we opened up these instruments again, the change would hurt us, not help.

**1:16 [Comment From Brian Beary]** How many Gitmo trials and convictions have there been to date?

**1:16 Benjamin Wittes:** One detainee, David Hicks, reached a plea deal—and was sent home to Australia.

**1:17 Benjamin Wittes:** Two detainees have gone through full military commission trials. One, Salim Hamdan, was convicted and given a surprisingly short sentence. The other was convicted and sentenced to life in prison.

**1:17 Benjamin Wittes:** More cases are in the pipeline, but the system's vitality under an Obama administration is very much in doubt.

**1:18 [Comment From Joseph (Washington, DC)]** In civil suits regarding rendition, surveillance, and torture, would members of the Bush administration be able to claim executive privilege and state secrets or do they lose those rights once out of government?

**1:20 Benjamin Wittes:** As I understand executive privilege, it is a privilege that resides in the CURRENT president. Only Obama could assert the privilege on their behalf. If that sounds improbable, it may be. On the other hand, some presidents have used executive privilege to protect the communications of their predecessors. I believe, for example, that President Bush's first use of the privilege concerned President Clinton's communications concerning his pardons.

**1:21 [Comment From David Risley]** What do you think of the idea of treating non-state, multi-national terrorists who ignore the norms of international humanitarian law in essentially the same way we treat pirates, in terms of both domestic and international law?

**1:21 David Mark:** Hi Folks - We'll be wrapping up shortly, and have time for two more questions.

**1:21 Benjamin Wittes:** Well, one problem with that idea is that the way we treat piracy is itself changing...

**1:22 Benjamin Wittes:** In general, I think the idea of unlawful combatancy and piracy are closely linked historically. Terrorism, in my judgment, is something a bit different (though closely related) and requires rules of its own—rules that hybridize criminal and law of war models.

**1:23 [Comment From Brian Beary]** How many people have been held at Guantanamo in its entire post 9/11 history?

**1:24 Benjamin Wittes:** Nearly 800 people have passed through the facility. By 2004, when the government began the review mechanisms it created after the Supreme Court's first intervention, it was down to 558. Now it's around 250. So even under the Bush administration, there has been substantial progress. The trouble is the more progress you make, the more the base houses only the most difficult cases to resolve.

**1:24 [Comment From David Risley]** Getting back to your proposal regarding preventive detention. Would that also apply to potential domestic terrorists? (If not, why not?) If you abandon the "enemy combatant" standard, what "targeting" standard do you propose be used in its place?

**1:26 Benjamin Wittes:** In my book, Law and the Long War, I suggest a different approach to domestic terrorist detentions. This is, in some ways, a harder



problem (because it's closer to home). But it also involves many fewer people (almost none, in fact). So I would limit the system I'm describing here to aliens caught overseas.

**1:26 David Mark:** Thanks Benjamin, for the chat today, and to all the participants for their excellent questions. You can join us next week at the same time and same URL for another chat with Brookings expert Rebecca Blank. She'll be on hand to talk about poverty in the U.S.

**1:26 Benjamin Wittes:** Many thanks for all the excellent questions. This has been a real pleasure.