

War on Terrorism

A Legal Framework for Detaining Terrorists

Enact a Law to End the Clash over Rights

Background

U.S. policy toward detaining foreign combatants remains murky six years after the September 11 attacks. The detention debate has been playing out in the federal court system, Congress, and, more recently, in the 2008 presidential campaign. A series of executive actions by the Bush Administration to create special detention procedures and facilities, including a detention center at Guantanamo Bay Naval Base in Cuba, has prompted rebukes by the Supreme Court, which, in turn, have led so far to two rounds of legislation.

Developing rules for detaining suspected enemies engaged in unconventional warfare against the United States and its interests represent the core challenge facing American legal policy in the war on terror.

Recommendations

Specific elements of a long-term detention regime that should be supported by the next president include:

- An impartial decision-maker in charge of making status determinations
- Basic procedural protections for detainees, including the assistance of counsel, the ability to see and challenge a reasonable summary of the government's evidence, and the ability to call witnesses
- A written, public opinion explaining the basis for each status determination, and review of such determinations by federal civilian courts
- For those deemed properly subject to detention, some form of regularized ongoing judicial review to ensure that continued detention is necessary and appropriate.

Key Facts

- As of November 2007, approximately 320 detainees are in Guantanamo
- More than 450 detainees have been released or transferred from Guantanamo since the facility was opened in 2002



- The United States is going to be holding some numbers of these detainees outside the criminal justice system for some time to come.

A full version of this proposal, as well as supporting background material, is available at www.opportunity08.org.

About the Author and the Project

Benjamin Wittes

Benjamin Wittes is fellow and research director in public law at the Brookings Institution. As a *New Republic Online* columnist, he focuses on the Supreme Court; judicial nominations and confirmations; and legal issues surrounding the war and terrorism. He previously served as an editorial writer for *The Washington Post* specializing in legal affairs. He is currently writing a book on the legal architecture of the war on terrorism and serves on the Hoover Institution Task Force on National Security and Law.

Mark Gitenstein

Mark Gitenstein is a nonresident senior fellow at the Brookings Institution. He has practiced law in Washington D.C. since 1989. He also served on the staff of the Senate Intelligence Committee (1975-1978) and as lead Democratic Counsel and then Chief Counsel of the Senate Judiciary Committee (1981-1989).

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