

The Washington Post

Obama's Dick Cheney Moment

Advertisement » Your Ad Here

By Benjamin Wittes
Tuesday, September 29, 2009

President Obama's decision not to go to Congress for help in establishing reasonable standards for the continued detention of Guantanamo detainees is a failure of leadership in the project of putting American law on a sound basis for a long-term confrontation with terrorism. It is bad for the country, for national security and for civil liberties. It represents a virtually wholesale adoption of the failed policies of his predecessor -- who, with equal obtuseness, refused to root American detention practices in clear law approved by the legislature and similarly failed to learn from repeated Supreme Court rebukes to this unilateral approach. It violates Obama's much-noted [statement](#) this spring that he would "work with Congress to develop an appropriate legal regime so that our efforts are consistent with our values and our Constitution." And it delegates a profound and difficult policymaking exercise to the judiciary and, ultimately, to a single man on the Supreme Court.

The only point in Obama's defense is that few political actors have given him reason to think he would have responsible partners if he did the right thing. Human rights and civil liberties activists are so keen to avoid legitimizing detention in legislation that they have treated as a victory the president's decision to adopt the very policy they have spent the past eight years denouncing.

Congress is not looking statesmanlike either. Republicans have been too busy making political hay out of Obama's sputtering closure of Guantanamo to act as constructive participants in this important legislative project. Democrats, always afraid of their shadows on national security issues, have hidden behind civil liberties platitudes that most do not really believe. Members across the spectrum have acted boldly only when it comes to making sure that no Guantanamo detainees end up in their districts.

But it is Obama who is president, and presidents go to war with the Congress and civil society they have, not the Congress and civil society they wish they had.

Obama's decision will have several major consequences, all of them bad.

First, while it will not stop detentions, it will ensure that the ground rules for those detentions remain murky, ever-shifting and unclear to agencies that have to conduct operations in the field. This uncertainty will encumber operations and create perverse incentives for both targeted killings and for detentions by allied proxy forces that don't have to go through eight years of litigation to neutralize a suspected enemy fighter.

Second, it leaves in place a system of judicial review of Guantanamo detentions that ill-serves detainees and government alike. The current system of making policy and reviewing detentions through habeas corpus litigation serves the government badly because the standards are unstable and evidence collected one day for intelligence purposes proves useless in justifying detentions years later when the rules shift, judges grow less comfortable and that material suddenly has to serve as evidence

in court. It serves detainees badly because review has been painfully slow and detainees in habeas get only one bite at the apple. If a detainee loses his habeas case, that's it. By contrast, most proposals for long-term detention laws involve regular review and ongoing oversight, giving many more opportunities for error correction and for detainees to convince authorities that they no longer pose a danger that requires their incarceration.

Third, the failure to go to Congress to write the rules means that the rules for detention will be written by judges. So far, the judges who have heard habeas cases have disagreed about a great many central issues -- many of which the Supreme Court will ultimately have to resolve. The high court, which has not a single national security expert, may end up making good policy or bad. But because the Supreme Court is ideologically split on these issues, it seems likely that its swing justice, Anthony Kennedy, will play a disproportionate role in writing the rules of the road. Is it really better to hand this complex policy problem over to the whim of a single unelected detention czar in robes than to ask the legislature to decide when America is going to detain alleged terrorists, under what rules and with what rights?

There exists perhaps no area of national policy in which President Obama entered office with greater opportunity to create a new politics than the law of counterterrorism. Many conservatives understood that President Bush's executive-power approach had not succeeded in sustaining robust presidential power to confront the enemy. Many liberals, conversely, understood that the left's dream of a pure law enforcement model for defeating al-Qaeda was a fantasy. Obama ran on a platform of "change," and this was an area where constructive change required, first and foremost, presidential leadership.

We may never know what would have happened had Obama been willing to divert some portion of his prestige from health care to the creation of a political coalition for strong counterterrorism measures rooted in statutory powers debated and passed by the people's representatives.

How very curious, though, that so much of American political culture finds it more comfortable for him to get in touch with his inner Dick Cheney than to try.

Benjamin Wittes, a former Post editorial writer, is a senior fellow at the Brookings Institution and a member of the Hoover Institution's Task Force on National Security and the Law.

Post a Comment

[View all comments](#) that have been posted about this article.

Add a comment (max 5000 characters)

Submit

Comments that include profanity or personal attacks or other inappropriate comments or material will be removed from the site.

Additionally, entries that are unsigned or contain "signatures" by someone other than the actual author will be removed. Finally, we will take steps to block users who violate any of our posting standards, terms of use or privacy policies or any other policies governing this site. Please review the [full rules](#) governing commentaries and discussions. You are fully responsible for the content that you post.

Ads by Google

Oxford Seminars

TESOL/TEFL certification courses on college campuses across the US.
www.OxfordSeminars.com

How to make Electricity

A shocking new homeowner's kit the power co's hope you will never own
power4home.com

Paid Teaching China \$699

No Experience, Native Speaker salary and benefits in china
www.ifrevolunteers.org

© 2009 The Washington Post Company