A FUTURE CHALLENGES ESSAY

Obfuscation and Candor

Reforming Detention in a World in Denial

by Benjamin Wittes

Koret-Taube Task Force on National Security and Law
www.futurechallengesessays.com

"The greatest trick the Devil ever pulled was convincing the world that he didn't exist," says the low-grade con man to the supposedly-crack Customs agent in the 1995 movie *The Usual Suspects,* speaking of the great criminal mastermind Keyser Söze. The arrogant Customs Agent Kujan listens with patronizing incredulity to stories of the untrackable, invincible Söze, convinced he knows the truth and can get the con man before him to spill the beans over time. Only in the movie's final seconds does Agent Kujan realize that this con man actually is the master criminal himself—or at least is exploiting his legend. And, having convinced Agent Kujan that he doesn't exist, he has disappeared: "And like that—he's gone!"

American counter-terrorism policy has a bit of Agent Kujan's Keyser Söze problem. The more successful it is, the less people believe that the Devil really exists—at least as an urgent public policy problem requiring the sort of tough measures that challenge other interests and values. The longer the United States goes without suffering a mass-casualty attack on the homeland, the less apt people grow to believe that Al Qaeda really poses a lethal threat, that September 11 was more than a lucky strike, that terrorism poses challenges not addressable through conventional law enforcement means alone, or that the problem ranks up there with other pressing challenges of the moment—challenges that, unlike Al Qaeda, visibly threaten harm on a daily basis. The more effectively we conduct counter-terrorism, the less we believe in it and the more uncomfortable we grow with policies like non-criminal detention, aggressive interrogation, or extraordinary rendition. The more we convince ourselves that Keyser Söze doesn't really exist, the less willing we are to use these tools, and we begin reining them in or eschewing them entirely. And like Agent Kujan, we willingly let Keyser Söze walk out of the room.

task force on national security and law

HOOVER INSTITUTION
STANFORD UNIVERSITY

In the case of detention, my subject in this essay, I mean this rather literally. Of the nearly eight hundred men the U.S. military brought to its prison at Guantánamo Bay, Cuba, as combatants in the War on Terror, fewer than two hundred remained in American custody as 2010 began. Under the administrations of presidents George W. Bush and Barack Obama alike, we have let dangerous people walk out of the room. Most of them have proven to be men like the one Agent Kujan believed himself to be confronting: low-grade nothings who go home and demobilize. Some, however, have turned out to be if not quite master criminals, certainly people whose release proves a far greater evil than their detention ever did. There have been suicide bombers and terrorist leaders. And there have been disappearing acts. Nobody knows at this stage whether we will come to see the number of such individuals as a manageable and acceptable cost of reducing America's detention footprint or whether we will come to see our willingness to let large numbers of suspects walk out the door as a folly akin to Agent Kujan's.

Ironically, it is not just the Devil who is trying to convince the world—and us—that he doesn't exist. We are playing something of a similar game with some of the very counter-terrorism policies over which time, complacency, and bad experiences have heightened our embarrassment. Having learned that detention infuriates people around the world, creates difficult legal problems, and troubles our collective conscience, we have begun to pretend that detention doesn't exist or that we're phasing it out. Yet finding ourselves unable to abolish it and unwilling to face the many troubling questions associated with reforming it, we have chosen obfuscation instead. In other words, even as the terrorists are, like Keyser Söze, conning us into believing they no longer exist, we have begun trying to con the world—and ourselves—into believing that we are no longer detaining them.

Although Guantánamo's closure grew more controversial over the course of Obama's first year in office, one should remember that during the 2008 general election campaign, it was a matter of consensus between the candidates. Sen. John McCain, like then-Sen. Barack Obama, promised to shutter the facility. And like Obama, McCain never said quite what he meant by that. The promise to close Guantánamo, like many political promises, conveyed different meanings to different constituencies—who heard in it what they wanted to hear. To many people on the political Left, the closure signaled an abandonment of non-criminal detention, and more generally, a return to a law enforcement model of counter-terrorism. To those concerned with harmony in America's trans-Atlantic relations, it signaled a meeting of the minds with Europe over a festering sore in our ties with our closest allies. And to many people offended by the choice of a detention site selected specifically to evade the jurisdiction and

scrutiny of federal courts—a problem those same courts had already addressed—it signaled a re-embrace of the rule of law and an abandonment of a kind of off-shore-banking model of counter-terrorism detention. The words "close Guantánamo" can mean any of those things.

Or none of them. Indeed, the phrase Obama and McCain both used actually promised only to close a single detention facility. Neither candidate promised to abandon non-criminal detention, to free everyone he could not charge with a crime before a federal court, or to bring other overseas detention facilities under the purview of American judges. Technically, either man could have satisfied his promise by moving every detainee from Guantánamo onto prison ships at the mouth of the Guantánamo Bay. Only in implementation would the promise acquire stable meaning.

We will never know what McCain's effort to give meaning to the phrase might have looked like. But during Obama's first year in office, the President clarified his meaning with relative precision. (For whatever it's worth, I suspect McCain's efforts would have looked similar.) Let's start by outlining what "closing Guantánamo" does *not* mean*:*

- To the Left's disappointment, but to nobody else's surprise, it does not signify the end of non-criminal detention. While the new administration has modestly adjusted the legal theory under which it conducts military detentions and trivially adjusted the definition of the category of people it claims the power to lock up, it has by no means forsworn the power to hold suspected Al Qaeda or Taliban fighters without criminal charge for the duration of the current conflict.

- Nor does it mean the end of detention without judicial due process protections—or the right of counsel—in legal black holes beyond the supervision of federal courts. Those still exist abroad, after all, and while the Obama administration has adjusted policies at these facilities, it rightly defends the propriety of resisting their supervision by the courts.

- Nor is it an effort of the type I have urged to place detention on a more solid legal footing by enshrining it in law that would both constrain and legitimize its use. Bringing Guantánamo detainees to the United States will neither give them any more judicial review than they receive at the island prison nor in any significant respect change the character of that review. It will change, in other words, neither the substance nor the procedures associated with detention—just the location.

So what is Obama really saying to the nation and to the world more generally when he closes Guantánamo—or, rather, when he declares its closure to be a matter of national policy to be effectuated by no specific date but in the due course of time? The answer is that he is embracing obfuscation—attempting to convince the world, and his own polity, that detention doesn't exist. He may or may not take a bit more risk than the Bush administration did in releasing some detainees. He will certainly attempt to bring more of the remaining detainees to trial than did the prior administration and will tend to favor federal courts over military commissions in doing so. But the most significant change is, in fact, geographic. He intends, at some point, to move the remaining population of this single detention facility to a detention facility in Illinois and hope that this facility is less of a diplomatic eyesore than Guantánamo has been. Closing Guantánamo is not a repudiation of detention. It is a repudiation of detention only at Guantánamo Bay, Cuba.

I have long argued for a policy focused on rules, not facilities, on the theory that it doesn't matter *where* a nation detains its adversaries nearly so much as it matters *how* it does so. I have, as a result, no particular commitment to maintaining Guantánamo and have never argued against closing it. While it has certain advantages logistically and legally over alternative facilities in the United States, and the costs associated with replacing it will not be trivial, those who have to represent American foreign policy abroad describe Guantánamo with near unanimity as a problem for them in the exercise of their duties, and I do not resist the notion that it has outlived its usefulness.

That said, it is worth pausing to consider the oddity of regarding this particular operation with such shame that shuttering it has become a national security imperative to the President and his team. Back in May, in a major policy speech at the National Archive, Obama described Guantánamo's continued operation as "setting back the moral authority that is America's strongest currency in the world." And rhetoric like this is common in his administration. Yet Guantánamo, after all, was the military's most open detention facility, the only one exposed in a sustained fashion to public scrutiny, the only one regularly toured by hundreds of journalists and human rights organizations, the only one whose detainees met regularly with counsel and whose incarcerations were supervised by federal judges. By most detainee accounts, conditions at the facility were dramatically better than those at the theater internment facilities from which they arrived. Allegations of abuse at Guantánamo itself, for all the attention they received, were comparatively rare and exhaustively and publicly reviewed. On the merits alone, one might expect human rights groups to demand Guantanamo's emulation, not its closure. How much better would life have been for

the tens of thousands of detainees held by United States forces overseas since the beginning of the War on Terror had conditions at Guantánamo been a broader norm, rather than a *sui generis* oddity? And why should any human rights activist see its closure, combined with the maintenance of much larger facilities not subject to comparable scrutiny, as a victory?

Ironically, those same qualities that should have made Guantánamo increasingly attractive over time also made it visible. And the more American elites and courts and foreign allies came to disbelieve in Keyser Söze, the more that visibility bred not pride but shame. This began, of course, long before Obama. Though the Bush administration never committed to closing Guantánamo, it made the original judgment that a big detention footprint hurts America's interests more than it helps—that it hurts enough to take risks to reduce it. And it began to look for ways to obfuscate the detention we engage in. It stopped bringing people to Guantánamo relatively early on. And it effectuated the lion's share of the transfers from the facility, removing more than five hundred thirty detainees from the base over the years. The mass repatriation of the facility's Saudis was a project of the Bush administration, not the Obama administration. And moving detention out of the light and into the shadows was well under way by the time Obama took office. Closing the facility entirely was more an acceleration of an existing trend than a dramatic policy shift.

Rejoining the World—In Denial

The Western World does not believe in detention. Even when it needs detention, the West does not believe in it or want to acknowledge it. And over the years, Western nations have developed elaborate systems for pretending they don't engage in it. The chief system for this pretense has been us, the United States; in more recent years, the Afghan criminal justice system has played an increasingly important role in helping the West pretend.

None of the United States' major coalition partners in Afghanistan engages in detention operations. While U.S. forces have the authority to hold Taliban or Al Qaeda operatives whom they capture, coalition forces do not. Under standard coalition procedures, rather, they either turn detainees over to the Afghan criminal justice system within ninety-six hours of capture or they release them. The result is that U.S. detention operations and Afghan prosecutions, in practical terms, function on behalf of the coalition more broadly. Given that the United States is far more secure from terrorism than is Europe, it seems

preponderantly likely that American detention operations have done more—probably much more—to protect European security than American security. Yet European countries not only refuse to participate in detention operations, they have become detention's principal critics.

The arrangement—in which the United States conducts detentions on behalf of the West as a whole while our Western allies refuse meaningful participation in those operations and energetically criticize them—mirrors the larger relationship between the United States and Europe on security matters. It is part of a larger pattern of European free-riding on the American security umbrella, and as with much such behavior, it gives European countries all of the benefits and none of the costs of a robust detention policy. The United States neutralizes some dangerous enemies who pose a threat both to European forces in the field and to European civilians at home. At the same time, Europe's hands are clean from a process that would raise political hackles at home—just as it does in the United States—and European officials are neatly insulated from the very difficult policy problems associated with these detentions. Indeed, they can publicly take the high road vis-à-vis the United States and pretend to maintain a pure law enforcement model for counter-terrorism. It is an ideal detention arrangement for a public that doesn't believe in detention.

We should not wax too contemptuous, however, for we are fast becoming the new Europeans. Beginning under the last administration and more decisively under this one, America has moved to rejoin the international community's consensus that detention should take place out of view and preferably be conducted by proxies. Indeed, the whole direction of U.S. detention policy is moving towards exactly this obfuscatory model. Closing Guantánamo, but not the less-visible detention facility at the Bagram air base in Afghanistan is only the most dramatic embrace of hypocrisy. Both the Bush and Obama administrations had opportunities to legislatively enshrine American detention policy in law—a move that would have legitimized detention by stating clearly the circumstances in which Congress regards it as appropriate and will publicly stand behind it. Yet both passed up the chance. Importantly, the Obama administration did so to loud cheers from its political base.

Perhaps more significant, the United States increasingly relies on Afghans and other foreign proxies to handle our detentions in a fashion that closely mirrors the way Europeans have long relied on the United States. American forces too are turning detainees over to the Afghan criminal justice system. The United States built the government of Afghan President Hamid Karzai a detention facility to handle returned

detainees. And the United States has turned tens of thousands of Iraqi detainees over to the criminal justice system in that country. Some of this reflects, particularly in the Iraqi context, the turning over of responsibility to an increasingly-capable government that ultimately has to run its own affairs. As such, it is a good thing, one to be cheered. But it also reflects American shame at the project of detention. Detainees in Iraqi or Afghan custody can't file habeas corpus lawsuits, after all; they don't generate political controversy domestically; and they don't draw flak directed at the United States from human rights groups. To put the matter bluntly, they're not our problem. It turns out that we are almost as happy as the Europeans are to develop arrangements that give us the benefits of detention without our having to engage in it.

The consequences, of course, are more than somewhat perverse. Neither the Afghan nor the Iraqi governments hold detainees in conditions anywhere near the norm for U.S. detention operations. Moreover, the desire to keep detention to a minimum probably creates perverse incentives toward rendition and targeted killing, a practice that has escalated dramatically in recent years. Indeed, in his State of the Union address in January 2010, President Obama apparently found Guantánamo too shameful even to mention. But the President did boast that "in the last year, hundreds of Al Qaeda's fighters and affiliates, including many senior leaders, have been captured or killed—far more than in 2008." Very few of these people have been captured; to be precise, it is the killing part that's on the rise and that the President is boasting of boosting in his first year in office. It would be a dubious victory indeed for human rights if American forces were now killing people they used to capture. But dead people don't file habeas lawsuits either—and strangely, perhaps, they don't attract the same kind of sustained political attention that prisoners do. A Predator drone air attack is a few-day story—and the story is often of a triumphant "We got him!" variety. While military targeting, like detention, produces its share of errors and collateral damage, the erroneously targeted don't have time to protest their innocence or gin up public sympathy, and they don't have legions of American lawyers eager to make them into the next cause *du jour*. Though it yields a suboptimal outcome both from the point of view of intelligence gathering and from the point of view of human rights, a kill is legally a far cleaner outcome than a capture these days.

But in keeping our detention out of sight, the United States has a big problem that Europe does not have: we don't have an America. While we can pawn off some detainees on local proxies, there is no extrinsic power whose interests in our detention needs subsume our own and who will serve all of our detention needs so we don't have to—even while we complain about it in public and object. Europe can have a no-detention

policy because it knows the United States will pick up the slack. We, however, cannot. We can minimize detention. Through a combination of prosecution, releases, proxies, and Predator attacks, we can keep the number of detainees small, at least for now. But at the end of the day, the United States cannot avoid detention entirely—not even under the Obama administration. It has to maintain some detention capacity in a world, itself included, that doesn't believe in the project of detention any more.

And unsurprisingly, developing a detention policy for such a world turns out to be rather hard. Consider the competing interests we increasingly demand that our detention system satisfy. It must allow us to incapacitate the people our security requires us to take down. It must create accountability for those detentions and ensure that we don't lock up innocent people. It must create accountability for decisions to release people from detention and make sure we don't let dangerous people walk free. It has to be a system our own courts will uphold and our domestic politics will tolerate—which is to say it has to be a system that will make us proud or at least not embarrass us to the point that it generates its own fragility. And it cannot be a persistent sore point in our relations with the rest of the world.

The Instability of Denying Detention

On the surface, we appear to be drifting organically towards a new system. This system's parameters include detaining people only when absolutely necessary and avoiding detention both through over-aggressiveness (killing) and under-aggressiveness (taking risks by letting people go). They also include conducting detentions by proxy whenever possible. When proxies cannot do the job and Americans must detain adversaries ourselves, the key parameter becomes invisibility: theater internment rather anything closer to home, Bagram rather than Guantánamo.

For now, this peculiar system seems to be working passably well—if rather strangely. The American detention footprint has been shrinking dramatically since American forces began turning huge numbers of Iraqi detainees over to the Iraqi government. International pressure on the United States over the issue has declined commensurately. And all of this has happened without great apparent cost. While some former detainees have presented non-trivial security threats, many have demobilized, proving that whatever risk they posed was manageable by means other than detention. New captures, at least of major terrorist figures, are being handled relatively smoothly through the criminal justice apparatus. In the short term, it's hard to see the costs of America's emerging policy of minimizing detention while shamefacedly hiding the residue.

Yet the vitality of this approach depends on a series of contemporary circumstances that will not likely persist indefinitely. The most important of these is the small number of captives being added to the system at present.

As long as the numbers stay small, proxy detention in theater presents a viable option for a high percentage of cases. As long as the numbers stay small, the domestic criminal justice system can plausibly absorb and handle most of those relatively rare cases where rendition or proxy detention does not offer a reliable alternative. And as long as the numbers of new detainees entering the American detention system is a rounding error on the number of detainees leaving it—either through release or transfer to foreign custody—the newcomers can be effectively hidden amidst the declining overall population. As long as these conditions prevail, the American public and the world at large see a declining detainee population and are likely not to care that that aggregate number masks some new entrants into the system.

But all of this works only as long as the number of new detainees does not once again approach, let alone exceed, the number of detainees exiting U.S. custody. If, all of a sudden, the United States once again began capturing people by the hundreds and thousands, as it did at the outset of combat operations in Afghanistan, it would no longer be able to sustain the fiction of a small detention footprint.

A closely-related point involves the escalating detention capacity of our proxies over time. The Afghan and Iraqi governments today, after years of American involvement and investment, find themselves capable of taking responsibility for a wide swath of detention operations. That capacity did not exist at the beginning of our conflicts there, nor will it exist necessarily the next time the United States has to engage the enemy in some other location. If one imagines that significant U.S. operations in, say, Somalia or Yemen might yield a new influx of detainees, precisely the same failures of governance that would necessitate such operations would also prevent local governments from taking responsibility for detentions—at least for a time. Indeed, even now, the inability of Yemen's government to take responsibility for its Guantánamo detainees is one of the principal constraints on the Obama administration's plans to close the facility. In other words, the current capacity of our detention proxies to act as such is a created condition, not a found condition. And it will not exist in the next conflict America fights, just as it did not exist until created in either Iraq or in Afghanistan. In the interim between the outset of the next conflict and the creation of such proxy capacity, American forces will have to do their own—and Europe's—detention work once again.

Another potential source of instability in the current equilibrium is the judiciary. At present, American federal courts have clearly-established jurisdiction to hear habeas corpus lawsuits from Guantánamo and are actively considering whether they may also have jurisdiction over some suits from Bagram. Whether the federal courts are determined to have habeas jurisdiction over overseas detentions beyond Guantánamo will greatly influence the vitality of a policy based on keeping detention hidden by keeping it far away. Such a policy, after all, is more robust if the courts play along with the government's out-of-sight, out-of-mind policy fiction than if they play a game of hide and seek with the military's detention facilities. Policy makers are facing one environment if the courts will really tolerate a multi-tiered detention system that layers criminal detention within the United States on top of judicially-supervised, law-of-war detention for the shrinking number of Guantánamo detainees, on top of judicial abstention from detention everywhere else. They are facing an altogether different operating environment if the courts intend, to one degree or another, to follow military detentions around the world. The latter judicial approach—while probably more intellectually coherent than asserting jurisdiction at Guantánamo and nowhere else—would leave the military without one of its chief vehicles for obscuring detention.

Finally, the policy's vitality rests on the domestic and international acceptance of the transparent fiction that detention at sites more remote and less visible than Guantánamo somehow alleviates the anxiety that necessitated Guantánamo's closure in the first place. I venture no prediction as to the long-term politics of this issue—whether our allies, or our domestic elites, are really so naive, so stupid, or so partisan that they will take a less hostile attitude towards American detention when it's conducted at facilities not named Guantánamo Bay or by presidents not named George W. Bush. They may well tolerate a good bit of detention under such circumstances, as long as detention is a policy in retreat, not a policy on the march. But that only returns us to the conditions outlined above—declining numbers of detainees and proxy powers increasingly capable of handling a higher percentage of them. Political tolerance for the current American approach may not survive increasing numbers of detainees, particularly if they end up in direct American custody.

In short, the current equilibrium appears likely to prove unstable, both because of its dependence on conditions that will not persist forever, and because it fully satisfies few of the competing interests outlined above.

The Alternative

But can we do better? Can we design a detention policy that is more likely to survive the shocks of changed circumstances, new influxes of prisoners, and new state failures?

The simple answer is no—not, at least, if we insist on joining the Western consensus that detention is a disreputable matter of shame, rather than a legitimate tool of wartime statecraft. I do not mean to suggest that America should flaunt detention, use it unnecessarily, boast about it, or needlessly antagonize the allies, domestic political forces, and federal judges whom it discomforts. This was the style of the early Bush administration, and it did incalculable damage to the government's long-term capacity to use detention as a tool. Yet the current approach—the one pioneered in the late Bush administration and brought to fruition in the Obama administration—is trying to square a circle that will not be squared. Refusing to defend a tool has the effect of accepting its illegitimacy, and that necessarily induces a crisis when one suddenly needs to use that tool robustly. Using it quietly along the way to that point, meanwhile, is a recipe for constant political tension, as the weight of the system's hypocrisy piles up on judges, legislators, allies, and the public at large.

There is, of course, an alternative—but it's an alternative that cuts against the entire direction in which American detention policy has been moving. The alternative is candor, to acknowledge that we are in fact holding Keyser Söze and many others besides—some of whom may be innocent, some of whom are dangerous cannon fodder, and some of whose intentions and capabilities we just don't know with any confidence.

Candor about detention is not the same thing as triumphalism. It is not pride in capturing and holding the enemy. It is not a series of bombastic assertions that our detention screening never fails, or that everyone we catch is the "worst of the worst," or that our holding someone is evidence enough of his belligerency. Candor about detention is emphatically not the equation of non-criminal detention with the sort of toughness that distinguishes its proponents from the supposedly weak-kneed advocates of a criminal justice mentality. Candor about detention is not machismo.

It is, rather, the acknowledgment that detention is a tool that has a legitimate place in a global struggle against terrorist groups in which military power continues to play a front-and-center role. Candor is the refusal to bargain away detention's legitimacy or to conduct it in the shadows in shame. It is the insistence that detentions of various sorts require clearer rules. It is the frank acceptance that the enemy's refusal to fight according to civilized norms of combat will inevitably augment the error rates associated with adjudications for which we, not the enemy, will bear responsibility. In other words, candor involves a certain mature acknowledgment that detention adjudication is a complex human system that will inevitably fail some of the time, and that release from detention is also a complex human system that will inevitably

fail some of the time. It is the acknowledgment that we will detain people whose detentions we will come to regret and that we will free people whose releases we will come to regret. Sometimes the hapless con man will turn out to be just a hapless con man; and sometimes the hapless con man will turn out to be Keyser Söze. A policy based on candor would begin with these uncomfortable truths and would deal with them up front, not by hiding them in the shadows.

Ironically, a policy based on candor might end up having a certain amount in common with our current policy. For example, as United States forces gain confidence in the government of Afghanistan, they might—as they have done, in fact—turn over large numbers of prisoners to it, on the theory that managing a country's own nationals is one of the sovereign functions for which the United States wishes the country to take responsibility. While this might look rather like proxy detention, the difference would be that the transfers would be a vote of confidence in Afghan capacity, not a reflection of declining confidence in our own. A policy based on candor might sometimes even rely on proxy detention as a matter of convenience; it would never have to rely on it, however, out of fear.

What would a policy based on candor look like? As a preliminary matter, it would dispense with the very marginal question of whether Guantánamo Bay should stay or go as a detention site. The important issue is not and has never been the location of detention. The important issue is the rules for detention, the circumstances under which we will and will not detain people, and the rights we are prepared to grant to those subject to whatever system we set up. President Obama and Senator McCain alike, by promising to close Guantánamo rather than to fix a floundering detention system, put the wrong policy issue at the center of the conversation. As long as it remains there, candor is impossible. For the truth is that whether Guantánamo shuts down or remains with us indefinitely matters only in terms of public relations. Closing it will not fix the policy problem, and leaving it open will not prevent us from forging a new detention policy. Making a fetish out of closing it, therefore, creates international and domestic focus on benchmarks unrelated to the success of our detention operations. How many detainees remain at Guantánamo? On what date does the last one leave? Such questions reflect an instinct for the capillaries.

A policy based on candor would create distinctions between different categories of detainees, not between different categories of detention facilities. Detention rules that depend on geography create an irresistible temptation for the government to decide where to house a given detainee based on which system of review it wishes to use for

that person: Habeas corpus review too cumbersome in a particular case? Don't bring that detainee to Guantánamo or to the United States. This is a silly cat and mouse game. The relevant inquiry is what the government alleges against what sort of person, using what kind of evidence. If we write good rules for the different groups of people we confront, then sorting them into the right facilities in the right locations will not prove especially difficult.

Broadly speaking, America is dealing with three overlapping categories of people in its global counter-terrorism operations:

- Criminal suspects, whose salient feature is their violation of federal criminal statutes.

- Fighters, who in some meaningful sense joined the military forces of the enemy and have been captured, and whose salient feature is belligerency under either international law or the Authorization for the Use of Military Force.

- Hybrid figures, or terrorists, who display elements of both the criminal and the fighter, but whose ultimate salience is some combination of extreme dangerousness and high intelligence value.

Many detainees fall plausibly into more than one of these groups, and some fall into all three. There is probably no way to define as a matter of law the category in which a given detainee should end up. Faced, for example, with a Khalid Sheikh Mohammed—the architect of the September 11 attacks—the executive branch will inevitably face a choice of regimes question: does it wish to treat him as a criminal suspect, a high-value intelligence target, or an enemy belligerent—or all three at different times after his capture? The point, however, is that the rules for handling these type of captives will legitimately differ because detention is serving a different function in each case. Moreover, the key question should not be *where* the detention takes place. The type of person, not the type of prison, should determine the rules.

This brings us to perhaps the most important point: There have to be rules—and they have to be clear, sensible, and known—for each major category of detainee. Right now, only the first category—the criminal suspect—has a clearly defined set of rules to govern his incarceration and the adjudication of his case. The rules governing detention of fighters is being contested in numerous Guantánamo habeas corpus cases and those rules vary significantly by geography. Adding to the puzzle, the

military does not know which of its detentions today will come under what set of rules tomorrow.

What's more, there has been no serious effort whatsoever to establish distinct rules for detentions of people in the third category. Civil libertarians, human rights groups, and the political Left insist on cramming this group of people into the category of criminal suspects; the current and former administration alike and the political Right insist on cramming it into the category of wartime detainees. Yet this group deeply stresses both categories and properly requires rules of its own.

President Obama once seemed to understand that. Back in May, in his National Archives speech, he declared that "our goal is to construct a legitimate legal framework for the remaining Guantánamo detainees that cannot be transferred. Our goal is not to avoid a legitimate legal framework. In our constitutional system, prolonged detention should not be the decision of any one man. If and when we determine that the United States must hold individuals to keep them from carrying out an act of war, we will do so within a system that involves judicial and congressional oversight. And so, going forward, *my administration will work with Congress to develop an appropriate legal regime* so that our efforts are consistent with our values and our Constitution." It was a breakthrough statement for an American president about detention—and it took all of four months for his administration to drop the ball on it.

Clarifying the rules requires a serious societal conversation about detention—precisely the thing we have so long been striving to avoid, and precisely what we make impossible when we pretend we do not engage in detention. It requires that we make hard prospective choices about the allocation of risk: Are we more afraid of relatively-permissive detention rules serving as a recruitment tool for the enemy or of relatively-restrictive ones freeing members of the enemy? Are we more afraid of the injustice of erroneous detentions or of the violence resulting from erroneous releases? It requires that we make these judgments knowing there will be costs, and that we not then pretend to be surprised by those costs. These are judgments we should not be delegating to our court system—let alone subcontracting to the Afghan or Iraqi governments. We must face the reality of the project in which we are engaged.

At the end of *The Usual Suspects*, the master criminal—who has pretended throughout the movie to be a cripple—limps out of the police station, his bad arm and hand stiff and useless. Down the street, the limp fades, and the hand relaxes to normalcy, and he

gets into his lawyer's car and drives off. Inside the police station, Agent Kujan comes to the blinding realization that he has been duped by the man he thought stupid but who has been selling him a bill of goods since they met. He races outside, but it is too late; the agent is left with only self-recrimination, frustration, and anger. This is us, too, when former Guantánamo inmates turn out to be among the senior leadership of Al Qaeda in the Arabian Peninsula. Yet unlike in the movie, which portrays Agent Kujan as the fool, there is no accountability when our system fails. Were these releases the fault of the courts (whose threats of review spurred them), the Bush administration (which carried them out), the Saudi government (which didn't keep track of the former detainees adequately), or the Left and the international community (which relentlessly pushed for them)? The less responsibility we take for detention, the less accountability there is when it goes wrong, as it most certainly will—when we lock up the wrong guys or release the wrong guys, when we jail Chinese Uighurs or release suicide bombers.

But it's okay, we tell ourselves. Keyser Söze doesn't really exist. And we're not really detaining him, anyway. Are we?

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About the Author

Benjamin Wittes
Benjamin Wittes is a senior fellow and research director in public law at the Brookings Institution. He is the author of Law and the Long War: The Future of Justice in the Age of Terror *(2009) and* Detention and Denial: The Case for Candor after Guantanamo *(2010). He is the editor of* Legislating the War on Terror: An Agenda for Reform *(2009), and cofounded and coauthors the* Lawfare *blog. Mr. Wittes is a member of the Hoover Institution's Koret-Taube Task Force on National Security and Law and has written extensively on US detention policy.*

Koret-Taube Task Force on National Security and Law

The National Security and Law Task Force examines the rule of law, the laws of war, and American constitutional law with a view to making proposals that strike an optimal balance between individual freedom and the vigorous defense of the nation against terrorists both abroad and at home. The task force's focus is the rule of law and its role in Western civilization, as well as the roles of international law and organizations, the laws of war, and U.S. criminal law. Those goals will be accomplished by systematically studying the constellation of issues—social, economic, and political—on which striking a balance depends.

The core membership of this task force includes Kenneth Anderson, Peter Berkowitz (chair), Philip Bobbitt, Jack Goldsmith, Stephen D. Krasner, Jessica Stern, Matthew Waxman, Ruth Wedgwood, and Benjamin Wittes.

For more information about this Hoover Institution Task Force please visit us online at http://www.hoover.org/taskforces/national-security.

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