



Detention and Denial: The Case for Candor after Guantánamo

Benjamin Wittes

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"Our current stalemate over detention serves nobody—not the military or any other component of the U.S. government that has to operate overseas.... It is a system that no rational combination of values or strategic considerations would have produced; it could have emerged only as a consequence of a clash of interests that produced a clear victory for nobody."—from the Introduction

Benjamin Wittes issues a persuasive call for greater coherence, clarity, and public candor from the American government regarding its detention policy and practices, and greater citizen awareness of the same. In *Detention and Denial*, he illustrates how U.S. detention policy is a tangle of obfuscation rather than a serious set of moral and legal decisions. Far from sharpening focus and defining clear parameters for action, it sends mixed signals, muddies the legal and military waters, and produces perverse incentives. Its random operation makes a mockery of the human rights concerns that prompted the limited amount of legal scrutiny that detention has received to date. The government may actually be painting itself into a corner, leaving itself unable to explain or justify actions it may need to take in the future. The situation is unsustainable and must be addressed.

Preventive detention is a touchy subject, an easy target for eager-to-please candidates and indignant media, so public officials remain largely mum on the issue. Many Americans would be surprised to learn that no broad principle in American jurisprudence actually prohibits preventive detention; rather, the law "eschews it except when legislatures and courts deem it necessary to prevent grave public harm." But the habeas corpus legal cases that have come out of the Guantánamo Bay detention facility—which remains open, despite popular expectations to the contrary—have addressed only a small slice of the overall issue and have not—and will not—produce a coherent body of policy.

U.S. government and security forces need clear and consistent application of their detention policies, and Americans must be better informed about them. To that end, Wittes critiques America's current muddled detention policies and sets forth a detention policy based on candor. It would set clear rules and distinguish several types of detention, based on characteristics of the detainees themselves rather than where they were captured. Congress would follow steps to "devise a coherent policy to regulate the U.S. system of detention, a system that the country cannot avoid developing."

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