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# THE STATUS QUO BIAS AND COUNTERTERRORISM DETENTION

GREGORY S. MCNEAL \*

## I. INTRODUCTION

Counterterrorism detention policy in the United States is a mess. Commentators on both sides of the political spectrum have decried the U.S. approach. Those on the left have criticized the arbitrary and unfair nature of U.S. policy;<sup>1</sup> they argue that detention policy has unfairly trampled on the rights of individuals, producing results that are inconsistent and, perhaps, counterproductive, especially in the eyes of U.S. allies and the Muslim world. Others have approached this question from a security perspective, decrying the granting of privileges to those who fail to follow the rules of civilized nations yet then demand the protection of those nation's rules upon capture.<sup>2</sup> Those critics argue that our detention policies have unnecessarily endangered American security and must be toughened. Regardless of which argument is correct, both sides seem to agree that the status quo is untenable. In light of the critiques, what accounts for the lack of reform? One way of understanding the dysfunction inherent in detention policy is by seeing detention policy as a fixed policy domain mired in the status quo. Policy advocates have created an information-induced equilibrium where the costs of reform exceed the benefits of the status quo. The status quo is characterized by (1) a hyper-political discourse about counterterrorism detention policy that has led to (2) the elevation of politics over policy and (3) questions about the legitimacy of counterterrorism detention. When these factors are coupled with uncertainty about what

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<sup>1</sup> See generally DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* (2007); Robert J. Pushaw, Jr., *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1006–07 (2007) (citing other prominent critics such as Bruce Ackerman, Neal Katyal, and Harold Koh).

<sup>2</sup> JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005); see also Pushaw, *supra* note 1.

change might entail, the status quo becomes a powerful force, characterized by a lack of focused attention to issues, and an inability to justify change. In this Article, I will first analyze the policy discourse surrounding detention policy. Next, I will describe the current state of affairs in detention policy, describing the uncertainty in the system and the calls for reform. Finally, I will make the case for pessimism, arguing that reform is unlikely due to the polarized nature of the counterterrorism detention policy debate and the strength of the status quo.

## II. BETWEEN POLICY DISCOURSE AND PARTISAN ARGUMENTS

### A. STATUS QUO INDUCING ARGUMENTS ABOUT COUNTERTERRORISM DETENTION

To understand the status quo in counterterrorism detention, one must first understand the hyper-political discourse that surrounds counterterrorism detention policies. This discourse will be a substantial challenge for advocates looking to reform the current system. It is instructive to consider some of the ways in which interest groups have sown doubt about the merits and costs of counterterrorism detention; this subpart will summarize some of the most common critiques of counterterrorism detention.

One frequently used tactic used by critics of preventive detention was to delegitimize detention facilities such as Guantanamo, by depicting them as cage prisons.<sup>3</sup> In fact, human rights groups used the photos of “cages” used in Guantanamo as a tool to describe the Guantanamo detention facility as an inhumane place to detain people. I say the photos were used as a tool because those photos depicted temporary facilities that were closed shortly after the Guantanamo detention facility was opened. Donald Rumsfeld, during his tenure as Secretary of Defense noted that Camp X-Ray (the facility frequently featured in the cage critiques) was overgrown with six-foot-tall weeds, yet the imagery persisted, as did the myth of Guantanamo as a facility where men were caged as animals.<sup>4</sup> With that said, the hyper-

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<sup>3</sup> See, e.g., ANDY WORTHINGTON, *THE GUANTANAMO FILES: THE STORIES OF THE 774 DETAINEES IN AMERICA'S ILLEGAL PRISON* (2007); *CAGE PRISONERS*, <http://www.cageprisoners.com/> (last visited Apr. 10, 2011); cf. Jan Crawford Greenburg, *Closing Gitmo May Be Just the Beginning*, ABC NEWS (Dec. 14, 2008), <http://abcnews.go.com/TheLaw/President44/story?id=6461062&page=1> (explaining how Guantanamo began as an open air facility and is now a modern prison and Camp X-Ray is now overgrown with weeds).

<sup>4</sup> See Morris Davis, *In Defense of Guantanamo Bay*, 117 YALE L.J. Pocket Part 2 (2007) (“Overgrown with weeds, Camp X-Ray was only inhabited by banana rats and iguanas when I first saw it in January 2006. Nonetheless, to this day news stories about Guantanamo Bay frequently contain pictures of detainees in Camp X-Ray, even though it was abandoned more

political discourse surrounding detention policy is not limited to rights groups; Secretary Rumsfeld was just as guilty of committing this offense when he described the detainees in Guantanamo as the worst of the worst, an assertion that has been largely disproven.<sup>5</sup>

Another frequent assertion made by advocates and scholars, without any real factual support is that Guantanamo and other detention facilities are a recruiting tool for al Qaeda.<sup>6</sup> This assertion is a key element in the campaign to delegitimize and sow doubt about the status quo. This is presumably part of an effort to undermine the chances that the status quo becomes a permanent legislatively fixed policy option (as opposed to its current ad hoc form which may eventually fall into desuetude). The assertions by legal scholars making these claims fall into three categories: (1) legal scholars that claim that general civil liberties violations (including the use of preventive detention) committed in counterterrorism operations implicitly aid terrorist recruitment; (2) legal scholars that specifically argue that Guantanamo functions as a recruiting tool for al Qaeda; and (3) legal scholars that only allude to the fact, but do not argue that counterterrorism detention serves as a recruiting tool.

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than five years ago.”). Davis wrote his article in 2007, five years after Camp X-Ray was closed. Camp X-Ray was closed in April of 2002. See JOINT TASK FORCE GUANTANAMO, TIMELINE (2011), available at [www.jtftgmo.southcom.mil/index/Fact Sheets/TIMELINE.pdf](http://www.jtftgmo.southcom.mil/index/Fact%20Sheets/TIMELINE.pdf).

<sup>5</sup> KAREN J. GREENBERG, THE LEAST WORST PLACE: GUANTANAMO’S FIRST 100 DAYS 41–42 (2010); see also BENJAMIN WITTES, BROOKINGS INSTITUTION, DETENTION AND DENIAL: THE CASE FOR CANDOR AFTER GUANTANAMO 8 (2011) see also Katharine Q. Seelye, *The Detainees; Some Guantánamo Prisoners Will Be Freed, Rumsfeld Says*, NY TIMES, Oct. 23, 2002, at A14, available at <http://www.nytimes.com/2002/10/23/world/threats-responses-detainees-some-guantanamo-prisoners-will-be-freed-rumsfeld.html>.

<sup>6</sup> See Joseph Margulies & Hope Metcalf, *Terrorizing Academia* 60 J. LEGAL EDUC. 433, 451 n.85 (2010) (citing BARACK OBAMA CAMPAIGN 2008, THE WAR WE NEED TO WIN):

Guantánamo has become a recruiting tool for our enemies. The legal framework behind Guantánamo has failed completely, resulting in only one conviction. President Bush’s own Secretary of Defense, Robert Gates, wants to close it. Former Secretary of State Colin Powell, wants to close it. The first step to reclaiming America’s standing in the world has to be closing this facility. As president, Barack Obama will close the detention facility at Guantánamo. He will reject the Military Commissions Act, which allowed the U.S. to circumvent Geneva Conventions in the handling of detainees. He will develop a fair and thorough process based on the Uniform Code of Military Justice to distinguish between those prisoners who should be prosecuted for their crimes, those who can’t be prosecuted but who can be held in a manner consistent with the laws of war, and those who should be released or transferred to their home countries.

See also Melissa Epstein Mills, *Brass-Collar Crime: A Corporate Model for Command Responsibility*, 47 WILLIAMETTE L. REV. 25, 26 (2010) (“The reports and pictorial evidence graphically documenting abuses by American troops against Muslim detainees were the best recruiting tool our enemies could have hoped for.”).

First, those who claim but decline to directly state that counterterrorism detention serves as a recruiting tool argue that general violations of civil liberties, similar to what they assert happened in Guantanamo (e.g., torture during preventive detention), can lead to terrorist recruitment. Those that make this claim say: (1) “torture produces more terrorists” because terrorist recruitment thrives on America’s abandonment of human rights values;<sup>7</sup> (2) history shows that “Arab/Muslim prisons, particularly their torture chambers have served as incubators for generations of jihadis”;<sup>8</sup> (3) and al Qaeda recruits by playing on the image of an underdog or “demonizing enemy states as forceful”;<sup>9</sup> and (4) the photos of the human rights abuses of Abu Ghraib<sup>10</sup> likely spurred otherwise neutral individuals to feel motivated to “lead a life of terror” in retaliation for those abuses.<sup>11</sup> All of these arguments can be connected to the idea of America’s counterterrorism policies generally and counterterrorism detention specifically (Guantanamo and Abu Ghraib) serving as a recruiting tool. These authors do not cite direct evidence of the problems associated with counterterrorism detention, yet nonetheless the allegations sow doubt about whether the status quo policies should be permanently memorialized in law.

Second, there are various scholars who claim that Guantanamo (perhaps the most prominent example of U.S. detention policy) is specifically a recruiting tool, and thus bad policy. Those who make that claim say: (1) violent Muslim reaction to the *Newsweek* story about a Koran

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<sup>7</sup> Timothy K. Kuhner, *The Corruption of Civilizations*, 13 ROGER WILLIAMS U. L. REV. 349, 363 (2008). “But we must also recognize it to be pragmatically important, given that terrorist recruitment thrives on our abandonment of our own values and on the reasonable perceptions of U.S. foreign relations impropriety that follow.” *Id.* at 371.

<sup>8</sup> *Id.* at 363.

<sup>9</sup> See Megan Anne Healy, Comment, *How the Legal Regimes of the European Union and the United States Approach Islamic Terrorist Web Sites: A Comparative Analysis*, 84 TUL. L. REV. 165, 170 (2009).

<sup>10</sup> One photo showed the battered face of a deceased prisoner. See Atif Rehman, Note, *The Court of Last Resort: Seeking Redress for Victims of Abu-Ghraib Torture Through the Alien Tort Claims Act*, 16 IND. INT’L & COMP. L. REV. 493, 511–12 (2006). Another photo was of the bloodied body of a dead prisoner wrapped in cellophane packed in ice. *Id.* at 512. There are still more photographs and videos that exist that are not released to the public. *Id.*

<sup>11</sup> Mark A. Drumbl, ‘Lesser Evils’ in the War on Terrorism, 36 CASE W. RES. J. INT’L L. 335, 347 (2004).

Many observers suggest that the Abu Ghraib photos were the best terrorist recruitment tool possible. Whether that is true or not, I don’t know. But I think it is fair to say that Abu Ghraib increased the risk that a greater number of previously unmotivated individuals now feel motivated to lead a life of terror . . . . There are situations where diligently respecting rights—in other words fighting with one hand tied behind one’s back—may in fact enhance one’s ability to fight by diminishing the will, appeal, frenzy, and recruitment of the enemy.

*Id.*

being flushed down the toilet point to evidence of terrorist recruitment;<sup>12</sup> (2) Guantanamo as an image of civil rights violations such as prolonged detention or torture serves as a terrorist recruiting tool because it incites Muslims worldwide to act against the U.S. in revenge;<sup>13</sup> (3) Guantanamo is highlighted in terrorist recruitment websites, which serves as evidence of the United States “losing the moral high ground” and “[generating] the resentment which is the key to building the next generation of terrorists”;<sup>14</sup> (4) Guantanamo detention functions as a greater tool for terrorist recruitment than detention in Afghanistan or Iraq because transferring members of the “insurgency is likely to spread grievances across

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<sup>12</sup> See William T. Hennessy, *Willful and Outrageous Acts of Personal Abuse—Now OK for the CIA?*, 57 NAVAL L. REV. 203, 235 (2009) (stating that the military is rightfully concerned that stories such as the *Newsweek* published story about a Koran being thrown in a toilet at Guantanamo Bay serve as unnecessary fuel for the insurgents’ propaganda mill, which will result in increased terrorist recruitment).

<sup>13</sup> See, e.g., M. Cherif Bassiouni, *Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389, 424 (2006) (“[E]ach person tortured, as well as his/her family, are likely to become enemies of the U.S. and seek revenge for their treatment, thus generating more potential enemies likely to threaten the security of this country and its people.”); Douglass Cassel, *Liberty, Judicial Review, and the Rule of Law at Guantanamo: A Battle Half Won*, 43 NEW ENG. L. REV. 37, 44–45 (2008) (“[I]ndefinite detentions at Guantanamo . . . [enrage] Muslims worldwide, generating far more recruits for the ‘radical Islamists’ than any plausible number of enemy combatants likely to be set free by habeas.”); Mohamed R. Hassanien, *International Law Fights Terrorism in the Muslim World: A Middle Eastern Perspective*, 36 DENV. J. INT’L L. & POL’Y 221, 245 (2008) (“These generations would be living in crowded mega cities and will become attractive recruits for radical groups . . . [and] will grow up angry and will seek someone to blame, in a political atmosphere in which their impressions of the U.S. will be largely shaped by Abu Ghraib and Guantanamo photos or stories.”); Michael P. O’Connor & Celia M. Rumann, *Fanning the Flames of Hatred: Torture, Targeting and Support for Terrorism*, 48 WASHBURN L.J. 633, 664 (2009) (“[A]l Qaeda used ‘the fact that we torture people to recruit new members, and then we’re going to have to deal with a whole new wave of terrorists.’ It is this mechanism—recruitment based upon the outrage sparked by Abu Ghraib and Guantanamo—that has resulted in perhaps 80–90% of the foreign fighters coming to Iraq to kill Americans in suicide bombings and other attacks.”); Jordan J. Paust, *Serial War Crimes in Response to Terrorism Can Pose Threats to National Security*, 35 WM. MITCHELL L. REV. 5201, 5214 (2009) (noting that a serial war crimes governmental policy such as a common plan to use unlawful coercive interrogation “undoubtedly . . . served as a terrorist recruitment tool”); Symposium, *Supreme Court Panel: Discussion & Commentary*, 21 REGENT U. L. REV. 385, 391–92 (2009) (“[Al Qaeda’s] recruits are fungible. An endless stream of people remain willing to sign up, so you want to marginalize them in their societies. If you read the transcripts of Khalid Sheikh Mohammed’s combatant status review tribunal hearing down at Guantanamo . . . plays totally into [al Qaeda’s] narrative.”).

<sup>14</sup> Kenneth Roth, *Why the Current Approach to Fighting Terrorism Is Making Us Less Safe*, 41 CREIGHTON L. REV. 579, 591 (2008) (“If you look at the terrorist recruiting websites . . . they highlight Guantanamo, they highlight Abu Ghraib . . . . When the Bush message is less attractive than the message of the terrorist recruiter, we are losing the fight against terrorism and that is very much what is happening.”).

geographic jurisdictions,”<sup>15</sup> and therefore insurgents should be detained and prosecuted in the local area in which they were captured because it centralizes the grievance and limits the ability to link to the global insurgency;<sup>16</sup> and (5) Guantanamo is understood explicitly and implicitly as a terrorist recruiting tool by policy makers and the international community.

For example, one article cites Dennis Blair, when he was nominee for Director of National Intelligence, testifying that Guantanamo is “a rallying cry for terrorist recruitment.”<sup>17</sup> Another article references the U.N. General Assembly’s adoption on September 20, 2006 of the United Nations Global Counter-Terrorism Strategy, which recognized “conditions conducive to the spread of terrorism” to include “dehumanization of victims of terrorism in all its forms and manifestations.”<sup>18</sup> These direct assertions about counterterrorism detention as a recruiting tool are mirror images of the efforts by human rights groups to undermine the creation of a permanent preventive detention regime. While Guantanamo has been the focus of human rights groups for the past nine years, their focus is not just on the closure of Guantanamo but also an end to preventive detention.<sup>19</sup> What we have witnessed in their campaign against Guantanamo is a mirror image of

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<sup>15</sup> Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1818 (2009) (“[T]he capture, detention, and prosecution of insurgents are potential grievances insurgents can use to attract new recruits or motivate existing insurgents . . . . Guantánamo is an example. Detention policies in Afghanistan and Iraq spark little backlash or protest compared to Guantánamo, and a global insurgency analysis would predict that Guantánamo might inspire more terrorist than it holds.”).

<sup>16</sup> *Id.*

<sup>17</sup> Devon Chaffee, *The Cost of Indefinitely Kicking the Can: Why Continued “Prolonged” Detention Is No Solution To Guantánamo*, 42 CASE W. RES. J. INT’L L. 187, 189–90 (2009).

<sup>18</sup> See United Nations Global Counter-Terrorism Strategy, G.A. Res. 60/288, Annex, U.N. Doc. A/RES/60/288, at 4 (Sept. 20, 2006); see also Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, G.A. Res. 61/171, U.N. Doc. A/RES/61/171 (Mar. 1, 2007). “States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law.” *Id.* at 2. “[I]t is imperative that all States work to uphold and protect the dignity of individuals and their fundamental freedoms, as well as democratic practices and the rule of law, while countering terrorism.” *Id.* at 3. Implicit in U.N. Resolution 61/171 is the recognition that violations of human rights, humanitarian law, and the rule of law can exacerbate the fight against terrorism. See Paust, *supra* note 13, at 5213–14.

<sup>19</sup> See Suzanne Ito, *Preventive Detention Must Be Repudiated and Overturned*, ACLU (Jan. 5, 2009, 6:33 PM), <http://www.aclu.org/2009/01/05/preventive-detention-must-be-repudiated-and-overturned> (describing ACLU’s efforts to overturn preventive detention writ large, not just close Guantanamo); see also David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693 (2009); David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957 (2009).

the campaign they will mount against any changes that will make permanent a preventive detention regime.<sup>20</sup>

The final example of status quo inducing partisan discourse in the form of scholars and other advocates sowing doubt about Guantanamo specifically and preventive detention more generally is the category of authors who tangentially suggest that Guantanamo and preventive detention serves as a recruiting tool. Again, these scholars raise the argument but offer little empirical support. Nonetheless, they are successful in sowing doubt about the costs associated with a preventive detention regime. For example, one article considered the circumstances under which members of the Muslim-American community would voluntarily cooperate with police efforts to combat terrorism; in the process of gathering respondents' evaluation of current foreign and national security policy issues, the study assumed that the Guantanamo detentions played a significant role in al Qaeda propaganda.<sup>21</sup> The author did not primarily argue that Guantanamo or preventive detention is a recruiting tool for al Qaeda; rather the author accepted the argument as a fact, something that appears to be common within the anti-preventive detention policy community.<sup>22</sup>

Furthermore, many advocacy groups essentially claim: (1) Guantanamo symbolizes abuse of Muslim prisoners and serves to spur al Qaeda's terrorist recruitment in communities that identify with the victim;<sup>23</sup> and (2) the existence of Guantanamo allowed U.S. policy to be

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<sup>20</sup> See, e.g., Spencer Ackerman, *Civil Liberties Groups Oppose Obama's Plan to Close Guantanamo, Absent Serious Changes*, WASH. INDEPENDENT (Apr. 8, 2010, 12:51 PM), <http://washingtonindependent.com/81679/civil-liberties-groups-oppose-obamas-plan-to-close-gitmo-absent-serious-changes>.

<sup>21</sup> Tom R. Tyler, Stephen Schulhofer & Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 *LAW & SOC'Y REV.* 365, 378 (2010).

<sup>22</sup> See *infra* notes 130–134 (providing websites of human rights groups).

<sup>23</sup> See, e.g., KENNETH ROTH, HUMAN RIGHTS WATCH, *WORLD REPORT 2007*, at 7 (2007) (“[A]buses committed in the name of counterterrorism, [such as what happened in Guantanamo,] have only aggravated the terrorist threat. The use of torture and arbitrary detention spurs terrorist recruitment in communities that identify with the victims.”); John B. Bellinger III, Shayana Kadidal, Clifford D. May & William Yeomans, *Should Guantanamo Bay Be Closed?*, COUNCIL ON FOREIGN RELATIONS (Jan. 21, 2010), [http://www.cfr.org/publication/21247/should\\_guantanamo\\_bay\\_be\\_closed.html](http://www.cfr.org/publication/21247/should_guantanamo_bay_be_closed.html) (“[Guantanamo] has come to symbolize abuse of Muslim prisoners and serves as a powerful recruiting tool for al-Qaeda . . . . No doubt, al-Qaeda does utilize Guantanamo as a recruiting tool . . . . Guantanamo damaged our national security by tarnishing America’s standing in the world and serving as a powerful recruiting tool for terrorists . . . . [Efforts to keep Guantanamo open] are tantamount to giving Al Qaeda a major propaganda victory, as there is little the organization would want more than to continue this recruiting and propaganda boon . . . .”); *Eight Years After 9-11*, NAT’L SEC. NETWORK (Sept. 11, 2009), <http://www.nsnetwork.org/node/1404> (“[Obama’s] condemnation of torture, his pledge to close Guantanamo, and the

misconstrued as a war against Islam, which fits perfectly with bin Laden's narrative of America's contempt for Islam and Muslims.<sup>24</sup> The American Civil Liberties Union even made a video of interviews with five former Guantanamo detainees detailing their experience there, which illustrate these two claims.<sup>25</sup>

To further corroborate the claim, advocacy groups cite to prominent political individuals, military figures, and distinguished journalists who all argue that Guantanamo was a major recruiting tool for al Qaeda: President Barack Obama, 2008 Republican presidential nominee Senator John McCain, Matthew Alexander—the pseudonym of the Air Force Major and interrogator who, without using torture, extracted information that led to finding Abu Musab al-Zarqawi, Navy General Counsel Alberto Mora, and president of New America Foundation and two-time Pulitzer prize winner Steve Coll. Obama based his conclusion off of intelligence that he sees as Commander-in-Chief.<sup>26</sup> In addition, terrorist expert R.P. Eddy recognized that Obama's announcement to close Guantanamo hindered al Qaeda's ability to recruit, which is substantiated by Ayman al-Zawahri's confused, racially tinged attack on the Obama Administration.<sup>27</sup> McCain validated his stance by noting that an "al Qaeda operative in a prison camp in Iraq" told

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shutting down of secret prisons have weakened al-Qaeda's recruiting ability and improved America's image abroad.").

<sup>24</sup> See, e.g., Stephen Flynn et al., *Global War on Terror Series: The War on Terror—Are We Losing?*, COUNCIL ON FOREIGN RELATIONS (Nov. 17, 2005), [http://www.cfr.org/publication/9258/global\\_war\\_on\\_terror\\_series.html](http://www.cfr.org/publication/9258/global_war_on_terror_series.html) ("[Guantanamo confirms] bin Laden's narrative . . . claims about America's intentions, claims about American values, claims about America's contempt for Islam and Muslim have been borne out."); Daniel B. Prieto, Matthew C. Waxman & Robert McMahon, *Closure of the Guantanamo Bay Prison Camp*, COUNCIL ON FOREIGN RELATIONS (Feb. 6, 2009), [http://www.cfr.org/publication/18493/closure\\_of\\_the\\_guantanamo\\_bay\\_prison\\_camp.html](http://www.cfr.org/publication/18493/closure_of_the_guantanamo_bay_prison_camp.html) ("[Guantanamo's effects] had direct effects on our counterterrorism policies . . . in terms of serving as propaganda and an active recruitment tool for terrorists and really inflaming public opinions around the world . . . [Guantanamo] also served as an easy aid for recruitment and also served to misconstrue—or allow U.S. policy to be misconstrued as a war against Islam.").

<sup>25</sup> See Andrew Sullivan, *Justice Denied: Former Detainees Speak Out*, ATLANTIC (Nov. 3, 2009, 2:19 PM), [http://andrewsullivan.theatlantic.com/the\\_daily\\_dish/2009/11/former-detainees-speak-out.html](http://andrewsullivan.theatlantic.com/the_daily_dish/2009/11/former-detainees-speak-out.html).

<sup>26</sup> See John Aloysius Farrell, *Obama Defends Guantanamo Decisions*, GLOBALPOST (May 21, 2009, 2:54 PM), <http://www.globalpost.com/notebook/diplomacy/090521/obama-defends-guantanamo-decisions>.

<sup>27</sup> See *Experts: Al Qaeda Tape Demonstrates that It Feels Threatened by Obama Victory*, NAT'L SECURITY NETWORK (Nov. 20, 2008), <http://www.nsnetwork.org/node/1068> ("Al Qaeda recognizes that the promise of the Obama administration has already increased global goodwill and thereby undermines al Qaeda's extremist message and efforts to fundraise and recruit.").

him this information.<sup>28</sup> Alexander supported his remarks because he heard first hand from freedom fighters and Sunni Iraqis that Guantanamo was the number one reason they had decided to join al Qaeda.<sup>29</sup> Mora supported his belief with testimony from U.S. flag-rank officers claiming that Guantanamo was one of the main reasons why insurgent fighters joined al Qaeda and subsequently caused U.S. combat deaths in Iraq.<sup>30</sup> When testifying before the House Armed Services Committee, Steve Coll claimed that in order to undermine al Qaeda's efforts "to reconnect to its former political, financial, and recruiting support," the U.S. should, among other things, "[close] Guantanamo."<sup>31</sup>

The narratives described above are repeated by the media, further sowing doubts about the merits of preventive detention. For the most part, the media serves as an echo chamber for the scholarly and think tank community, making similar references and similar arguments. They essentially claim that Guantanamo and preventive detention (1) currently acts as a "centerpiece" in al Qaeda's war against America;<sup>32</sup> (2) serves as rallying symbol of cruelty for insurgent fighters to join al Qaeda;<sup>33</sup> and (3)

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<sup>28</sup> See *Cheney on the Fringe*, NAT'L SECURITY NETWORK (Aug. 31, 2009), <http://www.nsnetwork.org/node/1400> ("I think that these [enhanced] interrogations, once publicized, helped al Qaeda recruit. I got that from an al Qaeda operative in a prison camp in Iraq who told me that.").

<sup>29</sup> See *Conservatives Attack America's Legal System*, NAT'L SECURITY NETWORK (Nov. 16, 2009), <http://www.nsnetwork.org/node/1467> ("I listened time and time again to foreign fighters, and Sunni Iraqis, state that the number one reason they had decided to pick up arms and join Al Qaeda was the abuses at Abu Ghraib and the authorized torture and abuse at Guantanamo Bay . . . . Consequently it is clear that at least hundreds but more likely thousands of American lives (not to count Iraqi civilian deaths) are linked directly to the policy decisions to introduce the torture and abuse of prisoners as accepted tactics.").

<sup>30</sup> See *Guantanamo Bay Must Be Closed to Keep America Safe*, NAT'L SECURITY NETWORK (Jan. 22, 2010), <http://www.nsnetwork.org/node/1507> ("Serving U.S. flag rank officers . . . maintain that the first and second identifiable causes of U.S. combat deaths in Iraq—as judged by their effectiveness in recruiting insurgent fighters into combat—are, respectively the symbols of Abu Ghraib and Guantanamo.").

<sup>31</sup> See Steve Coll, *House Testimony: The Paradoxes of Al Qaeda*, NEW YORKER (Jan. 27, 2010), <http://www.newyorker.com/online/blogs/stevecoll/2010/01/house-testimony-the-paradoxes-of-al-qaeda.html> (providing Coll's testimony before the U.S. House of Representatives Armed Services Committee).

<sup>32</sup> See James Gordon Meek, *Gitmo Fades As 'Recruiting Tool for Al Qaeda*, N.Y. DAILY NEWS (Jan. 25, 2010, 12:36 PM), <http://www.nydailynews.com/blogs/dc/2010/01/gitmo-fades-as-recruiting-tool.html> ("It's not quite as front and center as it was during the Bush administration," said Flashpoint Intelligence terror expert Evan Kohlmann. "But Gitmo is still a centerpiece in Al Qaeda's argument that nothing has changed in the U.S. since Obama's election.").

<sup>33</sup> See, e.g., Matthew Alexander, *Torture's the Wrong Answer. There's a Smarter Way*, WASH. POST, Nov. 30, 2008, at B01 ("I learned in Iraq that the No. 1 reason foreign fighters flocked there to fight [for al Qaeda] were the abuses carried out at Abu Ghraib and

drives those “undecided into the arms of the enemy.”<sup>34</sup> One article gives hard figures, noting that Guantanamo and other counterterrorism detention facilities were used as a recruiting tool as many as thirty-two times since 2001 and four times in 2010 alone.<sup>35</sup> Another article wrote about Sarhan Hassan Wisme, an Iraqi individual testifying that his attacks of American soldiers and affiliation with al Qaeda was motivated by abuse of prisoners held in detention at Abu Ghraib.<sup>36</sup>

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Guantanamo. Our policy of torture were directly and swiftly recruiting fighters for al-Qaeda in Iraq.”); Editorial, *The Torture Report*, N.Y. TIMES, Dec. 18, 2008, at A42 (“Alberto Mora . . . told the Senate committee that ‘there are serving U.S. flag-rank officers who maintain that [main cause of] U.S. combat deaths in Iraq [was the result of] Guantanamo.”); *Guantanamo’s Shadow*, ATLANTIC, Oct. 2007, at 40, available at <http://www.theatlantic.com/magazine/archive/2007/10/guantanamo-apos-s-shadow/6212/> (“Gitmo has become a symbol for cruelty and inhumanity that is repugnant to a wide sector of the world community and a powerful tool that al Qaeda can use to damage US interest and recruit others to its cause.”); Joshua Phillip, *Guantanamo Detainees Will Be Moved to Illinois Prison*, EPOCH TIMES, Dec. 17, 2009, at A1, available at [http://epoch-archive.com/a1/en/us/sfo/2009/12-Dec/17/A1\\_200912117\\_NoCA-US.pdf](http://epoch-archive.com/a1/en/us/sfo/2009/12-Dec/17/A1_200912117_NoCA-US.pdf) (“According to [National Security Adviser James] Jones, ‘We think that by [moving Guantanamo detainees to a prison in Illinois], we are removing from terrorist organizations around the world a recruiting tool Guantanamo has come to symbolize.”); Julia Preston, *Officials See Risk in the Release of Photos and Videotapes of Iraqi Prisoner Abuse*, N.Y. TIMES, Aug. 12, 2005, at A12 (“It is probable that Al Qaeda and other groups will seize upon these images and videos as grist for their propaganda mill, which will result in, besides violent attacks, increased terrorist recruitment . . . .”); Joby Warrick, *To Combat Obama, Al-Qaeda Hurls Insults*, WASH. POST, Jan. 25, 2009, at A01.

<sup>34</sup> See, e.g., Max Fisher, *What We Can Learn from Saudi Intelligence*, ATLANTIC, (Nov. 1, 2010, 2:45 PM) <http://www.theatlantic.com/international/archive/2010/11/what-we-can-learn-from-saudi-intelligence/65518/> (“Sending a suspected terrorist to Guantanamo or Bagram risks angering his community and inspiring even more militancy.”); Charles C. Krulak & Joseph P. Hoar, *It’s Our Cage, Too*, WASH. POST, May 17, 2007, at A17 (“The torture methods . . . have nurtured the recuperative power of the enemy. The war will be won or lost not on the battlefields but in the minds of potential supporters who have not yet thrown in their lot with the enemy. If we forfeit our values by signaling that they are negotiable in situations of grave or imminent danger, we drive those undecided into the arms of the enemy.”).

<sup>35</sup> See Meek, *supra* note 32 (“Thirty-two times since 2001 and four times this year alone, senior Al Qaida in recruiting videos have used the prison at Guantanamo Bay as a clarion call to bring extremists from around the world to join their efforts.”).

<sup>36</sup> See Thomas E. Ricks, *The Insurgent Who Loved ‘Titanic,’* WASH. POST (Feb. 7, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/07/AR2009020701198.html> (“Sarhan boasted of having planted more than 200 bombs for attacks on U.S. troops. . . . [Sarhan] had started attacking the Americans in the spring of 2004, motivated by news of the American abuse of prisoners at the Abu Ghraib prison west of Baghdad. . . . In January 2007, [Sarhan] had affiliated with al Qaeda after hearing its local mufti speak about the need to unify because the Americans were retreating from Iraq . . . .”).

Numerous prominent policymakers, such as President Obama,<sup>37</sup> House Representative Jane Harman,<sup>38</sup> Senator Carl Levin,<sup>39</sup> Attorney General Eric Holder,<sup>40</sup> and former U.S. Director of National Intelligence Dennis Blair<sup>41</sup> are all on record claiming that either Guantanamo, preventive detention, or Abu Ghraib acts as a recruiting tool for al Qaeda. A memorandum made by the U.S. Department of Justice Office of the Inspector General mentioned that Guantanamo was a tool used by al Qaeda “in spreading negative views of the United States,” though it was only a brief reference.<sup>42</sup> In short, the political discourse surrounding preventive detention generally, and Guantanamo specifically, calls into question the prospects of reforming current counterterrorism detention policies by raising doubts about the merits of the status quo and any efforts to make current policies permanent.

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<sup>37</sup> See President Barack Obama, Remarks by the President on National Security (May 21, 2009) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>) (“Meanwhile, instead of serving as a tool to counter terrorism, Guantanamo became a symbol that helped al Qaeda recruit terrorists to its cause. Indeed, the existence of Guantanamo likely created more terrorists around the world than it ever detained.”).

<sup>38</sup> See President Barack Obama, Report to American People About Security Mistakes; Yemeni Threat Apparent (Jan. 9, 2010) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/1001/09/sitroom.01.html>) (“I think if we really want to do counterterrorism right, we have to eliminate one of Al Qaeda’s top recruiting tools, that’s Guantanamo Bay.”).

<sup>39</sup> See *Senate Armed Services Committee Hearing: The Origins of Aggressive Interrogation Techniques*, 110th Cong. 1 (2008) (statement of Sen. Carl Levin) available at <http://levin.senate.gov/newsroom/release.cfm?id=299242> (“[A] Qaeda and Taliban terrorists are taught to expect Americans to abuse them. They’re recruited based on false propaganda that says the United States is out to destroy Islam . . . . The abuse at Abu Ghraib was a potent recruiting tool for al Qaeda and handed al Qaeda a propaganda weapon they could use to peddle their violent ideology.”).

<sup>40</sup> See Attorney General Eric Holder, Remarks on the Closing of Guantanamo Bay (Apr. 29, 2009) (transcript available at <http://www.justice.gov/ag/speeches/2009/ag-speech-090429.html>) (“Guantanamo has come to represent a time and an approach that we want to put behind us: a disregard for our centuries-long respect for the rule of law and a go-it alone approach that alienated our allies, incited our adversaries and ultimately weakened our fight against terrorism.”).

<sup>41</sup> See *Nomination of Admiral Dennis Blair to be Director of National Intelligence: Hearing before S. Comm. on Intelligence*, 109th Cong. 7 (2009) (statement of Admiral Dennis C. Blair USN (Ret.)), available at [http://www.dni.gov/testimonies/20090122\\_testimony.pdf](http://www.dni.gov/testimonies/20090122_testimony.pdf) (“I agree with the President that the detention center at Guantanamo has become a damaging symbol to the world and that it must be closed. It is a rallying cry for terrorist recruitment and harmful to our national security.”).

<sup>42</sup> OFFICE OF THE U.S. INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, A REVIEW OF THE FBI’S INVOLVEMENT IN AND OBSERVATION OF DETAINEE INTERROGATION IN GUANTANAMO BAY, AFGHANISTAN, AND IRAQ 72 (2008), available at [www.justice.gov/oig/special/s0805/final.pdf](http://www.justice.gov/oig/special/s0805/final.pdf) (“[I]n addition to being ineffective and short-sighted, using [aggressive techniques implemented in Guantanamo] was wrong and helped al-Qaeda in spreading negative views of the United States.”).

Of course if only one side were heard in the debate over counterterrorism detention, we might see a change in policy that favored the goals of human rights groups. But supporters of preventive detention and Guantanamo are equally vocal in their assertion that Guantanamo and preventive detention are not recruiting tools. These counterarguments reinforce the status quo by bringing about an information-induced equilibrium, sowing doubt about whether weakening the current regime of counterterrorism detention is wise. While no academic has written an article claiming that preventive detention or Guantanamo does not serve as a recruitment tool, many think tanks and commentators have.

The main argument made by think tanks in support of preventive detention and in opposition to the notion that Guantanamo serves as a recruiting tool is that Guantanamo is rarely mentioned in the messages delivered by top al Qaeda leaders. Assuming that the list of collected statements and interviews from top al Qaeda leaders are representative of al Qaeda's recruiting propaganda,<sup>43</sup> those past statements reveal that top al Qaeda officials rarely mention preventive detention or Guantanamo.<sup>44</sup> Moreover, even in the messages where Guantanamo is referenced, it is incorrectly conflated with Abu Ghraib<sup>45</sup> (though this does not necessarily preclude the fact that preventive detention may act as a recruiting tool) and when mentioned it is mentioned very briefly. For example, Dr. Ayman al-Zawahiri, one of al Qaeda's top strategists, gave a twelve-page statement entitled "Nine Years After the Start of the Crusader Campaign" with four pages devoted to Pakistan, two pages to Afghanistan, nearly two to Egypt, two to Palestinians, and two to al Qaeda's prospects for victory.<sup>46</sup> In this

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<sup>43</sup> Advocates concede that there may be other messages not included in the sample and that collected statements and interviews from al Qaeda may only be partial translations. See Thomas Joscelyn, *Gitmo Is Not Al Qaeda's 'Number One Recruitment Tool,'* WKLY. STANDARD (Dec. 27, 2010, 2:24 PM), [http://www.weeklystandard.com/blogs/gitmo-not-al-qaedas-number-one-recruitment-tool\\_524997.html?page=1](http://www.weeklystandard.com/blogs/gitmo-not-al-qaedas-number-one-recruitment-tool_524997.html?page=1). However, the advocates go on to say that it is safe to assume that what was recorded in the collected statements and interviews includes most of what "al Qaeda's honchos have said publicly since January 2009." *Id.*

<sup>44</sup> See *id.* The translations for the thirty-four messages are available at *Translations/Transcriptions of Statements by al-Qaida Leadership*, NINE ELEVEN FINDING ANSWERS (NEFA) FOUNDATION, <http://nefafoundation.org/index.cfm?pageID=44> (last visited Apr. 10, 2011).

<sup>45</sup> See Benjamin Wittes, *Dan Byman on Guantanamo as Recruitment Tool*, LAWFARE (Dec. 28, 2010, 8:59 AM), <http://www.lawfareblog.com/2010/12/dan-byman-on-guantanamo-as-recruitment-tool/>.

<sup>46</sup> See Karl Rove, *Gitmo Is Not a Recruiting Tool for Terrorists*, WALL ST. J., Dec. 30, 2010, at A13. The statement can be found at *Zawahiri: 09.15.2010 Ayman al-Zawahiri Nine years After the Start of the Crusader Campaign*, WORLD ANALYSIS (Sept. 15, 2010, 6:02 AM), <http://worldanalysis.net/modules/news/article.php?storyid=1476>.

same statement, only a single sentence mentioned how the Koran was desecrated in Guantanamo, Iraq, and elsewhere.<sup>47</sup> In fact, a keyword search of all the messages by top al Qaeda leaders yielded only seven mentions of Guantanamo, while there are numerous more mentions of words like Israel/Israeli/Israelis (ninety-eight mentions), Jew/Jews (ninety-four mentions), Zionist(s) (ninety-four mentions), and other words that focus on the overall Zionist-Crusader conspiracy narrative against Muslims.<sup>48</sup>

The think tank message has not penetrated as deeply into media depictions of preventive detention as the opposition message has. In fact there are few sources directly arguing that preventive detention is not a recruiting tool. The only colorable argument could be that there will be no less recruiting by al Qaeda once Guantanamo is closed,<sup>49</sup> which suggests that Guantanamo exclusively cannot be a major recruiting tool for al Qaeda if the next detention facility and its complete absence of civil liberties violations, would be denounced by al Qaeda in the same manner. This notion reinforces the idea that a change from the status quo is unlikely if the new policy will face the same critiques as the status quo policies.

The political discourse over the merits of preventive detention and Guantanamo reinforces the status quo in counterterrorism detention policy. This is so because to bring about change, the first challenge is to convince policymakers that a problem is worthy of being addressed. This means it would be worthy of a place on the policy agenda, including time dedicated to hearings, and the support of party leaders who will make decisions about what discussions will move from committee to a floor vote. Overcoming the bias towards the status quo in counterterrorism detention requires overcoming substantial obstacles in a policy domain with few easy choices.<sup>50</sup>

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<sup>47</sup> See Rove, *supra* note 46, at A13.

<sup>48</sup> See Joscelyn, *supra* note 98, at 1. Other word mentions include: Palestine/Palestinian (200), Gaza (131), Crusader (322), Afghanistan (333), Iraq (157), Pakistan (331). *Id.* James Gordon Meek from the *New York Daily* obtained similar results: only fifty-eight out of hundreds of public statements and interviews between 2003 and 2009 contained references of al Qaeda griping about Guantanamo Bay. See Rove, *supra* note 46, at A13.

<sup>49</sup> See Andrew Cohen, *Charles and Umar Escape Guantanamo*, ATLANTIC (Jan. 13, 2010, 7:55 AM), <http://www.theatlantic.com/politics/archive/2010/01/charles-and-umar-escape-guantanamo/33292/>.

<sup>50</sup> See, e.g., FRANK R. BAUMGARTNER ET AL., *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* 247 (2009).

The first threshold is to convince gatekeepers that a problem is worthy of being taken up . . . . [T]he push forward to hearings and serious consideration will often be stymied by the lack of available space on the agenda or by outright opposition by subcommittee and committee chairs. To pass through the next gate, advocates must gain the support of the party leaders who decide what advances out of committee to a floor vote. Since this is Congress, every challenge is times two—two houses must advance legislation so that it may be enacted. It is a process full of

The discussion above highlights that policymakers and the public are aware of the problems associated with preventive detention, the potential costs, and plausible solutions. The reality is that shared information is pervasive in diffuse policy communities focused on these issues.<sup>51</sup> Interest groups are commonly aware “of the facts and figures associated with the justification for the current policy, various proposals to change it, and research or experiences . . . suggesting how any policy changes might be implemented.”<sup>52</sup> This aggregation of information, rather than prompting changes instead reinforces the status quo. Why? Because

individual policymakers typically do not have the ability single-handedly to change the collective understandings of entire policy communities. . . . [A] policy community is made up of experts, and they were not born yesterday; naïve is not the operating rule within Washington, after all. A policy community, even if it is riven by deep divisions, provides the opportunity for experts to share common information and to develop common understandings of the shape, direction, and justifications of public policy.<sup>53</sup>

Expertise on counterterrorism detention is in abundance, and most of the expert opinions probably end up cancelling each other out, there is thus little impetus for movement away from the status quo policy in any direction (e.g., a more rights protective regime or a more security protective regime).

#### B. WHAT IS U.S. COUNTERTERRORISM DETENTION POLICY?

In light of the preceding discussion of the political discourse surrounding counterterrorism detention, one may wonder how we can separate the rhetoric from the reality. If the partisan discourse is stripped away, what is U.S. detention policy? This seems like a simple question, but explaining counterterrorism detention policy may in fact be one of the most difficult quandaries in national security law and policy. Unlike the question of what rules govern criminal arrests, there is no hornbook one can turn to for quick guidelines on what U.S. policy is or should be. Thus, to explain U.S. policy, I will critically evaluate *Detention and Denial: The Case for Candor After Guantanamo*, which is the best case for detention reform in any scholarly publication.<sup>54</sup> The book, authored by Ben Wittes of the Brookings Institution, explains how there is simply no comprehensible

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resistance. Overcome the friction, and substantial policy change may follow, but it is not easy to overcome the high level of friction apparent in Washington policy making.

*Id.*

<sup>51</sup> *Id.* at 249 & ch.3.

<sup>52</sup> *Id.* at 250.

<sup>53</sup> *Id.*

<sup>54</sup> See generally WITTES, *supra* note 5.

policy behind U.S. counterterrorism detentions. Detention is a thing the U.S. government does through a patchwork of existing authorities whose defining characteristic is incoherence:

It is less a policy than a set of arrangements made in the absence of a policy. And at the core of its incoherence is its attempt to deal with a complex policy problem in the absence of clear rules. Nobody knows today exactly when it is legal to detain the enemy in counterterrorism operations, who counts as the enemy, what procedures the executive and courts must follow in evaluating detention cases, and what rights and protections the detainees must receive in the process. All of this is in flux, with different answers proposed for different facilities, different legal regimes, and different detainees. Uncertainty is the only sure thing.<sup>55</sup>

This is not to say there are no rules or boundaries delimiting this incoherence. Rather, rules abound in counterterrorism detentions, but knowing which ones apply, when they apply, and how they apply are all open questions whose answers depend on location, context, and the whims of actors in the system.

The failure of the American political system to engage seriously with the rules governing counterterrorism detention policy has placed the responsibility for defining those rules in the hands of foreign governments and unelected judges.<sup>56</sup> Wittes argues that when foreign proxies are used to house detainees, the U.S. “delegates to those countries the power to define the permissible boundaries of U.S. national security detentions. It relinquishes control over the conditions of confinement, and it also relinquishes control over the criteria for release.”<sup>57</sup> Want to know what U.S. policy governs detentions in the U.S.-built Bagram prison? Your Freedom of Information Act (FOIA) request will need to be addressed to Kabul, not D.C.<sup>58</sup>

Things are no better when it comes to detentions closer to home. Which elected official should Joe Citizen hold responsible when a released Guantanamo detainee decides to attack a shopping mall in Peoria? There is no identifiable, responsible person when judges are running the show. Instead detention of Guantanamo detainees, Wittes explains, is governed by the rules developed in the common law habeas process in the D.C. district courts and then reviewed by the D.C. Circuit Court of Appeals.<sup>59</sup> Wittes

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<sup>55</sup> *Id.* at 10, 32.

<sup>56</sup> *Id.* at 59–60.

<sup>57</sup> *Id.* at 59.

<sup>58</sup> Peter Graff, *Afghans Agree to Take Over U.S. Prison at Bagram*, REUTERS NEWS (Jan. 9, 2010, 1:42 PM), <http://www.reuters.com/article/2010/01/09/us-afghanistan-bagram-idUSTRE6081IN20100109>.

<sup>59</sup> See WITTES, *supra* note 5, at 60.

does not argue that judges are incapable of deciding detention cases,<sup>60</sup> nor does he argue that they are incapable of making rules to govern their process—rather, his point is that obfuscation has delegated this role to parties that are more constrained, less visible, and less accountable than the nation’s political leadership.<sup>61</sup> If you are upset about that mall in Peoria, your letter should not be mailed to Congress or the White House; rather, you should mail it to a judge’s chambers in D.C.

Of course, the notion that a released Guantanamo detainee may commit an act of terrorism is just an obvious, and perhaps unrealistic, cost of delegating to judges the responsibility for making rules regarding counterterrorism detentions. The bigger cost, according to Wittes, is that when these judges interpret the 2001 Authorization for the Use of Military Force (AUMF),<sup>62</sup> they are evaluating the substantive authority to detain the enemy, but “they also necessarily interpret the scope of the substantive authority to target the enemy, or, more generally, to wage war on the enemy.”<sup>63</sup> Who may be targeted and captured by soldiers, sailors, airmen, and Marines on far off battlefields will be dictated less by the orders of the Commander-in-Chief, Congress, or senior military leadership, and more by the developing case law governing a few dozen Guantanamo detainees. The fact that those cases mostly involved low-level Taliban members, that their cases were nearly a decade old, or that the evidence was not gathered with an eye towards habeas litigation under rules that would take years to develop, will not alter the binding nature of those precedents on current and future conflicts.<sup>64</sup> The Executive Branch and Congress have refused to define the rules governing *their* conflict “and the result has been that a

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<sup>60</sup> *See id.* at 60 (“What the decision does mean is that for good or ill, the rules will be written by judges through the common law process of litigating habeas corpus cases of the detainees still held at Guantanamo.”). Wittes comes close to criticizing the judges when he writes, “This body of law doesn’t look much like the law that a sensible political system would design. Indeed, I would suggest that it serves the key interests of neither the detainees nor the government.” *Id.* at 62.

<sup>61</sup> *Id.* at 91.

<sup>62</sup> S.J. Res. 23, 107th Cong. (2001).

<sup>63</sup> WITTES, *supra* note 5, at 61.

<sup>64</sup> *See id.*

[H]ow do we avoid repeating the bait-and-switch that we have engineered for ourselves? How do we avoid capturing people and justifying their initial detention based on crude intelligence, imagining ourselves to be operating within a relatively conventional law-of-war framework, and then finding our allies, our courts, and our own consciences pushing us toward applying a much higher set of standards down the road?

*Id.* at 120; *cf. id.* at 112–13 (“Those concerned primarily with security have no more reason to admire the current arrangements. . . . The most they can honestly say for the system is that it does not necessarily mean more trouble than a big bait-and switch for a declining group of people at Guantanamo . . .”).

diffuse set of actors have been groping their way toward rules in the absence of clear guidance and in the face of the need to decide large numbers of individual cases.”<sup>65</sup> This is, in a word, suboptimal. It is amazing that the executive branch allows this judicially driven uncertainty to endure.

The system is also suboptimal for detainees, because while it puts “pressure on the government to resolve detainee cases in general, adjudications are not functioning quickly enough to matter to the vast majority of individual detainees.”<sup>66</sup> Moreover, as the D.C. Circuit pointed out in *Al Maqaleh v. Gates*, only Guantanamo detainees get habeas review; the detainee at Bagram or anywhere else approximating the theater of conflict is not entitled to review.<sup>67</sup> As Wittes notes, habeas is the only opportunity detainees have to challenge their detention, “[j]udges hear the initial case. They rule, and if they rule against the detainee and the judgment withstands appeal, future detention reverts to purely a matter of executive discretion—forever.”<sup>68</sup> It seems the system is at least consistent in its suboptimality, neither the government nor detainees seem to benefit from the status quo. If a bias in favor of the status quo is the result of fear of the uncertainty regarding what change might bring about, that fear must be substantial and perhaps even irrational, because the current system is not only suboptimal in advancing the goals of detainees or the government, it is also woefully inadequate at providing certainty. Consider some of the questions that have not been resolved as a matter of U.S. counterterrorism detention policy; these are questions which should represent a great deal of uncertainty for the government and for human rights groups, and will largely be resolved by judges, without any input from *either* interest group:

“Who bears the burden of proof in these cases, and what is that burden—that is, who has to prove what?”<sup>69</sup> What are the boundaries of the President’s detention power—that is, assuming that the government can prove that a detainee is who it claims him to be, what sort of person is it lawful to detain?<sup>70</sup> “What sort of evidence can the government use?”<sup>71</sup> “How should the courts handle intelligence data or evidence that may have

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<sup>65</sup> *Id.* at 62.

<sup>66</sup> *Id.*

<sup>67</sup> See *Al Maqaleh v. Gates*, 605 F.3d 84, 87 (D.C. Cir. 2010) (reversing decision below and dismissing habeas petitions by detainees in Afghanistan, stating: “Upon review, and applying the Supreme Court decision in *Boumediene*, we determine that the district court did not have jurisdiction to consider the petitions for habeas corpus. We therefore reverse the order of the district court and order that the petitions be dismissed.”).

<sup>68</sup> WITTES, *supra* note 5, at 63.

<sup>69</sup> *Id.* at 64.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

been given involuntarily?”<sup>72</sup> Who is the “class of people subject to noncriminal detention”? Is it al Qaeda? The Taliban? Associated Forces? Supporters or substantial supporters? Functional members? Those falling under the command structure of the enemy organization? Those who provided independent support? Those who must be detained to prevent them from returning to the battlefield? Those who are likely to rejoin the enemy or pose a current threat?<sup>73</sup>

If membership is what counts for detention, when does membership end? If one is once a member are they always a member, and therefore always detainable? If the relationship can be vitiated, what does it take to vitiate it and who bears the burden of proving vitiation?<sup>74</sup> Does acting as a cooperating witness on behalf of the government count, or does it only matter if the detainee was a member of the enemy organization at the time of capture?<sup>75</sup> Must there be evidence of affirmative disassociation or merely expulsion from the organization?<sup>76</sup> Does evidence have a half-life such that “evidence that would suffice to justify detention at an earlier stage no longer suffices at the point of habeas review?” Or vice versa, does the “standard that the judges apply in habeas review theoretically apply at the point that the government acquires custody?”<sup>77</sup> These are just some of the open questions in counterterrorism detentions, illustrating the uncertainty of current policies it seems that—in counterterrorism detention policy, uncertainty abounds.<sup>78</sup>

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<sup>72</sup> *Id.* at 65.

<sup>73</sup> *Id.* at 68–69.

<sup>74</sup> *Id.* at 70.

<sup>75</sup> *Id.* at 73.

<sup>76</sup> *Id.* at 75.

<sup>77</sup> *Id.* at 70.

<sup>78</sup> Other questions include: How should hearsay be treated? Are “intelligence reports that record or summarize information provided by various sources; records and summaries of statements made by detainees during interrogation; and transcripts and summaries of statements made by detainees when appearing before [various administrative panels] admissible and probative?”

Is “reliability a necessary condition for admissibility or simply a critical factor in assessing the weight to be given to the evidence?” *Id.* at 76. “[W]hen is an interrogation sufficiently coercive to require either exclusion of a resulting statement from evidence or a significant diminution of the weight it is accorded?” *Id.* at 77. What interrogation methods will or will not produce admissible statements and how long and under what circumstances will the taint of coercive interrogations persist? *Id.* at 81. “Should allegations made by the government be treated as elements of a criminal offense, whereby a failure to prove one element means a failure of proof overall?” *Id.* at 81. Or should the court “take a more impressionistic view of the overall picture, using what the intelligence community calls the ‘mosaic theory’ of evidence?” *Id.* at 81.

The goal in recanting these questions first raised by Wittes and developed in much greater detail in *Detention and Denial* is to note the uncertainty that is *already present* in U.S. counterterrorism detention policy. Advocates who claim that they fear changing the status quo due to the uncertainty of what might result, fail to recognize that the current system is wrought with uncertainties—yet still the status quo endures.

### C. REASONS FOR POLICY DISARRAY AND THE STRENGTH OF THE STATUS QUO

U.S. counterterrorism detention policy is in disarray and the costs of this disarray have been hidden through a series of policy work-arounds that Wittes described as “shame, denial, and obfuscation.”<sup>79</sup> The U.S. detains suspected terrorists only when necessary and generally avoids that necessity by killing people (think unmanned aerial vehicles like Predator drones) or letting them go<sup>80</sup> (“catch and release”). When it is necessary to detain people, some of those detainees are prosecuted in federal courts, while others are held in theater internment facilities run by nations willing to do the dirty work of the U.S.<sup>81</sup> This policy has moral costs, security costs, and rights costs, and has created a system that is costly in the short-run and unsustainable in the long-run.<sup>82</sup>

In light of these costs, how can the status quo endure? It is not for a lack of ideas and proposed reforms. In fact, *Detention and Denial* is an example of a comprehensive retrospective review of U.S. counterterrorism detention policy, and a prospective template for reform. Much like Wittes’s prior work, it is thoughtful, incisive, stripped of partisanship, and loaded with practical solutions.<sup>83</sup> If only this were enough to bring about policy change. Unfortunately, in Washington, D.C., lots of great ideas compete for policy attention and only an appropriate alignment of events and interests can provide the window for policy change. Wittes, a veteran D.C. policy watcher, knows this and acknowledges as much when he writes, “I recognize that if our paralysis is as complete as I suggest, the book

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<sup>79</sup> WITTES, *supra* note 5, at 5.

<sup>80</sup> *Id.* at 5.

<sup>81</sup> *Id.* at 3–6; see Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

<sup>82</sup> *Id.* at 126.

<sup>83</sup> See BENJAMIN WITTES, *LAW AND THE LONG WAR* (2008); see also Stephen I. Vladeck, *The Long War, the Federal Courts, and the Necessity/Legality Paradox*, 43 U. RICH. L. REV. 893 (2009) (reviewing BENJAMIN WITTES, *LAW AND THE LONG WAR* (2008)); Curtis A. Bradley, *Terror and the Law: The Limits of Judicial Reasoning in the Post-9/11 World*, FOREIGN AFF., July 1, 2008, at 132; Gregory S. McNeal, *Please the Courts: Can Judges and Juries Win the War on Terror?*, WKLY. STANDARD, Aug. 11, 2008, at 44.

necessarily takes on something of the quality of an academic exercise—the crafting of a policy strategy for a country that prefers not to have a policy.”<sup>84</sup> Indeed, the country may prefer no policy today, but someday the U.S. may need to craft one, and when that day comes, Wittes’s work will be a starting point for reform. However, we should ask ourselves whether reform is even possible? Perhaps instead we should be pessimistic, seeing the country that, in Wittes’s words, “prefers not to have a policy?”<sup>85</sup> The policy paralysis associated with the status quo is, as I highlighted above, emboldened by limitless arguments for and against the current system.<sup>86</sup> This paralysis

serves nobody. It does not serve the military or any other component of the U.S. government that has to operate overseas. The system’s random operations make a mockery of the human rights concerns that gave rise to the very spotty judicialization of detention to date. Our current system is one whose parts interact in ridiculous and ill-considered ways that create absurd and perverse incentives. 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. The result is that it reflects no coherent policy choices . . . we continue to ignore those choices at our considerable peril.<sup>87</sup>

What might that peril be? Both the Obama and Bush Administrations released dangerous detainees, including suicide bombers and terrorist leaders.<sup>88</sup> Of course, both Administrations also released people whom they admitted were not properly detained in the first place.<sup>89</sup> It seems that peril and paralysis are linked concepts—the peril of continuing to hold an innocent person sits in equipoise with the peril of a recidivist detainee harming someone—both are plausible examples of harm that policy advocates can raise—and the elevation of such claims could reinforce

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<sup>84</sup> Wittes, *supra* note 5, at 10.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 13:

By the end of Barack Obama’s first year in office, the new president’s promise to close Guantanamo had become an albatross around his neck. . . . [T]he project itself had become controversial, with Republicans discovering an ideological commitment to Guantanamo and rallying behind it. Magnifying the ranks of the opposition was NIMBYism in Congress, where many members felt far less strongly about the underlying issues associated with detention than about the need to make sure that detainees came nowhere near their districts.

<sup>87</sup> *Id.* at 12.

<sup>88</sup> *Id.* at 2; *see also* Thomas Joscelyn, *Gitmo Recidivism Rate Soars*, WKLY. STANDARD (Dec. 7, 2010, 4:12 PM), [http://www.weeklystandard.com/blogs/gitmo-recidivism-rate-soars\\_521965.html](http://www.weeklystandard.com/blogs/gitmo-recidivism-rate-soars_521965.html); McNeal, *supra* note 83, at 44.

<sup>89</sup> Director of Nat’l Intelligence, Summary of Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba (2010), *available at* [http://www.dni.gov/electronic\\_reading\\_room/120710\\_Summary\\_of\\_the\\_Reengagement\\_of\\_Detainees\\_Formerly\\_Held\\_at\\_Guantanamo\\_Bay\\_Cuba.pdf](http://www.dni.gov/electronic_reading_room/120710_Summary_of_the_Reengagement_of_Detainees_Formerly_Held_at_Guantanamo_Bay_Cuba.pdf).

paralysis and a bias towards the status quo. When coupled with obfuscation of policy failures, hiding of policy costs, and denial of policy problems, the status quo becomes a powerful force.<sup>90</sup>

Of course, the power of the status quo that Wittes describes is emblematic of the status quo bias in nearly every area of American politics.<sup>91</sup> In these cases, a clash of interests produces a suboptimal policy outcome that some might describe as a compromise, but none would describe as a victory. What makes U.S. counterterrorism detention policy any different? Most groups involved in debates over detention policy recognize the problems with the status quo, but are unable or unwilling to advocate for change. Wittes argues that civil liberties and human rights activists have made a tactical judgment that the status quo is preferable to the uncertainty they may face if the United States decides to pass legislation governing counterterrorism detentions;<sup>92</sup> while government lawyers and members of the Bush Administration echoed these precautionary sentiments.<sup>93</sup>

The preference that groups may hold for the certain (albeit suboptimal) present over the uncertainty of change is not a concept unique to U.S. counterterrorism detention policy; rather, this preference is a regular facet of American political life.<sup>94</sup> Wittes's helpful contribution is his argument not only that U.S. policy is suboptimal, but also that it is incomplete, and therefore the status quo is uncertain for all and reform can remedy this uncertainty problem.<sup>95</sup> According to Wittes, there are entire areas of detention policy where the political branches have refused to craft rules with any degree of specificity; thus, in a crisis situation "we live with the uncertainty of not having any [rules] and fall back on whatever ill-fitting legal architecture makes itself available."<sup>96</sup> That uncertainty can't serve any side in the debate, and thus it provides an opportunity for policy change.

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<sup>90</sup> See generally WITTES, *supra* note 5, at 15, 28–30.

<sup>91</sup> See generally BAUMGARTNER ET AL., *supra* note 50; THOMAS A. BIRKLAND, *AFTER DISASTER: AGENDA SETTING, PUBLIC POLICY, AND FOCUSING EVENTS* (1997); DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* (2d ed. 1997).

<sup>92</sup> WITTES, *supra* note 5, at 111.

<sup>93</sup> *Id.*; see Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. 967, 992 (2009) (quoting JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 124–25 (2007)).

<sup>94</sup> See generally BAUMGARTNER ET AL., *supra* note 50; BIRKLAND, *supra* note 91; JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984); STONE, *supra* note 91.

<sup>95</sup> See WITTES, *supra* note 5, at 94.

<sup>96</sup> *Id.*

## D. POWER POLITICS OVER POLICY?

If human rights groups and government attorneys admit that the current system of detention is suboptimal, but argue against change because they fear the uncertainty of what legislation might bring,<sup>97</sup> that suggests that there must be adequate certainty within the current system. However, in light of Wittes's litany of open and uncertain substantive and procedural questions, one has to wonder if more than just fear of uncertainty is animating the status quo bias.

How is it possible that the government and rights groups both prefer the current system? After all, as described by Wittes, this is a system that does not serve the goals of either group, does not provide certainty regarding process or outcome, and forecloses the ability to influence and lobby about the development of that uncertain future. Something else must account for the status quo bias. One plausible explanation for this status quo bias is that political actors in general and executive branch actors in particular will tolerate the current system until such time as they *must* change the system. This perspective is best represented by the approach followed by the Bush Administration during its entire tenure. Jack Goldsmith describes how David Addington, legal counsel to Vice President Cheney, repeatedly dismissed any advice that sought to garner the support of Congress in the process of policy change.<sup>98</sup> Addington believed that the risks of a diminishment in presidential power were too high if the Executive Branch approached the Legislative Branch and was rebuffed. Thus, in his view, if a policy could be justified "on the President's sole authority," and going to Congress might limit that authority, any policy change beyond the status quo (which was an executive-controlled policy equilibrium) was something the Administration should not seek.<sup>99</sup> As a result of this resistance to change, the Administration followed a unilateral approach, which only yielded to outside pressure for change when faced with formal mandates such as Supreme Court review.<sup>100</sup> The consequential long-term undermining of policy effectiveness was left for later, to be dealt with in

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<sup>97</sup> *Id.* at 111.

<sup>98</sup> See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 124–25 (2007); see also *id.* at 76–77 (describing Addington's relationship with Vice President Cheney).

<sup>99</sup> *Id.* at 124 (describing the governing legal questions advanced by Addington "whenever someone proposed that the White House work with Congress to clear away a legal restriction or to get the legislature on board: 'Do we have the legal power to do it [on the President's sole authority]?' and 'Might Congress limit our options in ways that jeopardize American lives?'").

<sup>100</sup> See *id.* at 125 ("Whenever the Supreme Court threatened to review one of the administration's terrorism policies, Paul Clement was able to eke out small concessions from the White House."); see also McNeal, *supra* note 93.

Addington's words, "when and if it is necessary to do so."<sup>101</sup> "Do nothing until it is absolutely necessary to do something" seems to be an acceptable approach to some when it comes to counterterrorism detention policy.

A more cynical explanation may be that for interest groups, counterterrorism detention policy is more about politics than policy. For example, some commentators have claimed that it is politically unrealistic to consider prosecuting President Obama and other senior Administration officials for their counterterrorism policies, yet they believe that it is appropriate to perhaps prosecute officials at some future point in time.<sup>102</sup> Kenneth Anderson believes this suggests that the feasibility of accountability through prosecutions (the harshest form of opposition to status quo policies) is rooted in politics more than policy. He writes, "If it is politically unrealistic to consider going after Barack Obama and Harold Koh and Leon Panetta and Joe Biden, et al., and that is the reason for not pursuing criminal sanctions that follow upon criminality, well, one has to wonder when it *will* be politically realistic?"<sup>103</sup> His view is that opposition to current counterterrorism policies will likely be "politically realistic" when the administration in question is Republican rather than Democratic.<sup>104</sup> Under this cynical worldview, the time for policy change

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<sup>101</sup> *Id.* at 125–26 (explaining how Addington "focused on preventing an attack that day or that week, and not on what might happen next year or beyond"). For a general discussion of this non-conformity approach and the legitimacy costs associated with it, see McNeal, *supra* note 93, at 992.

<sup>102</sup> See David Akerson & Natalie Knowlton, *President Obama and the International Criminal Law of Successor Liability*, 37 DENV. J. INT'L L. & POL'Y 615 (2009) (arguing that President Obama may be held liable for his failure to prosecute the Bush Administration for their war crimes); Benjamin Wittes, *Is Barack Obama a Serial Killer?*, LAWFARE (Oct. 25, 2010), <http://www.lawfareblog.com/2010/10/is-barack-obama-a-serial-killer/>. Wittes quotes Mary Ellen O'Connell, a law professor and expert for the ACLU and CCR who stated, in response to his query as to whether President Obama was a serial killer who should be prosecuted:

We know that many countries have had their leadership commit very serious violations of international law with no accountability, the human rights community, international law community is committed to trying to change that, but we've had a setback over these last years and I don't expect it to happen. So I don't see any real purpose in arguing about those matters. I'm interested in going forward and getting our country into compliance with international law, and we can talk about accountability later.

*Id.* (emphasis in original).

<sup>103</sup> Kenneth Anderson, *The Mary Ellen O'Connell and Benjamin Wittes Debate on Targeted Killing and Drone Warfare*, OPINIO JURIS (Oct. 26, 2010, 12:54 PM), <http://opiniojuris.org/2010/10/26/the-mary-ellen-oconnell-and-benjamin-wittes-debate-on-targeted-killing-and-drone-warfare/>.

<sup>104</sup> *Id.*

President Palin and Vice-President Jindal are at the helm, all of a sudden many people find the situation somehow . . . different. It all seems so . . . criminal. The alleged criminals all seem so . . . prosecutable or indictable, somewhere, somehow. Despite angry assertions that the

will be shortly after the election of a president who is not ideologically aligned with human rights groups.

#### E. QUESTIONS OF LEGITIMACY

If, however, cynicism does not rule the day, and the issue is one of policy and not politics, perhaps the fundamental explanation for the lack of reform and preference for the status quo is that Wittes—who wants to make preventive detention a permanent feature of U.S. policy—believes that preventive detention is both legal and *legitimate*.<sup>105</sup> Unfortunately, many outside the U.S. and many within rights groups may not subscribe to the legitimacy of detention. In fact, no matter how persuasively Wittes makes the case that preventive detention has a long and legitimate pedigree (and I think he does make that case), his opponents may never be swayed. “Legitimacy,” say academics, “is a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.”<sup>106</sup> In many policy domains, legitimacy flows from conformity with the practices of external “legitimacy providers.”<sup>107</sup> To move from the status quo to Wittes’s preferred formalization of detention policy, and to do so in a way that would be deemed legitimate by human rights groups and allies abroad would require U.S. policy to conform to the standards in nations that do not practice preventive detention (because they view it as illegitimate).<sup>108</sup>

Herein lies the challenge for Wittes’s (and others) reform proposals—the legitimacy that comes from conformity with the principles that are

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policies are identical, a wave of law scholars produce an endless number of scholarly tomes and declarations, promptly submitted by the ACLU and CCR to courts everywhere they can find as earnest amicus briefs, that it really is different. It is very hard for me to see, as a pure political matter in the demimonde of the activist-scholar, international law advocacy community, that “politically realistic” is not simply another way of saying, “Republican administration.”

*Id.*

<sup>105</sup> See WITTES, *supra* note 83, at 33–58 (including an entire chapter dedicated to explaining the reality and legality of preventive detention in the United States); see also Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT’L SEC. J. 85 (2011), available at [http://www.harvardnsj.com/wp-content/uploads/2011/01/Vol.-2\\_Klein-Wittes\\_Final-Published-Version.pdf](http://www.harvardnsj.com/wp-content/uploads/2011/01/Vol.-2_Klein-Wittes_Final-Published-Version.pdf).

<sup>106</sup> Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 574 (1995) (noting that “over the years, social scientists have offered a number of definitions of legitimacy, with varying degrees of specificity,” some with evaluative and cognitive components); see McNeal, *supra* note 101.

<sup>107</sup> Ildio Barreto & Charles Baden-Fuller, *To Conform or to Perform? Mimetic Behaviour, Legitimacy-Based Groups and Performance Consequences*, 43 J. MGMT. STUD. 1559, 1561 (2006).

<sup>108</sup> For a discussion of conformity based legitimacy, see McNeal, *supra* note 101.

palatable to human rights groups and Europeans will necessarily be in conflict with any preventive detention regime premised upon criminal law and human rights standards. Wittes admits as much when he writes that there will be trade-offs and likely no win-wins.<sup>109</sup> This is perhaps his most critical point—the status quo is unmovable absent a crisis, one that is far off and perhaps hard for policymakers and the electorate to comprehend. He writes:

The American polity is not good at issues in which it is asked to make painful choices in the present by way of averting greater pain at some indeterminate point in the future. Few societies are. It is hard with respect to climate change and carbon emissions and with respect to national debt. And it is even harder with respect to writing rules that allow the government to deprive of liberty people that we have not yet captured—people that, we can tell ourselves, do not exist and that we will therefore never capture.<sup>110</sup>

In short, because new counterterrorism detention policies will be different from the current practices in place in other nations, a reform proposal cannot capture the attention of policymakers because almost any reform proposal will be seen as illegitimate by some. It may maximize security, or certainty, or rights, but the biggest hurdle to overcome is not those values—the values Wittes's proposals maximize—instead, the biggest hurdle is legitimacy, an amorphous value that is difficult to maximize absent conformity, and conformity is in the eye of the beholder

The legitimacy challenges outlined above are further complicated by the fact that, most policy and political actors are not as rationally calculating as Wittes seems to hope. Rather, they are satisficing, making incremental decisions based on limited data.<sup>111</sup> The policy process, when understood this way, is not a rational comprehensive process that will generate the best policy outcome, but is rather a series of “successive limited comparisons” in which actors make choices about the status quo, and the *feasible* alternatives.<sup>112</sup> In this framework, legitimacy is a key feasibility criterion, and perhaps the insurmountable obstacle facing reform minded advocates like Wittes.

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<sup>109</sup> See WITTES, *supra* note 83, at 143.

<sup>110</sup> *Id.*

<sup>111</sup> See HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION 118–20 (3d ed. 1976) (contrasting the economic and administrative approaches to uncertainty: “Whereas economic man supposedly maximizes—selects the best alternative from among all those available to him—his cousin, the administrator, satisfices—looks for a course of action that is satisfactory or “good enough”).

<sup>112</sup> Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79 (1959).

Taken together, what lessons can we learn from Wittes? His reform proposals are sensible, and as a normative matter, proper. I agree with the underlying premise upon which his case for candor rests—that detention is a necessary tool of security with a long history in American law.<sup>113</sup> I also agree with his contention that the U.S. should not put off change, shirking its responsibilities in the hope that new challenges won't overwhelm the system.<sup>114</sup> Nonetheless, as the preceding discussion highlights, reform advocates face significant challenges overcoming the bias towards the status quo.

### III. THE CASE FOR PESSIMISM

Despite my agreement with Wittes and other reformers, I believe a case for pessimism can and should be made, if for no other reason than to outline the major obstacles standing in the way of reform. The story told thus far is one of a hyper-political discourse, coupled with a counterproductive detention policy that neither serves the interests of the government nor the interests of human rights. Yet the policy endures. What accounts for the power of the status quo? The durability may be a consequence of a failure on the part of the United States both to acknowledge that problems exist and conscious efforts to hide failures. This denial has proven itself as a flexible tool for managing detentions, that is, “[i]t has given the United States a relatively stable and reasonably favorable short-term equilibrium, one in which international pressure over detention matters has declined dramatically.”<sup>115</sup> While effective in the short run, human rights and civil liberties activists on one side and government lawyers on the other side all seem to admit that a legislative policy fix would be preferable.<sup>116</sup> Denial alone though, cannot explain the status quo because, to many advocates, the time to fix detention policy is now.<sup>117</sup> Which raises the question, if the problems are as serious as some contend (and I believe they are), what explains the lack of change?

#### A. THE POWER OF THE STATUS QUO

Policy scholars have proven that the power of the status quo is a dominant feature in federal policymaking.<sup>118</sup> One way to understand the

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<sup>113</sup> See WITTES, *supra* note 5, at 33–58.

<sup>114</sup> See *id.* at 119.

<sup>115</sup> *Id.* at 109.

<sup>116</sup> *Id.* at 111 (“Many human rights and civil liberties activists, for example, acknowledge privately that in an ideal world the United States would treat these issues legislatively.”).

<sup>117</sup> See *id.* at 120.

<sup>118</sup> BAUMGARTNER ET AL., *supra* note 50, at 43 (“[F]or most issues most of the time, individual policy makers fight an uphill battle to reframe their issues. One of the most

power of the status quo is to envision it as a consequence of friction in the policymaking process. This friction prevents change from coming about, at least until the pressure for change overcomes the friction of the status quo.<sup>119</sup> Wittes admits as much when he notes that change may be unlikely until the U.S. is engaged in a conflict that overwhelms the nation's capacity to detain, either due to a mass influx of detainees or due to special categories of detainees whose intelligence value may be lost due to the inability of the U.S. to appropriately detain them.<sup>120</sup> At that point we may see pressure for change (albeit late, and at some cost). A way of understanding this in friction terms is to recognize that there is a constant undercurrent of pressure in favor of changing detention policy. The effect of that pressure may be zero, until it crosses a threshold, and over that threshold we may witness a substantial amount of policy movement. However, short of sufficient political pressure—likely prompted by the dim future painted by Wittes—I fail to see how reforms in counterterrorism policy will come about.

#### B. ATTENTION AND THE STATUS QUO

Part of the challenge in bringing about a change from the status quo is the ability to focus the attention of policymakers.<sup>121</sup> This is not to say that attention to counterterrorism detention is nonexistent, rather attention to the problem seems to be constant, but so too is information in support of and opposed to current policies. In Part II, I described how a hyper-partisan discourse surrounds counterterrorism detention policy debates, noting how arguments about Guantanamo specifically and counterterrorism detention policy generally, can lead to the status quo. Similarly, Wittes notes that human rights groups from the left have demonized preventive detention while those on the right have made Guantanamo an ideological commitment and plank in their political platform.<sup>122</sup> In this policy context it is difficult to focus the attention of policymakers, and persuasive arguments are not as new or persuasive as advocates may believe them to be. As prominent policy scholars have noted, “the problem is rarely the

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important reasons for this is that the issues are not new and the status quo policy was probably the result of substantial thought, deliberation, and compromise when it was adopted.”)

<sup>119</sup> *Id.* at 38.

<sup>120</sup> See WITTES, *supra* note 5, at 121, 136.

<sup>121</sup> BAUMGARTNER ET AL., *supra* note 50, at 246 (“Attention is perhaps the scarcest commodity in Washington, and from what we observed this makes good sense. Information is freely flowing from policy advocates within well-organized professional communities and is widely available to any interested party.”).

<sup>122</sup> WITTES, *supra* note 5, at 13.

scarcity of information, but rather its overabundance—policy makers don't know how to make sense of it all, being overwhelmed with so much information coming at them from [interest groups] on all kinds of issues.”<sup>123</sup> For detention policy, attention may be present but other priorities may seem more urgent. As this Article was entering the editorial process, the healthcare debate,<sup>124</sup> targeted killing and Predator drones in Libya,<sup>125</sup> and WikiLeaks<sup>126</sup> were the policy issues of the day, by the time this Article is in print, those issues will likely be replaced by more contemporary issues. If the status quo is to be changed, serious attention must be focused on changing it, and that can only happen with a policy window akin to the future crisis Wittes describes, and even then policy leaders must be convinced that the status quo policy is seriously, not just marginally flawed.<sup>127</sup>

### C. THE NEED TO JUSTIFY CHANGE

As articulated above, those who want to change detention policy bear the burden of proof. To move from the status quo, they must convince policymakers with limited attention that existing detention policy is so suboptimal that a new policy is justified. This is a substantial challenge, not just because people naturally resist change, or because they prefer the substance of the status quo, but also because the status quo is understandable, it is manageable, and many may fear the uncertainty and unintended consequences of changing the system.<sup>128</sup> To justify change, advocates must not only make the case to one policymaker or a handful of policymakers but must change the expectations and collective understandings of entire policy communities.<sup>129</sup>

In this context, it is important to ask who the constituency is for policy change. In counterterrorism matters, there is an entire cottage industry of national security and human rights experts whose daily existence is justified and reinforced by the status quo. For example, a central feature of the work

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<sup>123</sup> BAUMGARTNER ET AL., *supra* note 50, at 246.

<sup>124</sup> Bill Mears, *Supreme Court Won't Jump into Health Care Fray—For Now*, CNN (Apr. 25, 2011), [http://articles.cnn.com/2011-04-25/justice/scotus.healthcare.reform\\_1\\_appeals-court-affordable-care-act-health-care?\\_s=PM:CRIME](http://articles.cnn.com/2011-04-25/justice/scotus.healthcare.reform_1_appeals-court-affordable-care-act-health-care?_s=PM:CRIME).

<sup>125</sup> Martha Raddatz, *Pentagon Confirms First Predator Drone Strike in Libya*, ABC NEWS (Apr. 23, 2011), <http://abcnews.go.com/International/pentagon-confirms-predator-drone-strike-libya/story?id=13442570>.

<sup>126</sup> *The Guantanamo Papers*, NAT'L PUB. RADIO (Apr. 24, 2011), <http://www.npr.org/series/135694663/the-guantanamo-papers>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 42.

<sup>129</sup> *Id.* at 250.

the American Civil Liberties Union,<sup>130</sup> Center for Constitutional Rights,<sup>131</sup> Human Rights Watch,<sup>132</sup> Human Rights First,<sup>133</sup> Amnesty International,<sup>134</sup> and dozens of other groups is opposition to current detention policies. But unlike a traditional lobby, what constituency do these groups represent? More pointedly, are the mistakes in detention policy important enough for any individual member of Congress to take steps to change the policy? Will a member lose their seat over a failure to provide greater due process protections to detainees? Or is it more likely that they will lose their seat if they champion the cause of detainees and one of those detainees is released and kills some of his constituents? That is the political calculus facing policymakers, and in that calculus it seems difficult to justify changing detention policy absent some clear benefit to national security. Moreover, even if individual policymakers agree that the policy should be changed, they may face substantial hurdles in their attempts to convince Congressional leaders (who drive the legislative agenda) that the policy should be overhauled.<sup>135</sup> The power of the status quo is substantial and perhaps one of its most enduring features is the ability to “kick the can down the road.” As policy scholars have noted, “[t]he most important reason for the endurance of the status quo is that power is divided within

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<sup>130</sup> *Illegal Detentions in the War on Terror*, ACLU, <http://www.aclu.org/indefinitedetention/> (last visited Apr. 10, 2011) (dedicating an entire special webpage to the topic of counterterrorism detention).

<sup>131</sup> *Illegal Detentions and Guantanamo*, CTR. FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/illegal-detentions-and-guantanamo> (last visited Apr. 10, 2011) (listing detention and Guantanamo as an issue in which “the CCR has led the legal battle over Guantanamo for over eight years”).

<sup>132</sup> *Guantanamo*, HUMAN RIGHTS WATCH, <http://www.hrw.org/en/category/topic/counterterrorism/guantanamo> (last visited Apr. 10, 2011) (dedicating a section of their webpage to the topic of Guantanamo and counterterrorism detention).

<sup>133</sup> *The Case to Close Guantanamo*, HUMAN RIGHTS FIRST, <http://www.humanrightsfirst.org/our-work/law-and-security/closegitmo/about/> (last visited Apr. 10, 2011) (featuring a petition and a section of their website dedicated to closing Guantanamo and claiming that “Guantanamo continues to be Al Qaeda’s top recruiting too”).

<sup>134</sup> *Guantanamo and Illegal U.S. Detentions*, AMNESTY INT’L, <http://www.amnestyusa.org/counter-terror-withjustice/guantanamo/page.do?id=1351079> (last visited Apr. 10, 2011) (featuring a section of their webpage dedicated to bringing about an end to counterterrorism detention and Guantanamo).

<sup>135</sup> BAUMGARTNER ET AL., *supra* note 50, at 43.

Even if policy makers recognize that the policy is imperfect or the result of an error . . . it may still be a hard sell to convince others, especially those in leadership positions, that the current policy is working so badly that it must be overhauled. This threshold effect means that the vast majority of policies do not change at all. . . . Yet for most issues most of the time, individual policy makers fight an uphill battle to reframe their issues.

*Id.*

the American system and attention is limited. Because power is fragmented, many political actors must come together if policy change is to be made.”<sup>136</sup> If the politics since September 11, 2001 are an indication, the prospects for groups to come together on counterterrorism policy and justify change to policymakers are fairly dim.

#### IV. CONCLUSION

Taken together, the factors discussed above highlight how counterterrorism detention policy is biased towards the status quo due to an information-induced equilibrium which has created a context in which the costs of reform exceed the benefits of the status quo. The status quo is reinforced by the need to justify changes, the lack of focused attention to detention policy, and a hyper-politicized policy context in which change seems impossible.

Both sides in the counterterrorism debate are adequately informed about the defects in the current system and the ways to remedy those defects, yet they are unwilling to work for policy reform. The reasons for this are in part systemic and in part structural. Another reason is that the power of the status quo when balanced against the uncertainty of change is a powerful force in policy development. Moreover, the lack of a natural constituency for policy change means that reform proposals do not have an advocate willing to make the case to other policy leaders. These defects should suggest pessimism regarding the prospects for reform of counterterrorism detention policy.

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<sup>136</sup> *Id.* at 43–44.