
Introduction

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

U.S. counterterrorism policy has a bit of Agent Kujan’s Keyser Söze problem. The more successfully our forces take on the enemy, the less people believe that the Devil really exists—at least as an urgent public policy problem requiring the sort of tough measures that challenge other interests and values. The longer the United States goes without suffering a mass casualty attack on the homeland, the less apt people are to believe that al Qaeda and its affiliates and offshoots really pose a lethal threat, that September 11 was more than a lucky strike, that terrorism poses challenges that we cannot address through conventional law enforcement means alone, or that the problem ranks as high as other pressing

challenges of the moment—challenges that, unlike al Qaeda, visibly threaten harm on a daily basis. Oil spills, job losses, the national debt, China's rise, and North Korea's saber rattling are all visible with the naked eye. We do not have the option of disbelief. Yet the more effectively we conduct counterterrorism, the more plausible disbelief becomes and the more uncomfortable we grow with policies like noncriminal detention, aggressive interrogation, and extraordinary rendition. The more we convince ourselves that the Devil doesn't really exist, the less willing we are to use those tools, and we begin reining them in or eschewing them entirely. And we let the Devil walk out of the room.

In the case of detention, the subject of this volume, I mean that rather literally. Of the nearly 800 men that the U.S. military brought to its detention facility at Guantánamo Bay, Cuba, as combatants in the war on terror, fewer than 180 remained in U.S. custody as of the summer of 2010. Under the administrations of George W. Bush and Barack Obama alike, we have willingly let dangerous people walk out of the room. Most of them have proven to be low-level nonentities who go home and demobilize. Some have been innocent, detained in error. Some, however, have turned out to be if not quite master criminals, certainly people whose release proves a far greater evil than their detention ever did. We have released future suicide bombers and terrorist leaders. And there have been disappearing acts too. Nobody knows at this stage whether we will come to see the number of such individuals as a manageable and acceptable cost of reducing the U.S. detention rate or whether we will come to see our willingness to let large numbers of suspects walk out the door as a folly akin to Agent Kujan's.

Ironically, it is not just the Devil who is trying to convince the world—and us—that he doesn't exist. We are playing something of a similar game with some of those very counterterrorism policies, which—as a result of bad experiences, complacency, and the passage of time—have become embarrassing. We have learned

that detention infuriates people around the world, creates difficult legal problems, and troubles our collective conscience. Yet finding ourselves unable to abolish it entirely and unwilling to face the many troubling questions associated with reforming it, we have chosen denial and obfuscation instead: we pretend that noncriminal detention doesn't exist or that we're phasing it out. In other words, even as the Devil is conning us into believing that he no longer exists, we have begun trying to con the world—and ourselves—into believing that we are no longer detaining him.

The Western world does not believe in detention. Even when Western nations need detention, they do not believe in it or want to acknowledge it, and so, over the years, they have developed elaborate systems for pretending that they do not engage in it. The main vehicle for the West's pretense has been us, the United States; in more recent years, the Afghan government has played an increasingly important role in helping the West pretend. None of the United States' major coalition partners in Afghanistan engages in protracted detentions. But then again, why would they? The United States does it for them. While U.S. forces have the authority to hold the Taliban or al Qaeda operatives that they capture, coalition forces do not. Under standard coalition procedures, they either turn detainees over to the Afghan criminal justice system within ninety-six hours of capture or they release them. The result is that, in practical terms, U.S. detention operations and Afghan prosecutions function on behalf of the coalition as a whole. Given that the United States is far more secure from terrorism than is Europe, it seems highly likely that U.S. detention operations have done more—probably much more—to protect European security than U.S. security. Yet not only have European countries refused to participate in detention operations, they also have become the principal critics of U.S. detention operations.

This peculiar arrangement—under which the United States conducts detentions on behalf of the West as a whole while our European allies refuse to participate in those operations in any

meaningful way and energetically criticize them besides—mirrors the larger relationship between the United States and Europe on security matters. It is part of a broader pattern of European free-riding on the U.S. security umbrella. European countries enjoy all of the benefits of a robust detention policy and incur none of the costs. The United States neutralizes dangerous enemies who pose a threat to both European forces in the field and European civilians at home. At the same time, Europe washes its hands of a policy that would raise political hackles at home—just as it does in the United States—and European officials neatly insulate themselves from the very difficult policy problems associated with detention. Indeed, they can publicly take the high road vis-à-vis the United States and pretend to maintain a pure law enforcement model for conducting counterterrorism operations. It is an ideal detention arrangement for a public that doesn't believe in detention.

We should not wax too contemptuous, however, for we are fast becoming the new Europeans. Beginning under the last administration and more decisively under the current one, the United States has moved to rejoin the Western consensus that detention should be conducted out of view and preferably by proxies. Indeed, U.S. detention policy is moving exactly in the direction of this obfuscatory model. The announcement, with great fanfare, of the closure of Guantánamo but not of the less visible detention facility at the Bagram air base in Afghanistan is only the most dramatic example of the embrace of obfuscation, denial, and hypocrisy. Both the Bush and Obama administrations had opportunities to enshrine U.S. detention policy in law—a move that would have legitimized detention by stating clearly the circumstances under which Congress regards it as appropriate and will publicly stand behind it. Yet both passed up the chance. Significantly, the Obama administration did so to loud cheers from its political base. Moreover, the United States increasingly relies

on Afghans and other foreign proxies to handle our detentions in a fashion that closely mirrors the way that Europeans have long relied on the United States.

But in keeping our detentions out of sight, the United States has a big problem that Europe does not have: We don't have an America that can both do our dirty work and absorb our simultaneous criticism to ease our own consciences. While we can pawn off some detainees on local proxies, there is no extrinsic power whose detention needs entirely subsume our own and who therefore will serve all of our detention needs so that we don't have to—even while we complain about it in public. Europe can have a no-detention policy because it knows that the United States will pick up the slack. Nobody, however, will pick up enough of our slack to allow us the same luxury.

We can minimize detention. Through a combination of prosecution, release, proxies, and Predator attacks, we can keep the number of detainees small, at least for now. But at the end of the day, the United States cannot avoid detention entirely, not even under the Obama administration. The Obama administration itself has come to understand that. To protect U.S. security and the security of its allies, the United States simply has to maintain some detention capacity in a world that doesn't believe in the project of detention anymore.

Unsurprisingly, developing a detention policy for such a world turns out to be rather hard. Indeed, the goal probably is not achievable. That point is not yet obvious. On the surface, after all, shame, denial, and obfuscation seem to be serving the United States rather well at present. U.S. forces today are detaining people only when absolutely necessary and avoiding detention through both over-aggressiveness (killing) and under-aggressiveness (taking risks by letting people go). They also are conducting detentions by proxy whenever possible. And when proxies cannot do the job and the United States must detain adversaries itself,

it keeps them out of sight: through internment in the theater of operations rather than anything closer to home, Bagram rather than Guantánamo.

For now, at least, this peculiar system seems to be working passably—if less than straightforwardly. The number of people in U.S. detention has been shrinking dramatically since U.S. forces began turning huge numbers of Iraqi detainees over to the Iraqi government, and international pressure on the United States over the issue has declined commensurately. All that has happened without great apparent cost. While some former detainees have presented nontrivial security threats, many have demobilized, proving that whatever risk they posed was manageable by means other than detention. New captures, at least of major terrorist figures, are being handled relatively smoothly through the American criminal justice apparatus or by letting other countries hold the keys to their cells. In the short term, it's hard to see the costs to the United States of its emerging policy of minimizing detention while shamefacedly hiding the residue of Bush-era policies that embroiled the country in controversy.

Yet those costs, I argue, are nontrivial even now and at some point will become acute. As a preliminary matter, there are moral costs to allowing detentions to take place at the hands of disorganized and often brutal local proxies rather than taking responsibility for them ourselves—all the more when a Predator strike obviates a capture entirely. For those not moved by such concerns, there is also a huge cost in terms of lost intelligence to operations that presumptively employ lethal force rather than seek to capture those targeted. Predator drones destroy not only the people that they kill but their intelligence-rich surroundings as well. That is a cost that the public does not see but nonetheless does pay.

A more fundamental point is that a policy based on obfuscation will work only as long as the number of new detainees continues to decline and as long as we have some regional lackey on which to offload detainees. If, all of a sudden, the United States

once again begins capturing people by the hundreds and thousands, as it did at the outset of combat operations in Afghanistan and Iraq, it will no longer be able to sustain the fiction that it is getting out of the detention business.

In other words, while circumstances today may hide the costs, they will not do so forever. The longer we insist on a policy based on denial, the greater the political and legal dissonance that will arise when we can no longer keep detention in the shadows. Refusing to defend a tool publicly has the effect of accepting its illegitimacy, and that necessarily induces a crisis when one suddenly needs to use that tool robustly. Using the tool quietly along the way to that point, meanwhile, is a recipe for constant political tension, as the weight of the system's hypocrisy piles up on judges, legislators, allies, and the public at large. We should not defer until we need a detention system the hard questions that inevitably come up in establishing one.

There is, of course, an alternative—but it's an alternative that cuts completely against the direction in which U.S. detention policy has been moving. That alternative is candor—to acknowledge that we are in fact holding both the Devil and many others besides, some of whom may be innocent, some of whom are dangerous cannon fodder, and some of whose intentions and capabilities we just can't determine with any confidence.

This is a book about candor in an arena in which the siren song of denial is loud, omnipresent, and almost infinitely seductive. It is a book about the attractions of the Western consensus that detention is disreputable, a matter of shame rather than a legitimate tool of wartime statecraft. And it is a book about the ultimate necessity of resisting that consensus and facing directly the true needs of the United States in this arena.

I do not mean to suggest that the United States should flaunt detention, use it unnecessarily, boast about it, or needlessly antagonize the allies, domestic political forces, and federal judges whom detention discomforts. That was the style of the early Bush

administration, and it did incalculable damage to the government's long-term capacity to use detention as a tool. Being candid about detention is not the same thing as triumphalism. It is not taking pride in capturing and holding the enemy. It is not making a series of bombastic assertions that our detention screening never fails, or that everyone we catch is the "worst of the worst," or that our holding someone is evidence enough of his belligerency. Being candid about detention is emphatically not equating non-criminal detention with toughness to distinguish its proponents from the supposedly weak-kneed advocates of a criminal justice approach. Being candid about detention is not machismo.

It is instead acknowledging that detention is one among many important coercive tools in the U.S. toolbox and that it has a legitimate place in a global struggle against terrorist groups in which military power continues to play a front-and-center role. Candor is the refusal to bargain away detention's legitimacy or to conduct it in the shadows in shame. It is the insistence that detention of various sorts requires clearer rules. It is the frank acceptance that the enemy's refusal to fight according to civilized norms of combat will inevitably augment the error rates associated with both detentions and releases, for which we, not the enemy, will bear responsibility. In other words, candor involves a certain mature acknowledgment that adjudicating detentions is a complex human decisionmaking process that will inevitably fail some of the time, and that releasing people from detention is also a complex human decisionmaking process that will inevitably fail some of the time. It is the acknowledgment that we will detain some people whose detentions we will come to regret and that we will free some people whose releases we will come to regret. Sometimes the hapless con man will turn out to be just a hapless con man, and sometimes the hapless con man will turn out to be the Devil, who convinced us he did not exist. A policy based on candor would begin with these uncomfortable truths and would deal with them up front, not by hiding them.

Candor requires a serious societal conversation about detention—the very thing that we have been striving so long to avoid and that we make impossible when we pretend that we do not engage in detention. It requires us to make hard prospective choices about the allocation of risk: Are we more afraid of relatively broad powers of detention, which may result in the erroneous deprivation of people’s liberty and serve as a recruitment tool for the enemy, or of relatively restrictive rules, which may free members of the enemy? Are we more afraid of the injustice of erroneous detention or of the violence that may result from erroneous release? Candor requires us to make those judgments in the knowledge that there will be costs, and it requires us not to feign surprise at the costs when it’s time to pay. These are judgments that we should not be delegating to our court system—let alone subcontracting to the Afghan and Iraqi governments.

Candor also requires that we stop making indefensible claims regarding the security benefits that detention can bring. We cannot detain our way to security, and moving small numbers of detainees to the United States will not pose security risks to American communities. There is nothing magically valuable about the facility at Guantánamo Bay.

Candor is hard, and the political economy of candor disfavors its sudden emergence. The systemic obstacles to a more honest discussion of detention are enormous. Neither political party’s base wants a forthright discussion of the subject, and both spend huge quantities of money polarizing the debate. No interest group represents candor. Nobody litigates on its behalf. Candor does not fit on a bumper sticker. Indeed, it is hard today to envision the mechanism by which the United States might move toward a more honest discussion of detention—at least until a new wave of captures some day necessitates it. Our inability to face the subject now will make our task then all the more difficult.

My purpose in these pages is both to argue for actively taking responsibility for our detention choices and to map out the

contours of a more candid, morally serious approach to detention. I recognize that if our paralysis is as complete as I suggest, the book 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. I have written it because I dissent from this consensus; I object to the consensus; and I disrespect the consensus. If only for the sake of recording that dissent and disrespect and because I believe that denial will ultimately disserve us and that we will have no choice but to face the subject squarely, I offer it as an alternative view.

Toward that end, in the first chapter, I begin with an examination of our current detention policy—its content, its message, and its ultimate incoherence—and I attempt to illuminate both the many ways in which we have contrived to hide and deny detention and the perverse consequences of such a policy. Our denial, I argue, has been bipartisan—it began during the last administration, not the current one—and it has led us to an equilibrium that is easy to confuse with a stable long-term resolution of the detention problems that the country first confronted in the aftermath of September 11. But that equilibrium is, I argue, a mirage, a creature of circumstances unlikely to persist forever.

In the second chapter, I look at both the myth and the reality of preventive detention in U.S. history and law. The practice has not been nearly so frowned upon as is commonly imagined but has instead been sanctioned in a range of areas, unsentimentally and without apology. That point is important because a common argument against establishing detention rules in law is that doing so would, for the first time in U.S. history, legitimize preventive detention—a practice that our constitutional traditions supposedly strongly condemn. But that condemnation, I seek to show, is a myth, and the reality is rather more prosaic: American law countenances preventive detention when society regards it as truly necessary and when legislatures design laws carefully in order to avoid authorizing detention that is not truly necessary. Properly

understood, the historical and contemporary approach of American law to preventive detention should liberate, as well as constrain, policymakers; specifically, it should free them to consider carefully crafted detention policies that address real security needs and include appropriate due process safeguards against error.

That sort of system design is, of course, precisely what is *not* found in the context of counterterrorism operations today. In the third chapter, having argued for the basic congruence between such an approach to counterterrorism detention and other types of preventive detention, I turn to the current U.S. system for rule-making in counterterrorism detentions: the Guantánamo habeas corpus cases. I argue both that these cases are creating muddled rules and that they address, in any event, only a narrow range of the important detention questions that the United States faces. They are, for both reasons, an inadequate mechanism for confronting the country's long-term detention challenges.

In the fourth chapter, I look at two key scenarios that any approach to detention based on obfuscation and denial will necessarily fail to address: an acute unfolding terrorist plot—like the case of would-be Christmas bomber Umar Farouk Abdulmutallab and the more recent Times Square bombing attempt—and a situation in which U.S. forces once again begin detaining large numbers of low- to mid-level enemy fighters without having a proxy power on which to unload them. Failure to forge a coherent detention policy proactively to deal with such scenarios, I argue, will result in political and legal controversy when they inevitably eventually occur and will leave U.S. forces and law enforcement agencies without legal certainty regarding how they should be handled.

Finally, in the last chapter, I attempt to imagine what a policy based on candor would look like, arguing that it would involve setting clear rules for several distinct types of detainees—rules based not on where we capture and hold them but on the character of the detainees themselves. In particular, I identify four specific legislative tasks that Congress must take on if it is to devise a

coherent policy to regulate the U.S. system of detention, a system that the country cannot avoid developing.

I wish, in short, to argue a simple thesis: Our current stalemate over detention 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 operation makes 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. My modest argument here is that we continue to ignore those choices at our considerable peril.