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DETENTION DEBATES

Deborah N. Pearlstein*


INTRODUCTION

Since the United States began detaining people in efforts it has characterized, with greater and lesser accuracy, as part of global counterterrorism operations, U.S. detention programs have spawned more than 200 different lawsuits producing 6 Supreme Court decisions,1 4 major pieces of legislation,2 at least 7 executive orders across 2 presidential administrations,3 more than 100 books,4 231 law review articles (counting only those with the word “Guantanamo” in the title),5 dozens of reports by nongovernmental organizations,6 and countless news and analysis articles from media outlets in and out of the mainstream.7 For those in the academic and policy communities who have followed these debates in any detail, much of Benjamin Wittes’s Detention and Denial8 will sound familiar. You will recognize many of its

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4. A search on Amazon.com for the word “Guantanamo” yielded this figure.

5. A search on Westlaw for law review articles with the word “Guantanamo” in the title yielded this figure.


8. Benjamin Wittes is a Senior Fellow in Governance Studies, Brookings Institution.
arguments, recapitulated at times near verbatim, from Wittes’s prior works. You will understand why, despite its relatively recent publication date, events occurring since publication—in and out of the courts—have inevitably eclipsed elements of both its descriptive and prescriptive accounts. At the same time, you will be perhaps surprised to discover that the greatest problem in U.S. detention policy in the past decade has been neither its legality nor its wisdom but rather—mammoth volumes of litigation, legislation, and literary attention notwithstanding—that “we pretend that we do not engage in detention” (p. 9).

Although one wishes regularly for some greater definition of precisely which “we” Wittes means, he is undoubtedly right that debates about U.S. detention policy in the past decade have been beset by a kind of irrationality unfortunately familiar in democratic discourse on matters of national security. Politicians, for example, unrealistically insist that any detention regime be foolproof, or stoke fears that having any terrorist suspect held on U.S. soil poses an unmanageable security risk (pp. 8–9). But Wittes’s book neither sheds new light on the causes underlying such unfortunate features of democratic debate nor analyzes how one might better structure decisionmaking on such fraught questions of law and security. Indeed, his criticisms of the political process on these issues are followed paradoxically by a call for greater congressional engagement. Instead, Detention and Denial is better taken as a version of Wittes’s argument for why the current system of rules the United States has for detaining terrorist suspects fails substantively to meet our policy needs.

9. Compare p. 2 (“The more we convince ourselves that the Devil doesn’t really exist, the less willing we are to use those tools [such as non-criminal detention] . . . “), with Benjamin Wittes, Obfuscation and Candor: Reforming Detention in a World in Denial, HOOVER INST. 1 (2010), http://media.hoover.org/documents/FutureChallenges_Wittes.pdf (“The more successful [counterterrorism] is, the less people believe that the Devil really exists.”).

10. Most significant among these was the December 2011 passage of the National Defense Authorization Act (“NDAA”), Pub. L. No. 111-383, 124 Stat. 4137, which includes a number of detention-related provisions. The book was also published before, for example, President Obama issued an executive order establishing an administrative system of ongoing, periodic review for Guantanamo detainees who the habeas courts have determined are lawfully detained under statutory authorization. Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011). Wittes’s book at one point criticizes the review of Guantanamo detainees’ cases through federal habeas corpus on the grounds that once the courts rule against a detainee, there is no additional “bite at the apple” to challenge detention. P. 63.

11. One is reminded helplessly of Alvy Singer’s line from Annie Hall: “There’s an old joke . . . two elderly women are at a Catskill mountain resort, and one of ‘em says, ‘Boy, the food at this place is really terrible.’ The other one says, ‘Yeah, I know; and such small portions.’” ANNIE HALL (MGM 1977).

12. Given Wittes’s less than favorable reaction to key elements of the NDAA, and his recognition of the various issues his book identifies that the NDAA leaves unaddressed, it is perhaps fair to imagine that he continues to support additional and/or corrective legislation. See, e.g., Benjamin Wittes, NDAA FAQ: A Guide for the Perplexed, LAWFARE (Dec. 19, 2011, 3:31 PM), http://www.lawfareblog.com/2011/12/ndaa-faq-a-guide-for-the-perplexed/ [hereinafter Wittes, NDAA FAQ] (noting that some of the NDAA provisions are “deeply troubling” and “in some ways make things worse”); see also Benjamin Wittes, Is the Conference Report
In this respect, the book is of certain utility for the general audience at which Wittes aims. As discussed as it has been, the topic of how to detain terrorist suspects remains undeniably salient. While the number of detainees held in U.S. custody worldwide has clearly declined since its post-September 11 height, as Wittes notes (p. 6), litigation has continued over questions of who may be detained and under what circumstances, and legislation regarding the Guantanamo detainees in particular has become a perennial feature of the congressional calendar. Beyond the issue of what to do with the men the United States currently holds, there of course remains the possibility that the United States will in the future engage in operations—like foreign wars—that demand a detention program of some kind. What should we be doing now to avoid future mistakes?

Such questions alone make it worth understanding why the book’s aspiration to make the case in favor of new legislated “preventive” detention authority remains unfulfilled. As noted in the examples that follow, Detention and Denial suffers in part from basic errors of persuasive argumentation: substitution of straw men for opposing arguments of greater force and meaning; reliance on assertions, without footnote or textual example, of key elements of his policy case that are both susceptible of empirical demonstration and deeply subject to dispute; and an inadequate account of the law, particularly international law, he otherwise aims to critique. A greater problem is the largely unexamined expectations of democratic governance that Wittes assumes. While targeting both political branches for their irrationality and cowardice in failing to address key questions of detention in a forthright manner, Wittes expresses the least hope in the capacities of the courts—the only branch, in the book’s account, that has been compelled to provide answers in any degree of detail to many of the questions of detention long outstanding. Instead, Wittes writes in favor of replacing general legislation authorizing military detention, subject to executive and judicial interpretation, with more specific legislation authorizing detention, subject to the same process of post hoc challenge and interpretation. What feature of the interbranch process does Wittes believe will lead this path to produce a more rational policy than the current policy he condemns? The book offers no clear answer.


contrasting the account Wittes presents with an alternative analysis of the
fault lines that remain on questions of detention law and policy. Part II then
turns to Wittes’s policy prescriptions, focusing in particular on his assess-
ment of the costs of retaining the status quo as a way forward. Part III
finally examines the assumptions of institutional competence that underlie
Wittes’s insistence upon legislative rather than judicial resolution of remain-
ing detention dilemmas. With these assumptions exposed, this Review
suggests that such structural expectations cannot bear the weight that Wittes
asks of them.

I. ASSESSING THE CURRENT STATE OF AFFAIRS

To understand why Wittes believes “we” are in a state of denial about
the nature of and need for detention policy, it is necessary to know some-
thing of the evolution of that policy over the past decade. The United States
began large-scale military detention operations (and a smaller-scale
intelligence agency detention program) after the attacks of September 11,
2001.\footnote{See generally Lawyers Comm. for Human Rights, Assessing the New Normal:
Liberty and Security for the Post-September 11 United States 49–72 (2003), available at
The vast majority of those detained in this system in the years just
after the attacks were captured in connection with hostilities in Afghanistan
following the U.S. invasion in late 2001. Some of these detainees were
seized by the United States or its allies; others were turned over to U.S.
troops by local forces with a variety of motives.\footnote{See id. at 53–54.}

Although the United States had repeatedly engaged in wartime detention
operations during its history,\footnote{See Jennifer K. Elsea, Cong. Research Serv., RL 31367, Treatment of “Bat-
tlefield Detainees” in the War on Terrorism 28–29 (2007) (discussing historical U.S.
practice regarding prisoner of war status); Gary D. Solis, The Law of Armed Conflict:
International Humanitarian Law in War 186–249 (2010) (discussing individual battle-
field status with historical examples of detention).} and had long since incorporated into Army
regulations the Geneva Conventions’ relatively modest restrictions on such
detentions,\footnote{Dept of the Army, Navy, Air Force & Marine Corps, Enemy Prisoners of
War, Retained Personnel, Civilian Internees and Other Detainees (Army Regulation
190-8, OPNAVINST 3461.6, AFJ 31-304, MCO 3461.1) (1997), available at
nor al-Qaeda detainees would be afforded Geneva protections, and in partic-
ular that the armed forces of the Taliban government would not be entitled
to the privileged status of prisoner of war (“POW”).\footnote{See Memorandum from Alberto R. Gonzales to the President (Jan. 25, 2002), re-
printed in The Torture Papers: The Road to Abu Ghraib 118 (Karen J. Greenberg & Joshua L. Dratel eds., 2005). The memoranda on the topic exchanged among administration
officials focused on the applicability of the Third Geneva Convention regarding the treatment
did not address the potential applicability of the Fourth Geneva Convention, see Geneva Con-
}
quences of this decision, administrative hearings to determine the status of captured individuals—hearings mandated by Article 5 of the Third Geneva Convention in the event of any doubt regarding a detainee's status, implemented through Army regulations, and conducted regularly in previous conflicts—were abandoned. The United States quickly came to hold thousands of prisoners in Afghanistan, a number of whom it began off-loading to the U.S. Naval Base at Guantanamo Bay for detention and interrogation. The Guantanamo population itself was soon augmented by a handful of detainees seized in Europe, Africa, and Asia, far from the Afghan battlefield. As later became apparent, the detainees' varied origins and the general absence of standardized assessments of their identity in the field made determining who exactly the United States had in its custody and why they were being held wholly unclear in a large number of cases.

Compounding the uncertainty arising from the legal and operational novelty of detention procedures was the broad scope of detention authority the administration sought to assert. The international law of armed conflict (also known as international humanitarian law—"IHL"—or the law of war) clearly contemplates military detentions in situations of war between states or occupation of one state by another. Although less well-developed, IHL also has rules governing the conduct of armed conflicts between state and
nonstate actors, a situation that had commonly arisen in civil wars and insurgencies pursued in the territory of a party to the Geneva Conventions. After September 11, administration lawyers asserted that the United States was in an armed conflict that was regulated by the rules of neither of those models. Instead, they described a situation of global armed conflict between a state and several nonstate actors, not limited to any particular geographic territory. And it asserted the authority to detain suspected “enemy combatants” in that conflict as long as the United States considered itself involved in an armed conflict of this nature. The Bush Administration defined the term “enemy combatant” variously depending on the context. Broadly, the term seemed to contemplate not only armed fighters shooting at U.S. troops in Afghanistan but also associates or supporters of terrorist groups, as well as individuals suspected of participating in active terrorist plots, whether seized in Bangkok, Bosnia, or Chicago. The administration contended that the president’s power under Article II of the Constitution was the only affirmative font of authority needed to render such detentions lawful, that congressional authorization was unnecessary, and that fully independent


25. See Memorandum from Alberto R. Gonzales to the President, supra note 19.

26. Justice O’Connor, writing for herself and three others, stated as follows:

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as “enemy combatants.” There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such.


27. See, e.g., Brief for the Respondents at 3, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696) (describing determination of “enemy combatant” status as based on whether individual “was part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States” (internal quotation marks omitted)) (quoting Fact Sheet: Guantanamo Detainees, DEP’T OF DEF., available at http://www.defenselink.mil/news/Feb2004/d20040220det.pdf). A brief for the petitioner in Rumsfeld v. Padilla quoted a presidential finding that U.S. citizen Jose Padilla, seized in Chicago, was properly designated an “enemy combatant” for the following reasons:

[Padilla was] closely associated with al Qaeda, an international terrorist organization with which the United States is at war; ... engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States; ... possess[ed] in- telligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda; ... [and] represent[ed] a continuing, present and grave danger to the national security of the United States.

Brief for the Petitioner at 4, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027) (internal quotation marks omitted); see also id. at 14 (“[T]he long-settled authority of the Commander in Chief to seize and detain enemy combatants is not limited to aliens or foreign battlefields and is fully applicable in the circumstances of this case”).
judicial review would be an impermissible intrusion on presidential power. As enemy combatant detainees held at Guantanamo Bay and in the United States filed suits in U.S. federal court challenging the legality of their detention, they pressed questions of how broad the armed conflict was, who exactly could be detained within it, and what process they were to be afforded to challenge their status. As of early 2004, all of these questions were unsettled.

In the years since then, as the number of detainees in U.S. custody has shrunk, the law governing their detention has developed considerably. As part of the negotiated U.S. withdrawal from Iraq, the United States was required to transfer control of detention operations there to the Iraqi government by July 15, 2010. The population of detainees at Guantanamo has also fallen over time, from close to 800 detainees in 2002 to a population of 173 in 2011. Shortly after his election, President Obama announced the discontinuation of the putatively secret Central Intelligence Agency-run detention program in undisclosed facilities overseas. And while detention operations in Afghanistan continue, the United States has announced its intention to transfer control over the detainees there as part of its counterinsurgency strategy.

During the same period, the federal courts, the president, and the Congress together provided a set of working answers to the questions of the scope of the armed conflict, the identity of those who may be detained for its duration, and the process pursuant to which they may be held—answers geared toward the situation of the individuals already in U.S. custody. As the courts have elaborated, the 2001 Authorization for Use of Military Force ("AUMF"), which gave the president the authority to use all "necessary and appropriate force" against those he determined to be responsible for the

28. See, e.g., Brief for the Respondents, supra note 27, at 13–14, 47–49.


31. One commander wrote as follows:

Detention operations, while critical to successful counterinsurgency operations, also have the potential to become a strategic liability for the U.S. and ISAF. . . . It is critical that we continue to develop and build capacity to empower the Afghan government to conduct all detentions operations in this country in accordance with international and national law.


attacks of September 11, permits the president to detain "an individual who
was part of or supporting Taliban or al Qaeda forces, or associated forces
that are engaged in hostilities against the United States or its coalition part-
ners."33 Detainees held at Guantanamo Bay or in the United States—but not
in Afghanistan—are entitled to judicial review of their detention by seeking
a writ of habeas corpus.34 The detainees who remain at Guantanamo are then
entitled to periodic administrative review to assess the propriety of their
continued detention.35 And while the United States works to hand over de-
tention operations in Afghanistan to the Afghan government, detainees there
are afforded hearings before military detainee review boards and entitled to
representation by a "[p]ersonal [r]epresentative[]" charged with acting "in
the best interests of the detainee."36 To date, the courts have rejected the
suggestion that U.S.-held detainees in Afghanistan are entitled to seek habe-
as review in U.S. courts.37

Although the subject of enormous political controversy, the NDAA,
passed in December 2011, in fact changes little of the essential picture.
That Act had sought to clarify the definition the courts had embraced of
who may be detained under the AUMF. Yet the key provision of the
NDAA—the provision containing Congress's version of the definition—
insists that nothing in it is "intended to limit or expand the authority of the
President or the scope of the Authorization for Use of Military
Force."38 The NDAA likewise appears to embrace—with what are at most modest
changes at the margins—the review processes already available to detain-
ees at Guantanamo and in Afghanistan.39 And the law limits its
applicability to the conflicts authorized by Congress in 2001; it does not
purport to change the scope of the armed conflict in which the United
States has been engaged during the past decade.40

There are any number of reasons one might object to this state of affairs,
and many people do. Human rights defenders have variously argued that the

Use of Military Force § 2(a), 50 U.S.C. § 1541) (internal quotation marks omitted), reh'g en
banc denied, 619 F.3d 1 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011); see also
habeas review for Guantanamo detainees); Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010)
(rejecting a claim of right to habeas corpus by detainees held at a U.S. facility in Afghanistan).
36. HUMAN RIGHTS FIRST, DETAINED AND DENIED IN AFGHANISTAN:
HOW TO MAKE U.S. DETENTION COMPLY WITH THE LAW 9 (2011) (citing Memorandum from Robert Har-
ward, Vice Admiral, U.S. Navy, Deputy Commander, Det. Operations, U.S. Dep't of Def., to
U.S. Military Forces Conducting Detention Operations in Afghanistan 5–6 (July 19, 2010)),
Afghanistan.pdf.
37. See, e.g., Al Maqaleh, 605 F.3d at 84.
39. Id. § 1024.
40. Id. § 1021.
definition of who may be detained under current law is overbroad and inconsistent with international law, that evidentiary and other process-related rules governing these detentions are insufficient to protect against injustice, and that the denial of habeas to Afghan detainees is both unconstitutional as a matter of law and incoherent as a matter of policy. On the other side, there are those—including, it appears, some of the judges on the Court of Appeals for the D.C. Circuit—who remain deeply troubled by the constitutional ruling that guaranteed the Guantanamo detainees access to habeas review at all. At the same time, there are those who believe that existing detention authorizations are not broad enough in their scope and have sought to expand the class of individuals who may be subject to military detention. Others still, as Wittes notes (p. 111), support the status quo as less than ideal but also as the least-bad solution, driven by the fear that Congress’s more detailed engagement in detention policy will make matters worse than they are.

Wittes is clearly among the critics of current policy. Trying to avoid aligning himself with any group on questions of substantive scope and process, Wittes complains in the first instance about clarity and motive. As he puts it, “Nobody knows today exactly when it is legal to detain the enemy in global counterterrorism operations, who counts as the enemy, what procedures the executive and the courts must follow in evaluating detention cases, and what rights and protections the detainees must receive in the process” (p. 32). Moreover, the reason the United States is so lacking in answers to these basic questions is because America, like its Western allies, views non-criminal detention as “a matter of shame, to be conducted, for almost all detainees, as invisibly as possible” (p. 20). Wittes’s longstanding concern that detention rules remain unclear has been little assuaged by the raft of judicial decisions since 2008 addressing core questions of the scope and effect of the original AUMF. For Wittes, the courts have either not

41. For a useful summary of the evolution of these arguments, see Robert M. Chesney, Who May Be Held?: Military Detention Through the Habeas Lens, 52 B.C. L. REV. 769 (2011).

42. See, e.g., Al-Bihani v. Obama, 590 F.3d 866, 881 (D.C. Cir. 2010) (Brown, J., concurring) (“The Supreme Court in Boumediene and Hamdi charged this court and others with the unprecedented task of developing rules to review the propriety of military actions during a time of war, relying on common law tools.... [I]t is important to ask whether a court-driven process is best suited to protecting both the rights of petitioners and the safety of our nation.”), reh’g en banc denied, 619 F.3d 1 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814.


44. Chapter 3. For example, Wittes demonstrated his longstanding concern in an earlier article when he wrote the following:

In a profound sense, the Supreme Court, despite delivering itself of 178 pages of text on the subject of enemy combatant detentions, managed to leave all of the central questions unanswered. In fact, if a new front in the war on terrorism opened tomorrow and the military captured a new crop of captives, under the Court’s rulings, the administration would face very nearly the same questions as it did in 2002.

Benjamin Wittes, Checks, Balances, and Wartime Detainees, POL’Y REV., Apr. & May 2005, at 5; see also Benjamin Wittes, Terrorism, the Military, and the Courts, POL’Y REV., June &
answered key questions, or have reached inconsistent decisions in similarly situated cases—a sign to him of at least somewhat unsettled law. In particular, Wittes highlights four questions he claims are still lacking resolution: who may be detained, who bears the burden of proof (and by what measure of evidence), what kind of evidence is admissible, and how the courts should handle evidence (such as statements) obtained involuntarily (pp. 64–65). The NDAA effectively changes none of this.

Rather than seeing the engagement of the executive and judicial branches as moving toward resolution of these questions, Wittes views this activity, coupled (in the book) with Congress’s longtime inaction, as demonstrating his secondary thesis: that we are too embarrassed to confront our detention needs more directly. Without attempting to martial policymaker interviews or other research that might support this attribution of motive to a multi-branch, multinational set of government decisionmakers, Wittes criticizes both Europeans and Americans for a fundamental “lack of candor” on detention. The Europeans, he writes, have “insulate[d] themselves from the very difficult policy problems associated with detention,” following their general custom of “free-riding on the U.S. security umbrella” (p. 4). American political institutions, too, have proven incapable of having a “mature” discussion of the costs of detention, preferring to shuffle off responsibility to the courts or to more “brutal local proxies” overseas whenever possible (p. 6). As a result, what relative stasis might now exist in current detention policy is inherently unstable.

We might set aside for the moment those aspects of Wittes’s account that seem especially imprecise. (The claim, for example, that Europeans have insulated themselves from facing the policy and lawmaking challenges of terrorist-related detention seems especially odd given the Europeans’ lengthy history, pre- and post-September 11, of doing just the opposite.45) One might also forgive those broad assertions that are presumably intended to carry more narrative than analytic import—Wittes’s statement, for example, that “[t]he Western world does not believe in detention” (p. 3).

Still, the book’s descriptive account suffers from two larger problems. First, there is less uncertainty with regard to the detention rules governing U.S.-held detainees than Wittes suggests. While it is surely correct that the

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text of the AUMF itself answers none of the questions of scope and process that Wittes identifies, and that the NDAA insists that it is intending to change nothing in this regard, the summary above should make clear that the rules governing U.S. detention operations have undergone rapid and detailed development in recent years. Thus, a key part of Wittes’s description addresses not any current confusion in the rules but rather the lack of clarity in detention rules surrounding the situation in which our military forces found themselves beginning in 2002—a situation in which they were told that the rules they had long followed would no longer apply but were given no clear or plausible replacement to follow.46

To the extent Wittes sees questions remaining in the rules governing detainees still held in U.S. custody (pp. 66–93), most of his complaints involve questions the appellate courts have resolved since the book’s publication (or indeed, had already resolved by publication date). For example, it is clear that the government must prove detention is justified by a “preponderance of the evidence.”47 Likewise, hearsay evidence is plainly admissible, subject (as elsewhere in the law) to the court’s assessment of the reliability of the evidence based on its impression of all the circumstances.48 Congress’s essential acceptance of such developments might, as Wittes contends, be evidence of cowardice. Or, as the Supreme Court has noted on more than one occasion, Congress’s “positive inaction” in the face of high-profile judicial efforts at statutory interpretation may be some indication of its acquiescence in the rulings.49

The uncertainty in the rules Wittes most fairly raises regards not how currently held detainees will be managed but rather how, if at all, these answers will apply to anyone we may wish to detain tomorrow. Wittes thus worries about areas of uncertainty in the judicial definition of al-Qaeda “members” and “supporters” (pp. 68–69)—both categories of individuals the courts have indicated may be detained.50 In this, Wittes has some

46. Wittes overlooks the extent to which any confusion over detention rules was caused in part by decisions of the executive itself, and instead casts the courts as the villains: “[M]ilitary officials have found themselves caught up in a kind of bait-and-switch maneuver in which they took detainees into custody thinking that they were operating under the laws of war only to find themselves later confronted by federal judges demanding that their intelligence serve as evidence.” P. 64.

47. Al-Odah v. United States, 611 F.3d 8, 16–17 (D.C. Cir. 2010) (holding that detention could be proven lawful based on a preponderance of the evidence), cert. denied, 131 S. Ct. 1812 (2011).


49. See, e.g., Flood v. Kuhn, 407 U.S. 258, 283–84 (1972) (“We continue to be loath . . . to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.”); cf. Dames & Moore v. Regan, 453 U.S. 654, 678 (1981) (stating that congressional acquiescence in longstanding executive practice is evidence of tacit approval).

50. See Salahi v. Obama, 625 F.3d 745, 748, 753 (D.C. Cir. 2010) (on members); Al-Bihani v. Obama, 590 F.3d 866, 873 (D.C. Cir. 2010) (“[W]herever the outer bounds [of
justification. While the courts have resolved a large number of the questions with respect to the detainees at Guantanamo, and there seems little doubt that the courts would find authority for ongoing and otherwise lawful detentions of al-Qaeda or Taliban members in Afghanistan, it is not entirely clear to what extent the courts or the administration believe those answers apply beyond these circumstances. Can the military detain under current authority an Omaha native, who is unaffiliated with any designated terrorist group, and who is captured in Chicago plotting to destroy buildings domestically? Who could be detained and pursuant to what rules if the United States decides to invade Yemen next year?

It is true that the courts have not squarely answered these questions for once and all, and Congress has not legislated on these issues beyond embracing the existing uncertainty that the courts have themselves acknowledged. Whether one is troubled by this state of affairs, on the other hand, depends heavily on whether one believes, as Wittes does, that the detention authorities already on the books or those that could be developed (for example, a new statute authorizing the use of force against al-Qaeda in the Arabian Peninsula in Yemen) are inadequate going forward. As the following Part suggests, the case for Wittes’s policy prescription is far from airtight.

For the present purposes, it suffices to note that the book’s failure to put Wittes’s descriptive account about the importance of what the courts have left unresolved in prescriptive context points to a second reason why the “shame” story he tells is less than persuasive. It is certainly possible that Congress and the presidents have felt uncomfortable about detention operations, personally shamed, or otherwise uninterested in bearing moral or political responsibility for detaining people who may or may not be the “right” ones for the rest of their lives. Indeed, it would seem troubling if such a program did not give our public officials some substantial feelings of concern. But there is no evidence presented in the book for thinking shame a relevant motivating factor—only inferences from a series of decisions. Indeed, from the same series of decisions, it seems equally possible to conclude that the presidents have not introduced, and Congress has not passed more detailed detention legislation of the sort Wittes seeks not because they are ashamed or in denial but because not enough of them think it is a good idea to make it happen.

This is a conclusion that would, of course, run counter to the policy prescription Wittes prefers to advance. Thus, Wittes finds evidence of his shame

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hypothesis in even the least likely events. Consider the book's discussion, as follows, of the U.S.'s decisions to transfer detention operations in Iraq and Afghanistan to the Iraqis and the Afghans, respectively, as those countries have worked to become (to widely varying degrees) more capable of managing such affairs:

Detainees in Iraqi or Afghan custody cannot file habeas corpus lawsuits, after all; they do not generate domestic political controversy; and they do not draw flak directed at the United States from human rights groups. To put the matter bluntly, they are not our problem. It turns out that we are almost as happy as the Europeans are to make arrangements that give us the benefits of detention without requiring us to engage in it. (p. 23)

Such logic is hard to untangle. It certainly seems correct that Afghan detainees held in Afghanistan by Afghanistan have little basis for seeking habeas in federal court. Yet it is also the case that both presidential administrations have come to conclude that transferring control over detention operations to sovereign states that the United States once occupied but would now like to leave brings more than one kind of benefit. Such transfers have been advocated by our military leaders on the grounds that they are in the best interest of U.S. counterinsurgency objectives.\(^5\) They are more in line with international legal obligations and have thus historically won the support of human rights groups.\(^3\) Moreover, while no polling data are presented, this approach may be, perhaps not coincidentally, far more politically palatable to the average American voter. Despite all this, are we nonetheless pursuing such handovers also because of some sense of national "shame" in detention? Wittes's book offers no basis to think so. On the contrary, it suggests at least as much cause to think that the United States has pursued this course because its political leaders have consciously concluded it is the right thing to do.

II. GETTING TO POLICY

The absence of evidence, anecdotal or otherwise, bearing on the motives of detention policymakers suggests that Wittes's use of the capacious "we" may be meant to capture some other group of public actors who, in his view, have infected what should be a rational detention debate with "obfuscation and denial" (p. 94). Indeed, Wittes is occasionally more direct in singling out for criticism human rights groups and liberal academics for propagating the "myth" that "the United States does not do preventive detention" (p. 94). Here again, we might set aside complaints about the breadth of the brush with which Wittes paints,\(^5\) for it is Wittes's disagreement with the

52. COMISAF Report, supra note 31, at 2–16 & Annex F.
53. See, e.g., HUMAN RIGHTS FIRST, supra note 36, at 23–26.
54. The sole example of this myth perpetuation that he cites is a passing quote from a Washington Independent interview of New York University Law School professor David Golove. P. 34. Wittes gives no indication of the substantial scholarship of other putatively liberal scholars who regularly acknowledge the existence of preventive detention regimes but
substantive position taken by some such groups against "preventive" detention for terrorist suspects that animates the book at its core (pp. 33–34). For Wittes, new detention legislation is essential to fill the gaps in existing domestic sources of law authorizing detention. The most important gaps he sees are twofold:

The first involves the acute emergency detention of a highly dangerous person (or group of persons) when the information available is imperfect and the stakes are high enough to put a premium on the detainee’s short-term interrogation value. The second involves a situation in which U.S. forces once again capture large numbers of enemy forces—or enemy suspects—and have no reliable proxy on whom to offload them. (p. 95)

It is useful to consider each claim in turn. For a number of years, Wittes’s view that the federal government lacked adequate detention powers to deal with the ticking-bomb-type villain in an emergency setting was informed by his bleak assessment of the capacities of the criminal justice system. The federal courts were unfamiliar with the special challenges of trying dangerous terrorists, and process protections standard in the criminal context would squarely prohibit a host of coercive interrogation measures that might well make sense in an emergency setting.\(^{55}\) In this book, Wittes acknowledges that he had underestimated the utility of that system (p. viii), even describing the handling of the attempted Christmas Day 2009 airline bomber (who was questioned and later charged with offenses pursuant to standard criminal justice rules) as an instance of the system “actually perform[ing] rather well” (p. 100). Yet despite such significant and creditably candid admissions, Wittes continues to maintain that the United States lacks “a clear system for handling” suspects seized while attempting to commit a terrorist attack who may have critical information about the details of their own or another soon-to-follow attack (p. 95). Here, it seems, Wittes means to argue not that the existing criminal justice rules of arrest and questioning are actually unclear but rather that our system precludes counterterrorism officials from effectively interrogating suspects in a timely way (pp. 100–02). What the government really needs, Wittes contends, is “a brief grace period in which to hold someone, interrogate him, and figure out whom it is dealing with before making any big decisions” (p. 101)—presumably decli-
sions like whether to charge him with a crime or hold him militarily without trial.

Some of the weaknesses of this argument as a basis for inaugurating a new “preventive” detention regime are evident on their face. In the section in which Wittes argues most directly that the criminal justice system is insufficient for the emergency intelligence gathering task, Wittes notes three recent cases in which the traditional criminal system, in his assessment, performed as “an excellent intelligence gathering tool, even in exigent circumstances” (p. 102). Rather than then citing specific counterexamples in his defense, Wittes offers the bare proposition (without footnote or elaboration) that “there have been times when falling back on the criminal justice system has failed us—and it will happen again” (p. 102).

To the extent the book provides counterexamples elsewhere, they are, as best as one can discern, drawn exclusively from the particularly skewed pool of those held at Guantanamo Bay (pp. 97–98). Skewed how? Some of the Guantanamo detainees could have been lawfully held (under 2002 rules or today’s) without criminal prosecution at all, so that whether they are prosecutable is irrelevant. Others who could have been prosecuted upon arrest (given an imagined inclination on the government’s part circa 2002) can no longer be tried because of their intervening treatment, the tainting of evidence, or the passage of time.56 It is certainly the case that not every detainee held at Guantanamo can be successfully prosecuted in the U.S. criminal justice system today.57 But it is entirely unclear from Wittes’s account whether the system’s “failures” in these cases are because the system failed us or we failed it. Or because, under the law as it existed in 2002 and as the courts have acknowledged since, the AUMF and the laws of war gave officials adequate detention authority already.

In all events, Wittes’s ultimate recommendation—that officials need a longer “grace period” before being compelled to choose between AUMF and criminal detention systems—hardly supports the need for a new “preventive” detention regime. Even if there were evidence to support the need for a slightly longer waiting period before presentment—evidence absent in the context of Guantanamo detainees—such a conclusion would logically support at most a modest amendment to existing rules to allow an additional limited period of time before a terrorist suspect must be charged.58 Wittes’s book does not traffic in any such detail or identify arguments against even such a more modest amendment. Instead, it seems to have been written with a far grander detention scheme in mind.

56. See GUANTANAMO REVIEW TASK FORCE, supra note 21, at 20–22.
57. See id.
58. See FED. R. CRIM. P. 5 (requiring that criminal defendants be brought before a magistrate “without unnecessary delay”); Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56–57 (1991) (holding that Fourth Amendment requirement of “prompt” judicial determination that probable cause exists is generally satisfied if defendant appears before magistrate within forty-eight hours of arrest and noting that “promptness” required depends on balancing interests of state and defense parties in individual case).
Wittes’s second, and more interesting, argument helps explain his broader legislative ambitions. One of these days, Wittes rightly anticipates, U.S. forces will once again find themselves in another foreign, armed conflict in which it will be necessary to detain large numbers of enemy forces without a ready proxy to do it for us (pp. 95, 103–09). Such conflicts might be either state-against-state conflicts (like the United States versus Iran), or state-against-nonstate engagements (like the United States versus a Colombian “narco-terrorist” cartel). There is no current equivalent of an authorization for the use of military force against such enemies, nor has Congress seen fit to offer the president a generic authorization for the use of military force for potential future conflicts.

Imagine that Congress were to offer authorization for such a conflict once it is upon us, passing something similar in scope to the current AUMF. It would delegate to the president broad powers to use force as “necessary,” with no specific reference to detention and no direct comment on the effect of the past decade’s worth of al-Qaeda-related legal developments for the new conflict. For Wittes, the odds of disaster in such circumstances are high. He posits that the United States will again elect not to treat detainees in either variety of conflict as prisoners of war under the law on the books (p. 107). In his view, it is plain that those rules do not afford the flexibility in interrogation techniques that our security needs demand, and they require affording detainees a kind of “honorable status” that we cannot, “[a]t a spiritual level,” abide (p. 107). The result again would be the hasty, executive-driven creation of another ad hoc set of rules—rules that would predictably be challenged in court, raise comparable questions of authority and process, and reflect nothing that we have learned from the past decade. “We will, to lay the matter bare, have recreated Guantánamo” (p. 109). For this reason, he argues, we should pass forward-looking, comprehensive detention legislation now that anticipates such conflicts (pp. 118–19, 121).

Given Wittes’s interest in flexibility in security, it seems curious that he would wish to commit the government to specific (and presumably limited) detention language in future conflicts before it is clear what those conflicts are. Regardless, the greater problem is that Wittes encounters the complex world of international humanitarian law very much as it was encountered by the Bush Administration in 2002, with a generalized sense that the Geneva Conventions somehow require all detainees captured in any armed conflict to be afforded the privileged status of “prisoners of war.” Of course, the Third Geneva Convention (which addresses this specialized status) is clear by its terms that only certain categories of recognized soldiers are entitled to POW status—a status whose most significant distinction is immunity from

59. Compare p. 107 (“The United States has never gone along with the rest of the world’s decision to treat irregulars who fight by no known rules as the equivalent of honorable soldiers, and I have trouble imagining that it will begin to do so.”), with Memorandum from Alberto R. Gonzales to the President, supra note 19, at 118–21 (exchange of memoranda regarding applicability of POW protections).
prosecution for lawful acts of violence during an armed conflict.\textsuperscript{60} To my knowledge, an insistence that al-Qaeda fighters be afforded POW protections per se has never been an animating concern of the legal scholars or advocates with whom Wittes otherwise disagrees. On the contrary, those groups have been vigorous in their insistence that al-Qaeda members like Khalid Sheikh Mohammed be prosecuted criminally for their conduct—the opposite of what one would urge if one believed such individuals were lawfully immune.\textsuperscript{61} Further, neither the Third nor the Fourth Geneva Conventions (governing, for example, circumstances of occupation) precludes the detention of individuals in addition to those entitled to the specially privileged POW status. In key respects, these Conventions contemplate that such unprivileged detainees would be held, provided their detention is pursuant to adequate authorization and procedural protection.\textsuperscript{62}

Wittes is simply mistaken in fearing that compliance with the Geneva Conventions' regime somehow requires the United States to accord al-Qaeda detainees (or their narco-terrorist colleagues) the same honorable status given our own soldiers.

Wittes's certainty that the U.S. government (whoever might be in charge) will again elect to ignore the developed law on the books in coming conflicts then hinges on his assessment that the Geneva rules regulating interrogation are insufficiently "flexible" (p. 107). While Wittes does not identify the inflexible Geneva rules to which he refers, it seems likely that he means the protections of Common Article 3, which apply in circumstances of state-against-state and nonstate actor conflicts, to POWs and unprivileged belligerents alike, and which have been reflected in a number of U.S. statutes, executive orders, and military regulations setting forth the rules by which prisoners of any kind are to be treated.\textsuperscript{63} In relevant part, Common Article 3 prohibits "violence to life and person, . . . murder of all kinds, mutilation, cruel treatment and torture; . . . [and] outrages upon personal dignity, in particular, humiliating and degrading treatment."\textsuperscript{64} What is it about this rule that is insufficiently flexible? What kind of interrogation techniques would Wittes like to use that he believes the rule precludes? On what basis does he believe those techniques would benefit the cause of the United States in its future conflicts? One could imagine answers to such

\textsuperscript{60} Third Geneva Convention, supra note 19, art. 4.


\textsuperscript{62} See, e.g., Third Geneva Convention, supra note 19, arts. 3, 5; Fourth Geneva Convention, supra note 19, art. 78.


\textsuperscript{64} Third Geneva Convention, supra note 19.
critical questions—answers that are nonlegalistic, empirically based, or otherwise accessible to a lay audience. It is unfortunate that Wittes offers none here.

III. INSTINCTS ON INSTITUTIONAL COMPETENCE

There is another “we” that Wittes’s account seems to contemplate, a “we” encompassing Congress, the courts, and to an extent, the executive branch, and concerning how those institutional actors negotiate the sharing of decisionmaking authority over detention. Concerns of institutional competence, in this regard, are perhaps the book’s most intriguing, yet least explored, theme. In Wittes’s view, current U.S. detention rules lack clarity and sufficiency, in no small measure, because the courts rather than Congress have played too big a role in setting them. Taking aim at the body of opinions produced by the habeas corpus cases brought by the Guantanamo detainees, Wittes sees such judicial engagement as a failed policymaking exercise. The courts have created both confused and contradictory rules of who may be detained and on what terms, and have addressed only a fraction of the many issues at stake in developing rational detention policy (p. 11). The resulting body of law “doesn’t look much like the law that a sensible political system would design,” in that “it serves the key interests of neither the detainees nor the government” (p. 62) and indeed “translates into random, unpredictable outcomes for the dwindling Guantánamo population” (p. 92). Such is the product of our shamefaced denial of detention: “[Denial] effectively delegates policymaking to bodies that should not be making U.S. military and national security policy—from corrupt and imperfect foreign proxy governments to domestic courts” (p. 94).

Part of the reason why it would have been helpful to see more of Wittes’s views of the proper role of the courts in this book is because, to a lawyer’s ears, his critique of the courts sounds at times more like a description of precisely the institutional model of judicial decisionmaking that the separation of powers was designed to achieve. A different way of saying that the courts’ behavior has served the interests of neither party before them—Wittes’s criticism—is that the courts have functioned not as an instrument of the government in power but as an independent, impartial arbiter in precisely the manner designed.65 Where Wittes laments a set of “random,

65. For example, Alexander Hamilton described the importance of an independent judiciary as follows:

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the peo-
unpredictable outcomes” for the Guantanamo detainees, others might see reasonable variances among individualized determinations, the common result of the application of broad, standardesque rules to particular and varied facts.66 Where Wittes regrets that the courts have answered only a small set of the potential questions regarding the government’s power to detain individuals as part of a broad program of counterterrorism, others might praise the courts for exercising appropriate judicial modesty.67 And where Wittes sees an indication of legislative shame or inattention in Congress’s failure to address some of the questions the courts have not, another might assume, as courts often have, that Congress’s relative silence in the face of such highly public decisionmaking by another branch evinces at least tacit congressional approval of the actions the courts have taken.68 Indeed, Wittes’s key recommendation—that Congress pass legislation setting forth a more detailed vision of who may be detained and under what conditions—seems to assume a world in which new legislation could avoid the judicial resolution of key interpretive debates that inevitably arise, and demand resolution, no matter how detailed a law is passed.

66. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that citizen designated an “enemy combatant” has right to individualized hearing before neutral arbiter); United States v. Salerno, 481 U.S. 739 (1987) (upholding detention pending criminal trial where government demonstrates individual dangerousness by clear and convincing evidence). Consider one of Wittes’s examples of how different judges hearing Guantanamo cases evaluate the requisite quantum of evidence differently. In one comparison, Wittes notes that District Court Judge Robertson upheld the detention when the evidence showed “a reasonable inference that [the detainee] went to Kandahar to fight” while District Judge Kollar-Kotelly found insufficient evidence to justify holding another detainee when the evidence showed only that the detainee’s travels were “consistent with” those that had been taken by other fighters. P. 87. Wittes holds these cases up as an example of different judges reaching different conclusions about comparable facts. They might equally be cited as examples of different judges reaching different conclusions on different facts. Either way, both decisions were effectively ratified after the fact. The D.C. Circuit upheld the denial of habeas in the first case on appeal, Awad v. Obama, 608 F.3d 1 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011), and the Obama Administration declined to appeal the outcome granting habeas in the second. See Press Release, U.S. Dep’t of Justice, United States Transfers Two Guantanamo Bay Detainees to Kuwait and Belgium (Oct. 9, 2009), available at http://www.justice.gov/opa/pr/2009/October/ 09-opa-1095.html (announcing the transfer of the detainee to Kuwait following the ruling of the district court).


68. See supra note 49.
On one level, Wittes’s interest in greater congressional engagement with detention is laudable and readily understood. In our democracy, Congress is the branch formally charged with debating the issues and enacting its policy conclusions into law. Indeed, the absence of law—or sufficiently clear law—can raise the concerns of due process fairness and notice that animated the detainees’ original objections to the AUMF as sufficient grounds for their detention. Yet that case is not advanced here.

To the extent one might speculate about Wittes’s preference for Congress to say more about detention policy, it might be thought to rest on certain expectations about legislative competence as compared to that of the courts: notions that Congress has greater expertise in such matters than the courts, or that Congress is the more politically accountable body and therefore more appropriate than the courts to make such fraught judgments of detention or freedom. These are important, well-pedigreed expectations indeed. Yet whatever one may think of such arguments as a general matter, they do not seem compelling here.

Consider first the instinct that Congress is more expert in such matters than the courts, or at least more capable of designing a “sensible” system of detention than the one we now have produced out of iterative, multibranch engagement. That is, that members of Congress are smarter or better-informed than judges—and therefore more likely to produce “good” policy (by some metric), or at least a more regular, uniform set of rules. As Wittes’s review of some of the Guantanamo litigation makes clear, the federal courts in Washington, D.C., have spent the past three years acutely (and the past nine years more generally) considering the executive’s best arguments for who needs to be detained and pursuant to what procedures, as well as the detainees’ best arguments in opposition. They have equally pored over the written assemblages of evidence shedding as much light as may be shed on the kinds of individuals we have come to detain, the sum total of information that makes the best case that U.S. defense and intelligence agencies can muster for continued detention. In contemporary times, it seems fair to imagine that neither the average federal court judge nor the average member of Congress comes to office with inherent expertise on matters of detention. But the courts in recent years have been compelled to learn. Our representatives have been under no such compulsion.

A fairer hope, then, might be that Congress is not smarter on such matters per se but rather is simply able to write rules with more uniformity than the collected decisions of the federal courts. Yet here, too, Congress’s advantage in achieving rationality seems illusory. While the lower federal

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69. See, e.g., Hamdi, 542 U.S. at 543–45 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (finding that the AUMF lacked a sufficiently clear statement of authorization to support Hamdi’s detention); id. at 544 (“We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.”) (quoting Ex parte Endo, 323 U.S. 283, 300 (1944)) (internal quotation marks omitted)); see also Brief of Respondent, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027).
Detention Debates

Courts reach somewhat differing answers about particular questions of detainability and process, those rulings ultimately converge in the appellate courts, where they are finally resolved in a uniform way by the Supreme Court. As has been noted, for the vast majority of issues of concern among the cases already pending, such convergence has been achieved. Should Congress someday pass new, forward-looking legislation on detention, it will come in a uniform text. But that text, too, will inevitably engage in standard setting—describing the kind of person who may be detained under its authority, not the particular people themselves. That text, too, will thus eventually be subject to the same interpretive exercise the courts have just pursued with the existing AUMF, producing divergent lower court rulings, variations in application in individual cases, and some uncertainty pending appellate review. Might Congress clarify some points with new legislation? It is difficult to see how the recently passed NDAA clarified much of anything. Either way, the “rationality” it achieves in this respect will be a difference of degree, not of kind.

Perhaps then Wittes is more drawn to a second important argument in Congress’s favor: that Congress provides a more democratically accountable way of settling on a detention standard. Who may be detained is a question of policy; it should be decided at least in the first instance by a process of politics. As significant as this point is, there is here as well a contrary view that Wittes might have usefully considered—a view brought into stark relief by the sharply polarized debate surrounding the NDAA. The argument goes as follows: as important as electoral accountability is in legitimating the exercise of lawmaking, even the Constitution’s Framers recognized that there were limits to the wisdom of the masses. These were, after all, the Framers who expected the more popularly-representative House of Representatives to be not only too slow but also too partisan to play a useful role in the ratification of treaties. These were the same Framers who concluded that it was essential to have an independent, unelected federal judiciary to check “those ill humors, which... have a tendency... to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.” Similarly, popular election of the chief executive would be mediated by an electoral college; the risk of excessive legislative passions would be limited by a presidential veto; general legislative standards could be elaborated by more specific executive rules.

70. See, e.g., Wittes, NDAA FAQ, supra note 12 (detailing the questions left open by the NDAA and provisions whose meaning has been subject to active interpretive debate).

71. See, e.g., id. ("[T]he volume of sheer, unadulterated nonsense zipping around the internet about the NDAA boggles the mind... The added attention to it is a good thing. It’s an important subject and warrants genuine debate and discussion. The trouble is that much of the discussion is the intellectual equivalent of the ‘death panel’ objections to the health care bill.").

72. See THE FEDERALIST, supra note 65.

73. THE FEDERALIST, supra note 65, at 453.

In short, ours is not a democracy that has seen bicamerality and presentment as the structural answer to every question of political detail. If one sets aside, for the moment, concerns of due process fairness and notice to those who may be subject to detention, what marginal interest in accountability is served by requiring not only the elected president but also the elected Congress to specify in more detail exactly what detention force it considers "necessary and appropriate"? Does the marginal gain in accountability outweigh "[t]he true policy of the axiom" of the separation of powers, which is so that "legislative usurpation and oppression may be obviated"?

Most especially for matters that demand detailed expertise or particular attention to individual rights, Congress has regularly concluded that broad delegations of responsibility to the other branches best serve the public interest and has often expressly counted on the courts as a check on itself. Wittes would have a powerful book indeed if he could explain why that model must fail in answering the particular dilemma of detention.

CONCLUSION

Debates about what kind of counterterrorism detention tools the United States has and should use are far from over. America's closest international allies have grappled with related questions for decades; there is little reason to imagine this country will have certain answers to them soon. In this regard, Wittes's greatest contribution with this book is the reminder of detention's ongoing importance. There remains much to be untangled before there is consensus on what the United States should do or which governmental structures are best suited to getting it done.

("The President's role in the lawmaking process also reflects the Framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures."); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 446–63 (1998) (discussing republicanism).

75. 4 THE WRITINGS OF JAMES MADISON 208 (Gaillard Hunt ed., 1903) (1787).