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Reclaiming Skepticism: Lessons from Guantanamo

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RECLAIMING SKEPTICISM: LESSONS FROM GUANTANAMO

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3. What are the lessons from detaining non-U.S. citizens, labeled enemy combatants, at Gitmo?

INTRODUCTION

Learned Hand famously defined "the spirit of liberty" as "the spirit which is not too sure that it is right."[1] Hand's statement reflects the integral role of skepticism in our national identity. From its conception, the United States has justified and defined its existence through its embrace of liberty. Throughout, it has deemed liberty inextricable from skepticism—from the vigilance of a people who do not merely take their government at its word, but who oversee it and dissent from its actions when necessary. Indeed, James Madison observed in the constitutional ratification debates that we need to have government in the first place and to divide and check that government's powers because human beings are no "angels."[2]

Of course, skepticism—though embedded in our political and constitutional frameworks—is in sharp tension with other cultural pressures and impulses. Among the latter forces are those militating toward strong, even complete, deference to the President and his subordinates on national security matters in times of war or terror. Such deference takes myriad forms. These forms include congressional consent to executive-branch programs about which Congress has been told little to judicial dismissal of cases against the Government when it asserts that litigation would reveal state

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1. Judge Learned Hand, Address at the I Am an American Day ceremony (May 21, 1944), *available at* http://www.nacdl.org/public.nsf/ENews/2002e67?opendocument (last visited Mar. 31, 2009).

2. THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

secrets. The reasons for deference range from genuine fear that it might be dangerous for the executive branch to reveal information to anyone—even a federal judge or select members of Congress—outside of a small circle; to fear of political and social repercussions that may follow from pushing the executive branch to make disclosures that they deem dangerous; to a simple desire to avoid the responsibility that comes with knowledge. As former Senate Armed Services Committee Chairman John Stennis once reportedly told former CIA director James Schlesinger: "Just go ahead and do it, but I don't want to know!"[3]

The tension between these competing political and legal modes—skepticism and oversight on the one hand, deference to executive-branch decisions on the other—are cast in sharp relief by the detention, in recent years, of hundreds of alleged unlawful enemy combatants at the U.S. Naval Base in Guantanamo Bay. The President and other executive-branch officers championed deference. They assured the country that those detained at Guantanamo were "the worst of the worst," hardened terrorists who had engaged in hostile actions against the United States and who were determined to "return to the battlefield" at their first opportunity.[4] Relying on the notion that detainees had been captured "on the battlefield," the executive branch argued that the Guantanamo detentions were products of military decision making into which Congress and the courts should not intrude.[5] Critics of the detention system did not dispute, of course, that individuals who truly threaten the United States should be detained. Rather, they argued that long-term detention could not, consistent with our constitutional system and its deep grounding in skepticism, stem solely from one person's or one group's unchecked say-so.[6]

Events as of the time of this essay's writing—late November of 2008—provide a unique vantage point from which to consider the Guantanamo Bay detentions and the lessons to be drawn from them. On the one hand, the new President-elect pledges to close Guantanamo Bay and to try the remaining detainees in the United States. On the other hand, it is far from clear at this point what

3. DENIS MCDONOUGH ET AL., CTR. FOR AM. PROGRESS, NO MERE OVERSIGHT: CONGRESSIONAL OVERSIGHT OF INTELLIGENCE IS BROKEN 9 (2006), http://www.americanprogress.org/issues/2006/09/no_mere_oversight.pdf.

4. *See infra* notes 8-9.

5. *See infra* notes 9-11.

6. *See, e.g.*, Brief of Respondent, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027).

form these trials will take and how they will address the many problems—including the existence of evidence gleaned through torture and the need for some evidence to remain secret—that might surface as they proceed. Furthermore, we now have a fair amount of information and experience regarding the detention process of the last several years, including several court cases challenging it, and some limited data on the detainees.

This short essay draws on this information to assess Guantanamo as a case study in the struggle between skepticism on the one hand and pressure to defer to executive judgment on the other. It relies heavily on data obtained and analyzed in a series of tremendously important reports (hereinafter, collectively, "the Denbeaux findings")[7] by Mark Denbeaux of Seton Hall University School of Law, Joshua Denbeaux of Denbeaux & Denbeaux, and their co-authors (hereinafter, "the Denbeaux team"). This essay summarizes some of the dramatic contrasts between government assertions—as to detainee characteristics, the circumstances of detainee captures, and the adequacy of the process to challenge detentions—and the Denbeaux findings. It also situates the findings in the context of the legal claims made by the executive branch to the effect that it had virtually no constitutional obligation to justify its detentions, Congress's deference to these claims, and the mixed record of the U.S. Supreme Court in responding to the same. The essay concludes that Guantanamo exemplifies the crucial nature of skepticism and oversight to protect liberty and national security, the strong political and social pressures toward deference, and the tools in our constitutional system to push back against these pressures.

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7. MARK DENBEAUX & JOSHUA DENBEAUX, THE GUANTANAMO DETAINEES: THE GOVERNMENT'S STORY, http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf (last visited Mar. 31, 2009) [hereinafter DENBEAUX & DENBEAUX, FIRST REPORT]; MARK P. DENBEAUX ET AL., SECOND REPORT ON THE GUANTANAMO DETAINEES: INTER- AND INTRA-DEPARTMENTAL DISAGREEMENTS ABOUT WHO IS OUR ENEMY, http://law.shu.edu/news/second_report_guantanamo_detainees_3_20_final.pdf (last visited Feb. 16, 2009) [hereinafter DENBEAUX ET AL., SECOND REPORT]; MARK DENBEAUX ET AL., NO-HEARING HEARINGS, http://law.shu.edu/news/final_no_hearing_hearings_report.pdf (last visited Mar. 31, 2009) [hereinafter DENBEAUX ET AL., NO-HEARING HEARINGS]; MARK DENBEAUX ET AL., THE MEANING OF "BATTLEFIELD": AN ANALYSIS OF THE GOVERNMENT'S REPRESENTATIONS OF "BATTLEFIELD" CAPTURE AND "RECIDIVISM" OF THE GUANTANAMO DETAINEES, http://law.shu.edu/news/meaning_of_battlefield_final_121007.pdf (last visited Mar. 31, 2009) [hereinafter DENBEAUX ET AL., THE MEANING OF "BATTLEFIELD"].

EXECUTIVE CLAIMS ABOUT DETAINEES AND THE PROCESS DUE

The Bush administration repeatedly assured the public that the detainees at Guantanamo Bay were the "worst of the worst,"[8] terrorists who had been caught red-handed "on the battlefield."[9] More precisely, it deemed the detainees unlawful enemy combatants who could be detained for the duration of a military conflict with no process beyond their initial labeling as unlawful enemy combatants. Indeed, the administration argued that no further process was constitutionally due to anyone deemed an unlawful enemy combatant, even U.S. citizens who were captured or detained in the United States.[10] As for aliens detained at Guantanamo Bay (and thus outside the territorial limits of the United States), the administration went further, arguing that the Constitution not only grants them no such process right, but accords them no right to have a federal judge consider the question.[11] In short, the administration argued that the Guantanamo detainees (and all others detained as unlawful enemy combatants) could be detained indefinitely so long as the administration claims that they are unlawful enemy combatants.

RESPONSES BY THE U.S. SUPREME COURT AND CONGRESS

In 2004's *Hamdi v. Rumsfeld*,[12] the Supreme Court settled somewhere between deference and skepticism when it assessed the process due those who wished to challenge their status as unlawful enemy combatants.[13] While the Court spurned the Bush

8. DENBEAUX & DENBEAUX, FIRST REPORT, *supra* note 7, at 2–4; DENBEAUX ET AL., SECOND REPORT, *supra* note 7, at 3.

9. DENBEAUX ET AL., THE MEANING OF "BATTLEFIELD," *supra* note 7, at 4–5.

10. *See, e.g.*, Brief of Respondent, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696); Brief of Petitioner, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027).

11. *See, e.g.*, Brief of Respondent, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (Nos. 06-1195, 06-1196).

12. 542 U.S. 507 (2004).

13. *See generally id.* at 507. *Hamdi* considered the process due a U.S. citizen captured abroad and detained in the United States. The Combatant Status Review Tribunals (CSRTs) at Guantanamo, however, largely follow the process model suggested by the *Hamdi* Court as detailed in the next paragraph of this essay. Of course, the Guantanamo CSRTs are also responsive to the Supreme Court's holding—handed down on the same day as *Hamdi*—that aliens detained at Guantanamo Bay have a statutory right to habeas corpus. Rasul v. Bush, 542 U.S. 466, 483–84 (2004). The Court did not decide until four years later that the Guantanamo detainees also have a constitutional right to the same. *Boumediene*,

administration's claim that its say-so was the only process due, it concluded that alleged unlawful combatants did not have to be tried in U.S. civilian courts or through well-established courts martial. It granted the executive wide leeway to craft processes to give detainees "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[14] It suggested that military commissions lacking the process protections of U.S. courts could suffice.[15]

The *Hamdi* Court's analysis laid the groundwork for the Combatant Status Review Tribunals (CSRTs) adopted by the Pentagon shortly after the *Hamdi* decision.[16] The CSRTs are three-person military commissions charged with determining, by majority vote under a preponderance-of-the-evidence standard, whether detainees are correctly deemed unlawful enemy combatants.[17] The Pentagon's rules provide, among other things, that the Government's evidence is presumed genuine and accurate subject to rebuttal;[18] that CSRTs are "not bound by the rules of evidence such as would apply in a court of law";[19] that each detainee shall be appointed a Personal Representative (PR) to assist him in the process; that the PR is not an advocate for the detainee, does not have a confidential relationship with the detainee, and may be required to disclose information about the detainee to the CSRT;[20] and that the detainee may present evidence that the CSRT deems relevant, including the testimony of witnesses deemed "reasonably available" by the CSRT.[21]

Congress adopted a posture of strong deference toward the executive with respect to the CSRTs. The 2005 Detainee Treatment Act (DTA) essentially codified the CSRTs by leaving their details largely to the Pentagon.[22] The DTA also does not

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128 S. Ct. at 2240.

14. *Hamdi*, 542 U.S. at 533.

15. *Id.* at 533-34, 538.

16. *See supra* note 13.

17. Memorandum from Gordon England, Sec'y of the Navy, Implementation on Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004) at enclosure 1, § (G)(11)-(12), *available at* http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

18. *Id.* at enclosure 1, § (G)(11).

19. *Id.* at enclosure 1, § (G)(7).

20. *Id.* at enclosure 3, §§ (B)(1), (C)(1), (5)-(8), (D).

21. *Id.* at enclosure 1, §§ (F)(6), (G)(9)-(10).

22. Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, § 1005, 119

prevent the use of statements obtained through torture. It provides only that CSRTs "shall, to the extent practicable, assess" whether a statement was derived through "coercion" and "the probative value (if any) of any such statement."[23] Congress also limited the ability of detainees to challenge their CSRT determinations in federal courts. Under the DTA and the Military Commissions Act of 2006 (MCA), detainees may only bring suit in the U.S. Court of Appeals for the D.C. Circuit on the ground that their CSRT determination is inconsistent with the Pentagon's CSRT standards and procedures or "to the extent the Constitution and the laws of the United States are applicable, [that] the use of such standards and procedures to make the determination is [in]consistent with the Constitution and laws of the United States."[24]

Finally, the Supreme Court evinced skepticism in striking down the statutory limits on judicial review under the Constitution's Habeas Corpus Clause. Under the clause, prisoners generally may petition courts to challenge the legality of their detention absent congressional suspension of the writ.[25] The Court held that the statutory review restrictions unlawfully curtailed habeas review without the requisite formal suspension of the writ.[26] Among other things, the Court read the restrictions to prevent detainees from presenting new evidence to the D.C. Circuit in its exclusive review proceedings.[27] The Court explained that such a right was particularly important for detainees appealing from the relatively loose procedures of the CSRTs.[28] The Court also rejected the administration's argument that the Habeas Corpus Clause does not apply to the Guantanamo Bay detainees because they are aliens detained outside of the United States. The Court emphasized the practical control of Guantanamo by the United States.[29]

THE DENBEAUX FINDINGS

The Denbeaux findings demonstrate the practical importance of the struggle between deference and skepticism in the context of

Stat. 2680, 2740–41 (codified at 10 U.S.C. § 801 (2006)).

23. *Id.* § 1005(b)(1).

24. *Id.* § 1005(e); Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635 (to be codified at 28 U.S.C. § 2241(e)).

25. U.S. CONST. art. I, § 9.

26. Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008).

27. *Id.* at 2272.

28. *Id.* at 2272–74.

29. *Id.* at 2259–62.

the Guantanamo detainees. The findings betray the wide gap between the Government's sweeping public characterizations of the detainees as "the worst of the worst" who were captured on "the battlefield" and the Government's allegations to the CSRTs. They also illustrate the minimal nature of the process provided in the CSRTs.

DETAINEE BACKGROUNDS

With respect to detainee characteristics, the Denbeaux findings rely entirely on the Government's allegations in their unclassified evidence summaries for the CSRTs.[30] Based on the more than 500 summaries to which they had access, the Denbeaux team concludes, among other things, that:

- Fifty-fifty percent of the detainees were not alleged to have committed a single hostile act against the United States.[31] This is true despite the Government's expansive definition of a hostile act. For example, the Government deemed a hostile act to have been committed when it found that "1. [A] detainee fled, along with others, when [U.S.] forces bombed their camp. 2. The detainee was captured in Pakistan, along with other Uighur fighters."[32]
- All detainees (whether or not alleged to have committed a hostile act) were accused by the Government of having some affiliation with either the Taliban or al Qaeda or "associated forces engaged in hostilities against the United States or its coalition partners."[33] Seven percent of the detainees were listed as affiliated with "al Qaeda OR Taliban,"[34] indicating that the Government had not determined which of the two groups was the affiliate in each case. The Government deemed 10% of "unidentified affiliation" and 1% "other."[35] Levels of alleged affiliation also varied widely. The Government

30. DENBEAUX & DENBEAUX, FIRST REPORT, *supra* note 7, at 5.
31. *Id.* at 6–7, 11.
32. *Id.* at 12.
33. *Id.* at 7.
34. *Id.* at 8.
35. *Id.*

determined that 8% of detainees were alleged to have been "fighters for" their affiliated group, 30% were alleged to be "members" and 60% were labeled only "associated with" the group.[36] The Government used expansive definitions of membership: "simply being told that one had been selected as a member [in al Qaeda] would qualify one as a member,"[37] and one could become a member of the Taliban through conscription.[38]

- The Government deemed affiliation with any one of 72 groups sufficient to make a detainee an unlawful enemy combatant. Fifty-two of the groups "are not on either the [PATRIOT] Act Terrorist Exclusion List or on two separate State Department Designated and Other Foreign Terrorist Organization lists."[39]
- Ninety-three percent of the detainees were not alleged to have been captured by U.S. forces.[40] "The United States promised (and apparently paid) large sums of money for the capture of persons identified as enemy combatants in Afghanistan and Pakistan."[41]
- No more than 21, or 4%, of the 516 summaries reviewed "alleged that a detainee had ever been on any battlefield."[42] Only one detainee was alleged to have been captured on a battlefield by U.S. forces.[43]

THE CSRT PROCESS IN PRACTICE

The Denbeaux team also reviewed Defense Department reports, most of which were released under judicial order,[44] that document CSRTs conducted at Guantanamo Bay. The team had

36. *Id.* at 9.
37. *Id.*
38. *Id.* at 10.
39. DENBEAUX ET AL., SECOND REPORT, *supra* note 7, at 2.
40. DENBEAUX & DENBEAUX, FIRST REPORT, *supra* note 7, at 14.
41. *Id.* at 15.
42. DENBEAUX ET AL., THE MEANING OF "BATTLEFIELD," *supra* note 7, at 4.
43. *Id.*
44. DENBEAUX ET AL., NO-HEARING HEARINGS, *supra* note 7, at 2, 4.

access to records from CSRT hearings for 393 detainees,[45] although they had access to complete records for only 102 of those detainees.[46] The Denbeaux findings include the following:

- The Government did not "present a single witness at any of the 393 CSRT hearings. Instead it relied almost exclusively on the secret, and presumptively valid, classified evidence."[47]
- The Government typically provided detainees only with the unclassified, conclusory summary of the evidence against them.[48] Although the full CSRT records indicate that the Government presented some unclassified evidence beyond the summary in 48% of the hearings,[49] only 4% of detainees had access to that information prior to their hearings[50] and only 7% were shown it during their hearings.[51] No detainee was shown the classified evidence against him.[52]
- "[O]nly 26% of the detainees that requested witnesses were able to get any of those witnesses produced by the Tribunal."[53] Only 4% were able to get all of their requested witnesses.[54] While "[m]ore than half of the detainees who requested witnesses requested the testimony of witnesses who were not at Guantanamo," all such requests were denied.[55] "Thus . . . the only witnesses that any of the detainees were able to produce to testify on their behalf were other detainees."[56]

45. *Id.* at 4.
46. *Id.*
47. *Id.* at 19-20.
48. *Id.* at 21.
49. *Id.* at 22.
50. *Id.*
51. *Id.*
52. *Id.* at 30.
53. *Id.* at 27.
54. *Id.* at 27-28.
55. *Id.*
56. *Id.* at 29.

- "The promised CSRT process stated that detainees would be allowed to produce documentary evidence. In operation, the only documentary evidence that detainees were actually allowed to introduce were letters from family and friends. This was true even when the documentary evidence sought to be introduced was available and, in fact, even when the documents were in the Government's possession—such as passports, hospital records, and even judicial proceedings. In these cases, the detainee insisted that the documents would prove that the charges against him could not be true, but none of the documents was permitted to be introduced."[57]
- "No Tribunal apparently considered the extent to which any hearsay evidence was obtained through coercion."[58]
- "At least three detainees were initially found not to be enemy combatants and then subjected to multiple re-hearings [without notice to them of their initial 'victories' or of the re-hearings] until they were found to be enemy combatants."[59]
- "[I]n 78% of the cases, the [detainee's PR] met with the detainee only once. The meetings were as short as 10 minutes, and this includes time for translation. Some 13% of the meetings were 20 minutes or less, and more than half of the meetings lasted no more than an hour."[60] The PR "was totally silent in 12% of the hearings, and in only 52% of the hearings did the personal representative make substantive comments. However, sometimes the substantive comments of the personal representative advocated for the Government

57. *Id.* at 6.
58. *Id.* at 36.
59. *Id.* at 37.
60. *Id.* at 4.

and against the detainee."[61]

CONCLUSION

The Denbeaux findings illuminate the very real, very high stakes in the struggle between deference and skepticism regarding the Guantanamo detainees. The findings suggest, quite simply, that the Government erred in its longstanding assurances that the detainees were "the worst of the worst" and could be locked up for years consistent with morality, law, and national security. These errors are immeasurably costly, of course, to all who have been wrongly detained. And they bear costs that we in the United States have only begun to contemplate regarding our international reputation and national security. Among the many problems that the Guantanamo experience presents for the United States is the possibility that truly dangerous persons may have to be released because they were interrogated illegally at Guantanamo; the potential that fair hearings will make widely transparent that many innocents were wrongly held for years; and the possibility that the experience at Guantanamo itself has radicalized prisoners or others sympathetic to their plight.

All of this serves as a tragic reminder of a very simple insight at the heart of our constitutional system: human beings are fallible and a healthy skepticism of government is necessary to liberty and security. Because this proposition is at our system's core, it is hardly a surprise that a majority of the Supreme Court derived elements of it from the Constitution. The Court did so when it concluded that the military could not constitutionally evade oversight of long-term detentions by locating detainees offshore or by declaring detentions lawful.

For all of its tragedy, then, there are rays of hope in the Guantanamo experience. The experience illuminates tools for self-correction within our constitutional system. As of November 2008—in the wake of the Supreme Court's recent holding that detainees have a constitutional right to habeas corpus[62]—federal courts are reviewing habeas corpus petitions by detainees challenging their CSRT determinations. Whistle-blowers within the military have stepped forward over time to challenge the CSRTs and other elements of the Guantanamo detentions that they

61. *Id.* at 6.

62. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2240, 2262 (2008).

believe to be illegal. And public sentiment has evolved to the point that both major presidential candidates in the 2008 election pledged to close Guantanamo Bay.

Perhaps the most basic and most important lesson of Guantanamo Bay is the reminder it provides us of the crucial role that skepticism plays in our constitutional system. Certainly, as events at Guantanamo reflect, it is human nature to want to put skepticism aside and to rally around a reassuring leader in times of terror or war. Yet as these events also reflect, such temptation obscures the basic insight that humans are tremendously fallible and ought not to be trusted, unchecked, with a people's liberty or security. Because our Constitution is grounded in this basic insight, it—and the cultural values that it reflects and fosters—contains tools to help us right our paths when we stray too far from skepticism and too close to the deceptive comforts of deference.