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Always a judicial function

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Attacking Congress for what it fails to do is a timeless Washington tradition. But some attacks are misplaced, and that includes charges leveled recently by the Brookings Institution, which faulted Congress for failing to write a detailed code specifying the procedures courts must use as they decide who at Guantánamo Bay, Cuba, may be lawfully detained.

Perhaps in response to that attack, on March 4, Sen. John McCain (R-Ariz.) and Sen. Joseph Lieberman (I-Conn.) introduced a bill in the Senate that would codify the government's power to detain terrorism suspects indefinitely without charge or trial. Sen. Lindsey Graham (R-S.C.) is reportedly trying to negotiate White House support for something similar.

Those arguing for such new laws misunderstand both the limits of the legislative function and the nature of the judicial process. Determining whether a prisoner's detention is lawful has always been a judicial function, and a moment's reflection is enough to see that it could hardly be otherwise. The wide range of conduct that could subject a person to lawful detention simply cannot be reduced to a statute.

Take, for instance, a detainee's alleged attendance at a training camp. What if he stayed only a day, or a week, and in that time engaged in no training and left voluntarily? What if he attended the camp longer than a week but was kicked out because he opposed all forms of terrorism? What if he attended a camp that was unaffiliated with al-Queda and was opposed to their extremist ideology? May these people be detained for the rest of their lives? Or consider coerced statements. Drawing the line between lawful and unlawful coercion is a question judges face every day, the answer to which depends on the totality of circumstances. How could that "totality" be spelled out in a code?

The current Army Field Manual on interrogations, for instance, says interrogators may not question a prisoner for more than 20 consecutive hours. Does that mean any statement taken in less than 20 hours is automatically admissible? Or should the answer depend on whether additional coercive techniques were used?

And if other techniques are relevant, doesn't it depend on which ones, in what combination they were used, with what frequency and over what period of time? What if the interrogator questioned the detainee for more than 20 consecutive hours? Is that statement automatically inadmissible, without regard to extenuating circumstances?

Questions like these can be infinitely multiplied and will always elude legislative resolution. Should courts admit and give equal weight to all hearsay, or should it depend on whether the out-of-court statement comes from a U.S. intelligence officer as opposed to another detainee? What about hearsay from the intelligence service or police department of another country? Should that be treated differently? In short, should the admissibility of hearsay depend on all indicia of reliability — a constellation of factors that, by its nature, cannot be reduced to a laundry list?

Some judicial systems, like the accusatorial system in continental Europe, try to avoid these questions by legislating for every contingency. But even this has met with failure. As the legal philosopher Jerome Frank observed with respect to the French system, "the hope of attaining a large measure of legal certainty by codification proved vain." And federal statutes that approach this level of complexity — the tax code, for instance — are not models to be emulated. Instead, this country has always trusted in the common law process. Under judicial supervision, advocates use the tools of the adversarial system to narrow the case for decision. Mindful of the limitless variety of human experience, judges decide cases based only on the facts before them.

And thus far, the Guantánamo jurisprudence is developing precisely as it should. Courts have carefully balanced the government's interest in security against the prisoner's interest in liberty, all while protecting national secrets and judicial integrity. Some prisoners have won, others have lost, and a coherent jurisprudence is taking shape.

Naturally, one judge may evaluate a set of facts differently than another. To acknowledge this admits only what is trivial: Judges are human. Yet Brookings seizes on this fact and complains that some Guantánamo decisions might be inconsistent. But habeas decisions are subject to appeal, which sands down the rough edges of judicial independence and gradually produces a consistent jurisprudence.

If Congress did as Brookings bids, the certainty we are at last achieving would disappear in a bog of new litigation. After seven years and three U.S. Supreme Court decisions, the country is finally putting these cases behind us. All that would end if Congress drafted an entirely new code, which would throw settled questions into disarray.

Is the common law system perfect? Not so long as it is designed by human hands. But for centuries, it has proven capable of achieving a quality nearly as precious — justice. Congress well understands it cannot improve upon it, and should not be asked to try.

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