



Fox Rothschild Podcast

The Presumption of Innocence

Episode 68: The Legacy and Lessons of Guantanamo Bay: A Defense Attorney's Perspective

Featuring Matt Adams of Fox Rothschild and Mark Denbeaux

Matt: Welcome back to "The Presumption of Innocence," a podcast brought to you by the White-Collar Criminal Defense and Regulatory Compliance Practice at Fox Rothschild.

September 11, 2001 is a day when the world changed forever. Nationless terrorists that we would eventually come to learn were affiliated with a global web of loosely affiliated criminal enterprise manages to hijack domestic commercial airliners in the United States and turn them into guided missiles used to attack the World Trade Center in New York City, the Pentagon in Washington DC and crash into a field near Shanksville, Pennsylvania.

Before even the smoke cleared from the 9/11 attacks, the United States was in the midst of both a war footing and the largest criminal investigation in the history of its existence. Quickly, however, the lines became blurred between the nation's war footing and the law enforcement response. Just as quickly, questions emerged about the constitutionality of certain tactics undertaken during this unprecedented time in our nation's history. All of the ingredients for a constitutional crisis were present.

Those same ingredients may very well be present today and have been present at other points in our history as well. At this cross section between domestic law enforcement and military action, no issue garnered more attention after the attacks of 9/11 than the controversial decision of the Bush administration in 2002 to establish an offshore military prison to hold terrorism suspects --then labeled, quote unquote, "enemy combatants"-- at Guantanamo Bay, Cuba. Based upon reporting from *The New York Times* and other organizations, as of January 2025, at least 780 people from 48 countries have been detained at the camp since its creation, of whom 756 have been released or transferred to other detention facilities. Nine died in custody and reportedly 15 remain.

The U.S. Department of Justice at the time claimed that habeas corpus, a legal recourse against unlawful detention, did not apply to Guantanamo because it was outside of U.S. territory. In January of 2002, a temporary detention facility dubbed Camp X-Ray was created to house suspected al-Qaida members and Taliban fighters at the Guantanamo Bay prison. By May of 2003, the Guantanamo Bay Detention Camp had grown into a larger and permanent facility that then housed over 680 prisoners, most who didn't have formal charges against them. The Bush administration continued to maintain that it was not obliged to grant prisoners protections under the U.S.

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Constitution or even the Geneva Conventions, since the former did not extend to foreign soil and the latter did not apply to what they dubbed as unlawful enemy combatants.

Humanitarian legal advocacy groups claim these policies were unconstitutional and also violated international human rights laws. Several landmark Supreme Court decisions found that detainees had rights to due process and habeas corpus, but were still subject to military tribunals, which remained controversial.

In 2006, Professor Mark Denbeaux founded the Center for Policy and Research at my alma mater, Seton Hall University School of Law. This work was originally inspired by Denbeaux's pro bono representation of two Guantanamo detainees. He and his son are among the more than 100 attorneys who have represented detainees there. The Center has become widely known for its Guantanamo reports, key analytical accounts pertaining to the Guantanamo facility, and addressing things like the interrogation and the intelligence that they receive there from, national security implications of the detention and forensic science implications from forced interrogation via water boarding, extraordinary rendition, and other questionable tactics. Professor Denbeaux represented two Tunisian Gitmo detainees, Rafiq Bin Bashir Bin Jalud Al Hami and Lotfi Bin Ali. In 2009, Al Hami was released to Slovakia. In 2011, Bin Ali was released to Kazakhstan.

By 2009, Professor Denbeaux began his pro bono representation of two more Gitmo detainees. Abu Zubaydah, widely believed to be one of Osama bin Laden's top lieutenants, and Mohamad Farik Amin. Today, he remains Professor Emeritus at Seton Hall Law School and the Director of the School's Center for Policy and Research, and he is our very distinguished guest on "The Presumption of Innocence."

Professor Denbeaux, welcome to the program.

Mark: Thank you.

Matt: There's so many places that I could start, but I want to begin in a place that I think absolutely needs to be said from the outset. As a criminal defense lawyer, I'm often asked, how you can do it? How can you represent individuals accused of heinous acts? My response to them is often a lofty one, where I get my back up straight and I sound a little indignant and say, "I took an oath to uphold the Constitution, and even those accused of the most heinous acts are entitled to due process. My job is no different than those prosecuting the accused." I often say, and I sometimes even remind them, that in addition to due process, our Constitution guarantees the criminal accused of a right to counsel.

Throughout your career and including your work at Guantanamo Bay, Cuba, you've represented some of the most socially shunned individuals in our society. And looking back at your extensive career: the Mayflower Madam, accused terrorists, soldiers accused of disobeying their orders during the Vietnam conflict, members of the Black Panther Party. What do you say with the breadth of experience that you have representing these shunned individuals to those that might question your willingness to jump in and support them? The way that, you know, I just mentioned from a personal level, it's happened to me.



Mark: Well, I totally agree with your personal level, but I have a somewhat different perspective as well. My view is that if they call me and talk to me, whatever else they've done, they're scared, miserable, lonely and unhappy and desperate, and they need somebody to talk to and they need somebody to try to help them. It's their personal needs that are a driving force. I find it impossible to tell somebody we can't do something to help you if you're this desperate.

So I mean, I have represented lots of people. Some have been guilty. Some have been guilty of bad things. None of my Guantanamo clients have, however, and uh, I think it's in some of them were sort of victimized. The Black Panthers were basically wiped out and jailed, and they disappeared and they did all sorts of good things and some of them did bad things. But, that's just sort of how life works in the system.

You know, in this case you could easily argue the people who are most shocking to be entitled to lawyers are the torturers. After all, many people in the American government, civilians and uh, military tortured people. There's really no dispute about it. And yet the torturers have never been prosecuted. It's kind of interesting to me to find out why everybody is stuck that I would want to help somebody who's locked up and been tortured when no one else wants to even lift a finger to investigate what the torturers have done.

Matt: What initially motivated you to take on the legal representation of detainees at Guantanamo? What was the impetus for getting involved in such a very controversial --at the time and continues to be controversial-- issue?

Mark: Well, that story is kind of interesting. My son, Joshua, who was a trial lawyer, came to me and said, Dad, what do you think about Guantanamo? And I said, I haven't really thought about it very much at all.

And he said, well, do you think they have the right guys there? I said, I certainly believe they've got some of the right guys there, and I'm equally certain a bunch of those people don't belong there because they're so inefficient and they have no system for identifying it, and they've never had trials.

But then, so he said, what do you think, Grandpa-- my father --would've said? My father was a combat chaplain with General Patton. And he said, what do you think my father would've said, your father? And I said, he would've said, he would think it's pretty likely that --we're now talking about captured Germans-- he, my father certainly would've believed there were many Germans captured who would've been wrongly prosecuted.

And I said, but Josh, my father wouldn't have cared. He actually liberated a couple of the camps-- not the big death camps-- and it affected his whole life. But he wouldn't have cared. And Josh said, well, Dad, that's the whole point, isn't it? Somebody's gotta care. And we went down to do it. And the most shocking thing --when we went to the first session of the beginning lawyers --was how nobody knew anything. We were assigned two Tunisians because people were under the impression that Rafiq and Lufti Bin Ali were father and son. So everybody said, won't that be cute? Josh and Mark will represent a father and son who were there. Well, they weren't. They weren't related. They had nothing in common, but we got them.



And you know, what was amazing to us was to find out that there was no evidence against them. It took a long time. It took six months to get security clearance after you filed the habeas. Then it was hard to get down there. It's still brutal to go down there as a lawyer. Basically it takes a week. A day flying down, a day flying back, and it takes three days to interview people, but they only let you interview people for two and a half hours in the morning and two and a half hours in the afternoon. And if you have two clients, they'll let you have two meetings with each client. So you go down there for an entire week and spend five hours talking to one client and five hours to the other.

And when my client, first client, said to me, he said, well, how can you help me? And I said, well, the Supreme Court has said you have certain rights, uh, the habeas corpus. I'm a lawyer. And uh, I would say he responded, not unlike the way people ask you: how could you represent people like this? He said, the Supreme Court says I have rights? And I said yes. He said, how big is the Supreme Court's army? And I said, well, it's not very big, but you know, we'll see.

And I came to like him a lot. He turned out to be a witty and funny guy. And in fact, he was one of the wittiest people in the camp and the other detainees, they'd say he'd be standing there muttering under his breath making people laugh. And he was a very sweet and appealing guy. We got him out. That was Lufti. And, and he went to Kazakhstan.

Matt: Was he vindicated for wrongdoing or involvement in the 9/11 attacks? How did his legal process play out? Or did it just come to an abrupt end?

Mark: Well, it came to an abrupt end in one way. But you mean about the legal process? The interesting thing about Guantanamo is they opened it on January 11 and it was opened as sort of a perp walk. They wanted to prove they were winning in the global war on terror. So they picked up hundreds of people and then brought them to Guantanamo in their orange jumpsuits. They had goggles on, hoods over their head, feet, shackled, hand shackled, both shackled together, and they made 'em walk in with the press and everybody taking pictures. People claimed that that was a successful part of the global war on terror. It turned out that actually none of them, they had no idea who they were. They were giving bounties to people to turn in al-Qaida people. \$5,000 bounties were given to people who turned in al-Qaida people in Afghanistan. Fathers turned in their daughters' fiances, there were all sorts of grudges being done. And the truth is that they never figured it out. Lufti, whom I've mentioned, was never charged with a crime, not one.

And my other client who you were mentioning, my Malaysian client, was charged with being affiliated with a client in a bombing in a Malaysian hotel. And I'm not totally sure whether he had any knowledge of it, but he was 500 miles away and they all agreed that he never agreed to the bombing and was locked up by the time the bombing took place. And they held him there. He was just released this year.

Matt: What were the primary legal and logistical challenges that you faced representing the detainees at Guantanamo?



You mentioned the limited access and the constraints of traveling there, but did you ever feel like you actually had an opportunity to have, for example, a privileged conversation that wasn't being overheard?

Mark: Well, we were told they were all privileged. But that was discovered when I, when I was down there and they discovered that there were fire extinguishers in the roof of each of the cells in the ceiling. It was discovered that they, in fact, were microphones and everything that was said there was not only sent to the, the headquarters down there, but then sent around the world. There never was any attorney-client privilege, but none of us believed it. But none of my clients had anything they could say that would actually be damaging.

The real problem is, my clients were never charged with a crime. And my legal problem was I couldn't get that fact in front of anybody who had any power. By the way, when I say getting down there was hard, I don't want to leave out the fact you couldn't call them by phone. There were no phone communications. If you wanted to talk to 'em, you had to spend that entire week. And if at the end of the week on the way back you thought of something you wish you could have asked them, you have to wait and go back a month or two later. And that was very hard. And I was 62 when it started, I was 80 at the end. And it was very, very exhausting, those trips, too.

Matt: How many did you take? How many trips down to Guantanamo did you actually take?

Mark: I lost count, but it's 90, 100, something like that. But remember, I did it for 15 years.

Matt: Wow.

Mark: So, um, so I mean, and the biggest problem was you had a habeas corpus right, but first it was getting discovery. And, you know, one of the problems was that all discovery was classified and you couldn't even tell your client what the classified evidence was against you. So you had to find your way around it.

And one of my early clients, a tiny little guy missing fingers in his hand, he was supposedly an ally of Osama bin Laden. It was inconceivable, but I couldn't ask him that, so I said, did you ever hang around a tall guy with wearing a big white? No, he said, I didn't. And I said, said, are you sure you've never? He stopped. He said, are they saying I was around bin Laden? He said, and he holds his hand up with two fingers, says, what would I be doing around bin Laden? He said, that's absolutely stupid and ridiculous. But that was one of the allegations against him.

And all of the allegations they put against all of my clients were never determined or proven. There was never a hearing on whether he was affiliated with bin Laden in any way. And he clearly wasn't. Um, he was an Algerian guy who was studying the Koran in Kabul when we came in.

Let me go to the big client, Abu Zubaydah, who was the poster child for torture. He is the first person the CIA caught in March of '02. He was, in a variety of ways, tortured by most standards, but not the official standard, in April, May and June. In June, the FBI stopped torturing him and participating. And the reason that's significant is the biggest problem under pushing the creation of the torture



program was the CIA's need to establish control of interrogation. What they needed to do was to have techniques that they could use that would have two qualities: one, exceed what the FBI would be permitted to do. And two, they'd be able to argue it was effective.

And they had two, the torturers-- Mitchell and Jess, who were making fortunes all over the place -- were the ones they hired. And so the torture was set up to be something that only the CIA could have access to the individuals and the torture program was not approved until August of 2002. And an important fact is when the FBI pulled out said, we can't do it on June 2. One of the more shocking things was the CIA stopped all questioning. They put him in isolation for, uh, basically for two months. Nobody questioned him, even though they told the Department of Justice he had knowledge of imminent threats on the homeland. They never asked him a question for two months. Then they sent him in to torturing. And as the Senate committee found out, the torturers got nothing that the FBI using their techniques hadn't already gotten.

Matt: Yeah, I'm just, I'm drawing this contrast in my mind as we're talking, professor, and you know, when I represent a client in a domestic criminal action, I have a charging document-- whether it's a complaint or an indictment-- it speaks to what the allegations are, but most importantly speaks to what they are not. And I can deal with it because it's a defined universe. In a sense, it sounds to me a lot like you were going into these representations of detainees at Guantanamo really without an understanding as to what the allegations were, other than some broad-based platitudinal type of view that they were affiliated with evil.

Mark: Yes. But they also, for instance, my client, Lufti Bin Ali, when we first looked at his file, it was kind of shocking. Because first of all, one of the things they noticed was he may be a complete doofus or he may be blowing smoke. I think we should assume he's blowing smoke and knows a whole lot more. And they never got past that.

And after six years, they never, ever produced any information. So one of our problems was going down there and saying, we can't really tell you what their charges are against you, 'cause they won't tell us. So you're right. And by the way, the other problem was all the evidence that they did come down with was at least the result of torture by all normal American constitutional standards and they couldn't even use it.

Matt: I know you dedicated a lot of your career to testifying as an expert on forensic interrogation techniques. And what aspects of those techniques, those enhanced interrogation techniques, as they were oftentimes called-- a sort of more vanilla way of saying that the word torture-- I think--

Mark: Right.

Matt: --for, people that didn't want to get caught up in that. And, you know, that was a wide-ranging view at the government during the time that certainly these were "enhanced," but they were, they would stop short of saying torture. What did you come to learn about the accuracy of the information that would flow from those types of techniques in representing the parties that had to endure that type of interrogation?



Mark: First of all, one of the things, they found a document called the Manchester Document, which was supposedly the al-Qaida playbook in London. And in that book they said, you can't resist torture, try to delay it a few hours so people can make plans and adjust and then talk. I don't think anybody resisted torture until we got to the torture program starting in August.

I never found anybody who actually came up with any information that was of any use. I mean, they would say, so and so knew so and so, and that person knew so and so, and if you connect them with this person here and so and so lied, they could string these things together, but they couldn't even prove.

Their problem was all they did in the first three or four months was arrest everybody whose name they could be given. Basically Muslims in Afghanistan. And they brought them in in a rush to show success in the global war on terror. If they hadn't brought them in in the orange jumpsuit, shackled hoods, helmets, book and shuffling along and made a big deal of how bad they were, they'd have all been released in a month or two. They released lots of people in Afghanistan. And in fact, one of their problems was they didn't know who was a problem in Afghanistan.

There's three kinds of intelligence gathering. One is the criminal intelligence gathering that the FBI is very good at. It's interviewing. They know a crime has been committed or something's been committed and they have something that they're looking to find out and they have targets and issues around it and people. And they're very good at getting people to talk.

The second kind of intelligence is the military intelligence, which is basically what's over the next hill. We don't want to be ambushed. Who is out there? And if they could find somebody who would help them, even though that person hated America, they would use the information.

The third kind of intelligence is the intelligence our government thought or hoped they could produce, which is find out who are the bad people out there who don't like America, and might be planning to do something to us. And there's no mechanism for doing that. And all the evidence is that virtually everything they got from torture was either-- I'd say it was useless because it was a result of torture-- but produced almost no evidence.

Matt: Did you ever feel that your work was being affirmatively obstructed by either policies of the government or military officials directly? How did you respond to that, if that was the case?

Mark: You know, you begin with the fact that they tell you when you get down there and you haven't been able to talk to your client, you're going to walk in and meet a client doesn't even know who you are or why you're there.

You had to bring an interpreter down, which was very expensive because they had to spend five days down there and you had to go down so they could help interpret. That interpreter has to have security clearance, so you had to find an interpreter who could interpret appropriate Arabic and have security clearance so they could walk in and talk with you.



So, you know, I don't even quite know where to list how hard everything is. But if you have two and a half hours and you have to interpret, you immediately have at least half the time repeating the same words in two different languages.

Matt: Immediately half the time.

Mark: Yep. Right. And it often takes more than that because the interpreter's Arabic does create a little bit of a bond, talks to them. They're all, they're themselves are all Muslims, and they will vouch for you a little bit and be helpful in some ways. So the interpreters were helpful, but very hard to get.

Matt: Wow. Now, the Seton Hall Law Center for Policy and Research has produced over the course of your work in Guantanamo multiple reports analyzing government data on detainees.

What do you believe was the most important or impactful finding to come out of this research that your team conducted at an empirical level?

Mark: Well, I actually think it was our first report. Our first report when I was down there, my first time, when I came back from my second visit. A journalist for AP gave me a DVD, or CD, and he said, here is what the government used in their prosecution of these people.

When we say prosecution, after the Supreme Court said they had a right to a hearing, they scurried around and set up this informal procedure. And they had no lawyers and no transcripts, but they would come in and make findings as to how people were in their behavior. So we had a list of all about 600 people who were there.

And in the course of looking at that list, two things happened. One, all but three people lost. Of the three people lost, two had second, they gave them a second hearing. By the way, you couldn't tell them whether they won or lost so they could never know whether they won or lost. They were just sent back and nothing happened. But they had a real problem if they had to give them a second hearing. They just came in and gave them a second hearing, and then they were found to be enemy combatants. The third person won twice.

Matt: Wow.

Mark: That's what my son said. And then what do you think happened? They gave him a third hearing and then he was found to be an enemy combat.

Matt: Did you find that the staff at the Guantanamo facility was distrusting of you American lawyers coming down there?

Mark: Yes. Two things, first of all, if you're going to be a guard guarding people who are incredibly dangerous people, it makes your job important and you gotta be vigilant and you have to look after yourself and they have to protect America. These people view us as helping terrorists. And they're all told that, you know, when these people get out, eventually they're going to come back and they're going to kill and rape your mothers, your girlfriends, your wives, everybody. They'll find your hometown and they'll do that to every one of your loved ones. Of course no one ever even got out



of there. But that made, you can see how that made the guards view us as enemies. And they all believed everybody was guilty, 'cause else why would they be there? Which was a presumption many people had.

So, we were at the beginning, we'd be escorted with an armed guard-- it's interesting to see, it's just a side holder. Everybody had it. We stayed on the, what was called the leeward side of the island where the airport was. Then you'd take a ferry across Guantanamo Bay for 20 minutes, being met with this armed guard. And they would then escort you around and you'd have to get badges and do things to go in and out.

But they would let you go get them a little bit of food. 'Cause at least you could sit there and sort of break bread a little bit with them. And they'd take you out to lunch, leave for lunch, go back, and then take you back. After a while, they were easier to deal with. I remember telling one of them, I said, God, you should be proud. He said, why? I said, you guys, not a single person has ever escaped from Guantanamo. The guard says, how can they escape from here? It's an island stuck out in the middle of the ocean. Oh. I said, maybe that's the point. So the guards had, as time went by and as their tour would go up, they were nicer to the detainees as they got to know them.

So I think the guards were very difficult at the beginning and bolly bored and polite, pleasant, and maybe nice sometimes as the years going by.

Matt: Professor Denbeaux, from your experience and perspective, how did Guantanamo Bay challenge the rule of law in our country and perhaps the American constitutional principles that we enjoy in the criminal justice system domestically? And what are the long-term legal and moral consequences of the U.S. government's actions during that period of time? Which really continue today, as I said at the outset, there are still at least a finite number of detainees at Guantanamo, and it, by all accounts, this administration is looking to repurpose Guantanamo into another form of detention facility.

Mark: I would say that one, it's impossible to defend anything about the legal process or the legal rights or the courts. The Supreme Court gave several pretty high quality, but not great sort of, speeches about America's legal system. And then they reached conclusions that didn't uphold it. I mean, for instance, one was if you won your habeas corpus petition for your client-- and some people did-- the Supreme Court had ruled that even if you win your habeas corpus petition, their courts don't have the power to tell the government where to place people or what countries to send them to, because foreign affairs are where the executive branch has its greatest power.

And of course, that principle meant that winning didn't win anything. Something that was again causing really great distress. I mean, if you couldn't win, it was bad enough. But if you could, it was almost worse. So that kind of goes to today. I mean, if you could get a habeas corpus petition, the protection that they have now is because they're on the soil of the United States. The Constitution applies. So the rule of law applies. So in fact, courts can do something about it. Guantanamo, the trick to Guantanamo was claiming it wasn't U.S. soil. 'Cause everybody has a constitutional right, if they're either an American citizen anywhere in the world or if they are in fact on U.S. soil. So our deportees have at least some constitutional rights. And that's why the courts are making ruling.



But getting back to Guantanamo. I mean, I think it's important for Americans to believe that we do try to be a good country, but when we're scared or under pressure or intense times, we fail. I mean, that would be the Japanese and World War II. That would be Guantanamo. But it also is going to be... the problem with Guantanamo, it was America responding to in a way that was very clear we were all afraid or supposedly afraid. And we all believed there were more attacks coming. And many of your audiences won't remember, but you know, right after 9/11 there were a lot of beliefs that people were here with poison and they were going to drop it into the reservoirs and poison all Americans. And there were just endless examples of things people should be afraid of. The fear was pretty intense for quite a long time, even though it was in fact quite foolish.

And in some ways, Osama bin Laden won. He changed the civil liberties of the United States. Getting on to and off airplane is difficult because of Osama bin Laden. Having to walk through security in courthouses. You didn't have to do that before Osama bin Laden. You can go through and look at the ways in which America has changed. You know, unless you're 40, you can't even remember what America was like in the 90s. All you can remember is what's going on now. So an awful lot of our freedoms and our quality of life have been changed in ways that get lost in the process.

So I don't know where to answer your question except to say that it's not just the legal system has failed. The entire impact of it, the way fear has changed us.

Matt: You're a legal scholar. Dedicated your life to defense of the constitutional principles that our country stands for. When do you think, if ever, the United States will reckon with its policies surrounding detention and interrogation at Guantanamo Bay? Or will this just be one of those chapters that we talk about with an asterisk? Case in point, you know, lot of people say history has a way of repeating itself, long before Guantanamo Bay, Fred Korematsu-- who I learned about studying constitutional law at Seton Hall under one of your colleagues -- he was an American civil rights activist who really challenged the internment of Japanese Americans during World War II. He refused to comply with an executive order, which authorized the forced relocation and incarceration of Japanese Americans from the West Coast after Japan bombed Pearl Harbor.

The United States Supreme Court, speaking of, you know, pronouncing broad platitudinal speeches that have no teeth, ruled six to three in what has now been described as one of its biggest errors of the court in history, upholding his conviction for refusing to evacuate to an internment camp. And while that Supreme Court decision still stands today, the Commission on Wartime Relocation and Internment of Civilians wrote in its 1983 report that was entitled, "Personal Justice Denied," that the Korematsu case quote "lies overruled in the court of history," unquote. Against the backdrop of what happened, you know, those words were spoken in 1983. By 2002, you're describing a system of offshore internment of what the administration then called unlawful combatants. Did we learn anything? Was Korematsu really overruled in the court of history? Or is this just the quiet part being spoken out loud, that there are times where we actually do dispense with our constitutional rights in this country because we are afraid or there are some other exigencies that we need to deal with?

Mark: Your point is what do we do when we look back historically? And the, usually historically, we look back and say, you know, that was a terrible thing we did, but the law has been cleared up and we'll never do it again. And of course, we just keep finding ourselves doing it again and again.



I will say this: I think America keeps making these mistakes at certain key times and they do it over and over again. And I'm not sure they'll ever not do that, we'll ever not do that. On the other hand, we do learn from it and people do try to do better. And lawyers, there were no lawyers for Korematsu at the time. There were lawyers here for these people. Now in, we didn't get them out, effectively. They only got out when the State Department found places they were willing to send them to. No lawyer ever got anybody out of Guantanamo. But the publicity that came about, the public relations, the steady sense that this is ugly and bad, worked and people got released.

And I think that the best thing that we can say is, if we keep doing our best, we'll get a little bit better sometimes, a little worse other times. Look, you know, I was in the Civil Rights Movement. I was in Selma in 1965. And that led to the Voting Rights Act. And I think you could argue there, the Voting Rights Act was designed to clear up 150 years of gross injustice. But 50 years later, they're trying to, it's being taken away again on the assumption that somehow or other bad people don't do bad things, and that good people aren't very strong. And I think that's where we have to accept ourselves and keep trying to do better.

Matt: Did they get anything right at Guantanamo Bay? Is the whole chapter of the detentions at Gitmo post-9/11, now that the numbers have waned down, you know, to the single digits essentially, did they get anything right there?

Mark: That's a good question. I never thought of it that way. I'm pretty sure the answer is not one thing was done right. All except they had a huge public relations coup at the time to show that the Bush team was winning the global war on terror. Once we turned into a global war on terror, whatever that means, then Guantanamo was going to stay open until people said, oops, wrong about the global war on terror. And nobody's ready to say that, even now.

Matt: All these years later, we have had promises to close the prison at Guantanamo Bay, Cuba. Why hasn't that occurred? We had eight years of the Obama administration, where President Obama pretty directly said, I am going to close the prison at Guantanamo Bay. But he never got it done. Why?

Mark: Right. Well, believe me, we heard that. Our clients heard that. Everybody down there heard it, because that was 2008 to 2016. I think the answer is, first of all, it's a little bit tactical. He wasn't very shrewd. If he had wanted to close Guantanamo, he shouldn't have announced on his first day, the first order we'll do is close Guantanamo. He shouldn't have mentioned it. And then somewhere in April, he should have closed Guantanamo, having it all arranged and people were out of there. So there'd be a big stink, but then it would be done.

You know, one of the reports we did was a study on the claim was that if you were released, you'd return to the fight. Well, it turned out not a single person returned to the fight. In fact, they couldn't produce any evidence. One of the interesting things is the only person they've ever been to identify as somebody who was returned to the fight was a Kuwaiti who was released to Kuwait over the objection of the government and the Kuwaiti government. And then he left and killed an Iraqi. He's the example of people who returned to the fight.



Now, one of their problems is they don't know who was in Guantanamo. You know the funny thing is, if you kill an Arab man, you say, ah, he was in Guantanamo. There's no way to tell. So they would claim so and so returned to the fight, and they never even knew who they were. And one of the other definitions, what was return to the fight? Six people returned to the fight when their lawyer published an op-ed piece in the *Times* complaining about how they've been treated and when they were already out of the country. We don't even have a way to define return to the fight, so they can't even find the victory.

And you'll notice, they never mentioned that anymore. They're not out there saying, we had 700 people. What have they done? Because they can't even answer it. There's no evidence they've been anything but what many of them were: carpenters, shepherds. One of my clients went and bought a used appliance store in Tunisia, and ended up dying.

Nobody's looked into the fact that how many of the people released from Guantanamo, what are they doing now? How many are alive? Um, the ones who were released from Guantanamo who may have gone back to Chechnya, those people are, would, no one will ever know what happened to them.

So it's the ignorance of it from beginning to end. It's only the gross horror that stands out. And it's hard to-- until you can put a personal face on a victim, nobody really identifies with him.

Matt: Is it your proposition, Professor Denbeaux, that every single detainee at Guantanamo was there improperly? That every single individual human that was brought there had absolutely no role or connection to--

Mark: No.

Matt: --any terrorist network?

Mark: No. No. Well, I don't know what they even mean by a terrorist network. You know, al-Qaida was not a big organization. They had a couple hundred people in it and they were created to fight the Russians in the, in the 1980s. So, there were many people who were connected with al-Qaida in some ways, including staying in guest houses in places when traveling. You know, if you're traveling across Afghanistan, there aren't any Motel 6s. You end up trying to find houses and they tend to be, Algerians stay in Algerian houses and so on. And some of them are clearly connected to people who were angry and talking. There are people who did bad things. There were people shooting or at war with America. I don't deny that. But if we're talking about people out there, whoever attacked a civilian or went after somebody, women or children, the people in Guantanamo had an interesting split. A small group of them were responsible for these bombings in some loose way. They knew somebody, they were involved. Guy named Khalid Sheikh Mohammed was clearly involved, says he was and said he planned it. He was clearly involved.

But other than those five people, they had nothing to do with it. And in fact, there's a debate in Guantanamo about whether the 9/11 actually violated the Koran. Quite a significant number of people down there believe you don't kill women and children and civilians. You killed soldiers. And



one of the reasons they haven't come forth to say that is there some loyalty to the brothers and they don't want to be out there attacking them for doing it. But, it's, you know, if you're talking about terrorism-- putting aside those people I just mentioned, who, by the way, were brought in in 2006 in order to show they had some bad people. It might be interesting to know when the government was trying to figure out how to come up with some version of the habeas corpus that would satisfy the court, they were having trouble in the Senate 'cause they couldn't come up with anybody. So they brought in these five people and said, now we've got some bad people and we want to make sure they have hearings.

Matt: To that point they had the real bad people in CIA black sites offshore as well, right?

Mark: Sure, absolutely. They were only brought -- Bush admitted and said, he said, you know, we're closing the dark sites. And then he brought all of these people in. And then he said, these are really bad people and that justified Congress setting up this complicated military commission system, which was designed never to let people win. But it did get their stories out.

I'd say the thing we're most proud of, that first report that I mentioned to you about who was in Guantanamo, we were able to show how 8% of them were affiliated with al-Qaida. That was it. And we were able to show that 60% of them were nothing, but if you could be a fighter or supporter from or passing, 60% were just affiliated with the Taliban. Which as one of my students said, he said, you know, being affiliated with the Taliban in Afghanistan is a lot like being affiliated with the Bush administration when you talk to the Post Office people. Because the Taliban ran Afghanistan. And um, we ended up writing up one person who had been charged with being a member of the Taliban, but it said he was conscripted by the Taliban to be an assistant cook. And when the Northern Alliance attacked, he surrendered. That was one of the people they claimed was somebody who took up arms when of course he didn't, and all he did was surrender from cooking. I remember one of my students says, damn it. He said, why, we've got the sous chef. Why can't we at least get an effing chef?

Matt: Did you get any backlash for your work on Guantanamo, professionally, personally, at a higher level? Explain that. Because I think there's a lot of, sometimes defending civil liberties comes at a personal cost. Talk about that.

Mark: Okay. I did anticipate that that might happen. Seton Hall University backed us completely. Uh, at no point did they undercut what we were doing. They paid my expenses to go down to Guantanamo, including my interpreter who cost \$900 a week. So Seton Hall was heroic in this regard. I think at the very beginning, everybody's strategy was to expose the torture. Because if you could expose the torture, it might change the debate and it might help people get out.

So everybody was trying to do it. Well, we got screwed when the U.S., The Senate Select Committee on Intelligence announced that the CIA had tortured people. So suddenly the secret that they had been tortured was no longer a secret.

Matt: They ripped the bandage off and just said it out loud.



Mark: Yeah, yeah. So now we had no leverage on them.

But I will say this, I remember in those early couple of years, there were things that were happening around some of us that were unnerving. I think one of mine-- which was quite silly-- was, I had one of those mobile light going off and people walked by, you know what I mean, in, in the backyard or in the driveway?

Matt: Yeah, the motion sensor.

Mark: Motion. Right. Well, one time my motion detector went on, I'm seeing at two in the morning. I'm saying, well, shit. Then I say, our CIA can't be this stupid. And of course, by then I knew they could. And we went out and looking, and I did that a couple times. And I think the only relevance of that is showing I was, I had a degree of concern that I wouldn't have known I had if the light hadn't gone off and I hadn't decided I had to look around.

Matt: It could have been an animal

Mark: I'm sure it was.

Matt: But for your work that was going on at the time.

Mark: Yes, I'm quite sure a deer ran by. But the fact that I thought it might not have been a deer was a sign of some anxiety floating around.

Matt: When was the last time, Professor Denbeaux, that you were at Guantanamo?

Mark: Well, COVID screwed that up. I went down a couple times at the beginning of COVID. We had to wear masks and do various things. And then my clients, after 19 years, I don't think they were that impressed with my assistance. And so their interest in my visiting was less. But also they made, the government made it a lot harder.

One of my clients, Abu Zubaydah, was originally charged with potentially a military commission. He is the one, the first person ever tortured. He's the one that torture program was invented to torture. And he's the one they now admit they have no evidence against him, but he'll be a forever prisoner because he is too dangerous. And the only thing he is dangerous about is talking about the details of what they did to him.

And I helped him publish some of his drawings doing them, and people should look at those. They were in the *Times* and other places. They're pretty compelling. But when we were dealing with him, it also turned out that I hadn't gotten very far. I'd go down there and mostly I went down there to talk to him, bring him some food. Do a few things. And I was perfectly happy to do that, but it got harder and harder. And sometimes you could go down there sometimes and your detainee and you would say, I don't want to see anybody today. Saying no to us was the only time they could ever say no to anything. And so you'd come down, you never quite knew if you were going to see them. And you'd get there the first morning and they'd say, no. You'd go back to the barracks, you'd come in the afternoon. The other one would see you. The next day, the first one would see you who had said no



the first time. There was even a tension about whether you could visit or not visit. And, my client lost interest in me. Too many nos, and I still appreciate him so many ways. And it's amazing. He is the only person they agree they can't prosecute because they have no evidence against.

Matt: There's 15 people among the remaining, by public reports at least. You know, we take those with a grain of salt, I guess when we're talking about something like this. But credible news sources have published that there are 15 detainees remaining at Guantanamo Bay.

Do you believe that those 15 will simply die there? Or what is your belief about how those 15 will be dealt with some going on 25 years after the 9/11 attacks?

Mark: As you pointed out, nine have already died there.

I think there are five there who, are credibly accused, but not that, no evidence has been established as such of participating or supporting 9/11. Maybe they got some money, they moved somebody around to get some funds. And I think those people are never going to get out. And I think they were trying to get them out.

And the big problem now is they don't want to be. I once asked the general in charge of it-- 'cause they were going to execute this guy, Khalid Sheikh Mohammad. And I said, General Martin, what are you going to do with his body? He said, we hadn't thought about that. Well, I said, you're making a martyr when you, you're going to send him home to his family. He said, we hadn't thought about that either. They don't even know what they want to do with the bodies of the people. They just want it to sort of slowly disappear.

And you know, if you take those five out and my former client, Abu Zubaydah, out. The other people generally have other problems in other locations. But they're slowly getting out. One of my clients got out in December, by Malaysia. So I don't have an idea. And obviously the-- look, they're now having to install handicapped access up there. 'Cause people have to be moved from their cells down to the courthouse in wheelchairs.

Matt: And our nation has just spent untold sums of money continuing to facilitate this extra-judicial system offshore. And let's bring it full circle because today, in today's times 2025, the Trump administration has broadly expanded a policy of migrant detention in the United States, some of that coming without due process, and building facilities like what's being billed as quote unquote "Alligator Alcatraz" in Florida.

Homeland Security Secretary Kristi Noem indicated publicly that Alligator Alcatraz will serve as a model for state-run migrant detention centers across the country. And she told various news outlets in a series of interviews that she hopes to launch a handful of similar detention centers in multiple airports and jails across the country in the coming months. Potential sites are reportedly already under consideration in Arizona, Nebraska and Louisiana, according to public reporting. Has our nation once again gone back into that same constitutional no-man's-land where we were with Korematsu and where we were with Guantanamo?



Without even resolving-- at least, the Japanese internment camps were fully and finally resolved at a point certain-- but we are not even done, based on what you've told us here today, resolving the Guantanamo situation and we're already starting another one. And in fact, President Trump has publicly called for the expansion of the Guantanamo Bay facility to be used as a migrant detention facility. Are we going back into this constitutional no-man's-land?

Mark: Well, this, I would say yes.

Because the measurement of whether we're going back is the climate going on when we do this.

Korematsu was World War II, which was in fact quite different, but still ridiculous for Japanese to be assumed to be terrorists. Guantanamo was the terrifying, scared time. We basically decided they were too terrible to pay attention to. And I think we're now doing that, if the climate continues. So if people hate terror, hate immigrants, this will continue.

I am, of course, always optimistic. I'm not convinced that the animus against detainees, deportees is of the same level. But yeah. It's not like, I think our generation has won a lot. Selma got a Voting Rights Act that's being taken away. Guantanamo never solved anything and held a whole lot of people wrongfully there for no purpose. And now we're going on and doing it again. I think we just have to recognize that every country makes serious mistakes when the politics gets tied up with anger, fear, prejudice.

Matt: Do you see the Supreme Court, as it's currently constituted, to present any reasonable checking force on unfettered executive power that allows things like happened under President Bush after 9/11 at Guantanamo Bay to happen again?

And the reason I ask you this question is because when I think about this, I think of like the exigency exception to the warrant requirement, right? The warrant requirement stands, we have to have a warrant that identifies the place to be searched and the items to be seized. Except when we don't.

Mark: Right.

Matt: Except when the circumstances of the times warrant that we throw the Constitution out the window. And the Supreme Court has basically said as much, at this point. As our Fourth Amendment jurisprudence stands, there is an exigency exception, there is a clear body of cases that throw terrorism into that exigency exception.

And are we going to be at this point where these type of detentions happen every 25 years or so and we just better get used to it? And, or is the Supreme Court willing to go out there and say, yeah, this is going to happen and it's an exigency that we'll allow?

Mark: Well, I guess your question is, are these exigency circumstances times, right? Because you have pointed clear, whenever we determine these times are appropriate for exigency circumstances, we throw it all out. So maybe the question I should be asking is sort of going through the list of things and saying, are these exigency circumstances sufficient to warrant torture? I'd like to think



people say no now, but they didn't say no a while ago. And basically all they've done is farm those people out so they can't even litigate it.

You know, Congress passed a law that basically said torture victims can't bring any lawsuits in the United States, so they can't even do that. Korematsu, they couldn't take that away from him.

I think really our question is a personal evaluation of the state of our view of democracy and our hopes and aspirations for our country. And I think things are looking pretty grim now, but I actually believe it was grimmer for people who were allegedly affiliated with 9/11 and the attack because the panic and the horror of that was so much greater. Nowadays, they're still having problems claiming the deportees are necessary or there are exigent circumstances. And I think the courts haven't agreed with that yet. Don't you agree?

Matt: Yeah, I think you're right. I think you're right in recapturing my question as essentially a question of whether there actually is an exigency.

I think universally after 9/11 people said yes, there is an exigency.

Mark: Right.

Matt: I think if you took a poll, you would get as damn close to a 100% of the population saying, yeah, I'm scared, yeah, this is crazy. I lived through that, you know, and it was a scary time. And I think the difference now is that there's an effort to maybe push us into that direction and not as many people are being pushed.

Mark: Right. I think that is right. And I think certainly the lower courts have not been pushed.

Matt: Yeah.

Mark: Your real question is, will the Supreme Court say this counts as the appropriate circumstances to apply exigencies to it? And I think we can hope not, and I think it would be reasonable for them not to. I don't know how to predict that.

Matt: Yeah. Well, we've been talking with Professor Emeritus Mark Denbeaux of Seton Hall University Law School about his experiences over the last 25 years or so, working with detainees at Guantanamo Bay. And I think Professor, that's a great stopping point because while we could perhaps talk all day about your career and your experiences, we've really brought a contemporary touch to an issue that we've been dealing with and reckoning with as a country for the last 25 years or so in the aftermaths of the 9/11 attacks. And perhaps longer as you, as we pointed out, post-World War II and the Pearl Harbor attacks, we had similar issues in the Korematsu case and perhaps even earlier in the World War I times. But that's all the time that we have for on this episode of "The Presumption of Innocence."

Professor, thank you so much for being with us. As a former student of yours, I took your evidence class as a second-year law student at Seton Hall. I can't tell you how much of an honor and a



privilege it's been to have you on the program. Until next time, this has been "The Presumption of Innocence." We'll see you then. Take care.