Chapter 15.
The Charade of Combatant Status Review Tribunals

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Abstract

Guantanamo detainees are provided a Combatant Status Review Tribunal (CSRT) to determine if they are enemy combatants, however they are not allowed to have attorneys present and there are severe limitations on fundamental due process rights. The June 2008 Supreme Court case, Boumediene v. Bush, noted “there is a considerable risk of error in the Tribunal’s findings of fact.”¹

This chapter will review several CSRT transcripts to compare the CSRT procedures to the due process procedures in traditional American criminal courts where the defendant is represented by counsel. The Boumediene case pointed out that a detainee’s opportunity to question witnesses at CSRT hearings “is likely more theoretical than real.”² This chapter will analyze numerous CSRT due process rights that are also more theoretical than real, resulting in a justice system that stands in stark contrast to the Nuremberg Tribunals’ historic legacy of fairness.

The Charade of Combatant Status Review Tribunals

The Nuremburg trials provided due process and a fair trial to some of the worst war criminals of the century. Each defendant was provided an attorney, had access to all the evidence against him, had the right to call witnesses, received a trial in a short relatively amount of time³, had a public trial with experienced judges, and detention pending trial was humane with no taint of torture. The detentions and procedures at Guantanamo

³ The Goring trial lasted 315 days from start to finish. It began on Tuesday, November 20, 1945 with verdicts given on October 1, 1946. He had been detained for approximately six months awaiting trial, having surrendered on May 9, 1945. Eric A. Larson, “60 Years Ago…,” Robert H. Jackson Center, http://www.roberthjackson.org/International_Law/time_capsule/

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Bay stand in stark contrast to the Nuremberg model. Detentions began in 2002 and no detainee was allowed access to a lawyer until 2004 or later. Thus far, more than 700 men have been detained at Guantanamo, yet, only one case has been resolved by means of a plea.4 No criminal trials have been completed and charges have been filed against only 15 in the six year period since the first prisoners arrived at Guantanamo on January 11, 2002.5

The hundreds of detainees who are not charged may instead receive a Combatant Status Review Tribunal, a process established by the U.S government in response to the U.S. Supreme Court’s 2004 ruling in Hamdi v. Rumsfeld.6 Though the word tribunal is defined as a “court of law” or “the place where a judge administers justice”, these tribunals at Guantanamo have little to do with the bedrock criminal justice principles valued by American courts. The lack of due process is exacerbated by the barring of defense counsel from these hearings. The end result is that many detainees are often worse off participating in this hearing than had there been no hearing at all.

The Supreme Court held in Hamdi, that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker.” The Hamdi court referred to a 1993 Supreme Court opinion which stated that “due process requires a ‘neutral and detached judge in the first instance.’”9 The Court stated, “It is equally fundamental that the right to notice and an opportunity to be heard ‘must be granted at a meaningful time and in a meaningful manner,’” noting that “[t]hese essential constitutional promises may not be eroded.”10

Because Hamdi dealt with an American citizen, some argued that the detainees at Guantanamo should not be entitled to the same level of constitutional due process since they are not citizens. The Bush administration had argued early on that the Guantanamo detainees were not entitled to protection by the U.S. Constitution or even the Geneva Convention.

However, the Court held, in 2006, in the case of Hamdan v. Rumsfeld11, that Common Article 3 of the Geneva Convention did apply to Guantanamo Bay detainee Hamdan. Common Article 3 is one of the articles that appear in each of the four different Geneva Conventions and as such covers everyone ranging from prisoners of war to civilians. The Court ruled that Common Article 3, which requires defendants be tried by a

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5. Ibid.
10. Ibid.
“regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples,”12 applies to Hamdan and other Guantanamo detainees.13 In explaining the term “regularly constituted,” the court referred, in part, to an International Red Cross treatise defining the term to mean courts that are “established and organized in accordance with the laws and procedures already in force in a country.”14

I will discuss the Combatant Status Review Tribunal process at Guantanamo by comparing it to what due process would typically be afforded a criminal defendant in the United States. I will do this by analyzing several cases: one of a “high level” detainee, Khalid Sheikh Muhammad15, and two other lower level detainees who have subsequently been released after years of detention without charges. I will discuss specifics from the transcripts of these tribunals to offer a comparison of what due process these detainees might have had if they had been represented by competent defense counsel and if traditional constitutional due process standards had been adhered to.

(The transcripts reviewed are available online as a result of Freedom of Information Act requests that resulted in court ordered disclosure of the transcripts as part of habeas corpus proceedings for some of these detainees.16)

No Guarantee of a Neutral and Detached Judge

The Combatant Status Review Tribunal transcript for Khalid Sheikh Muhammad gives an initial impression of being impartial and fair. It begins with the introduction of all tribunal members,17 followed by the swearing in of various court personnel such as the recorder and the reporter. The recorder is asked, “Do you, Lieutenant Colonel

15. Mr. Muhammad was recently arraigned along with four other Guantanamo detainees. Charges included 2,973 counts of murder, one for each of the victims of 911. The prosecution intends to begin his trial on September 15, 2008. As of June 2008, he had refused the assistance of counsel in his trial and says he welcomes the death penalty since he seeks to be a martyr. Jane Sutton, “Accused 9-11 mastermind welcomes death penalty,” Reuters, Jun 5, 2008 http://www.reuters.com/article/domesticNews/idUSNA SU6040120080605?feedType=RSS&feedName=domesticNews&pageNumber=1&virtualBrandChannel=0, 1 (accessed June 15, 2008).
17. In Mr. Muhammad’s case, the CSRT decision makers are a captain from the U.S. Navy (acting as President), a Lieutenant Colonel from the U.S. Air Force, and a Lieutenant Colonel from the U.S. Marine Corps, a Lieutenant Colonel. Also present are the Personal Representative (a Lieutenant Colonel from the U.S. Air Force), a Language Analysis (sic), a Reporter (a Gunner Sergeant from the U.S. Marine Corps), a Recorder (a Lieutenant Colonel from the U.S. Army) and a Judge Advocate (another Captain). Combatant Status Review Tribunals/Administrative Review Boards, “Combatant Status Review Tribunal of Khalid Sheikh Muhammad”, Department of Defense, http://www.defenselink.mil/news/transcript_JSN10024.pdf (accessed June 14, 2008), 1.
[name redacted] solemnly swear that you will faithfully perform the duties as Recorder assigned in this Tribunal so help you God?" to which he answers, “I do.” Following this oath, Mr. Muhammad is brought in the room. The problem with this initial phase is that all the introductions of tribunal members and the oath-taking occurs out of the presence of the detainee who is not bought into the room until these preliminary procedures are completed. While this may seem like a minor issue, the bigger issue is that the detainee has no idea who the tribunal members are and, therefore, would have no way to challenge the objectivity of one of the tribunal members.

The U.S. Supreme Court’s requirement in *Hamdi* that due process requires a ‘neutral and detached judge’ is a hollow right if detainees are not able to learn who the decision makers are. Failure to grant this undermines the fairness of the proceeding from the start. In a typical criminal trial, the defense could choose to file a motion to recuse (or remove) a judge based on bias. A motion to recuse can be filed based on actual bias (e.g., the particular judge has had prior negative dealings with that particular defendant that would make it difficult to be impartial in this case). Or it can be based on the appearance of bias. The Court has stated, “…what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal [is] required whenever ‘impartiality might reasonably be questioned.’”

If, for example, one of the presiding military officers at Guantanamo had made a comment previously saying that none of the detainees could be acquitted, that statement alone would be a sound basis for a motion to recuse since it indicates that this decision-maker is not able to be impartial in any CSRT case. This possibility is not as far-fetched as it may seem. Former Guantanamo Bay chief military prosecutor Colonel Morris Davis told the Associated Press on February 21, 2008 that he had resigned from his position at Guantanamo because of political pressures interfering with prosecution. Colonel Davis told *The Nation* on Feb. 20, 2008 that Pentagon General Counsel William Haynes told him that “We can’t have acquittals; we’ve got to have convictions.” Colonel Davis pointed out that political appointees in the system are “looking for a political outcome, not justice.”

Further complicating the discussion of the need for impartiality is the fact that the majority of decision makers on the CSRT panel are not lawyers and may have little understanding of which legal standards to apply. According to the guidelines for CSRT hearings established by the Deputy Secretary of Defense, only one of the three person CSRT panel of military officers is required to have legal training. That person is a judge

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22. Ibid.
advocate. He or she has an equal vote to the other two officers on the panel.23 One Judge Advocate General (JAG) officer who served on CSRT panels criticized the process stating that the training he received to be a Judge Advocate for the CSRT was minimal and that the CSRT process was not well defined. He discussed how the CSRT rules required having a JAG on each CSRT panel, but was silent as to the role.24

**A Defense Attorney Would Have Requested Translation**

In all CSRT hearings, the detainee is asked if he would like an interpreter. In Khalid Sheikh Muhammad’s hearing, he responds that he is comfortable proceeding with English but will ask for assistance from the interpreter if needed. At first glance, this exchange seems reasonable and appropriate. However, if the detainee had a lawyer, the lawyer would likely have requested an interpreter for the detainee at the outset. Often, defendants who speak English as a second or third language may not be in the best position to judge whether their case would be best presented with the assistance of an interpreter. Mr. Muhammad appears to speak and understand English fairly well at times, however there are some instances where his language limitations are evident. For example, at one point, Mr. Muhammad states,

…I’m not denying that I’m not an enemy combatant about this war but I’m denying the report. It not being written in the proper way. Which is really facts and mostly just being gathered many information…25

Clearly a translator would have been helpful, as well as an attorney to advise him on his right to remain silent and the prudence of exercising that right.

**No Defense Counsel Allowed**

The transcript indicates that the Tribunal informed the detainee that he “may have the assistance of a Personal Representative at the hearing.”26 However, that personal representative is not required to act in the interest of the detainee. The procedures for CSRT hearing require the personal representative to inform the detainee of the boundaries of his or her role:

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I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing. I am available to assist you in preparing an oral or written presentation to the Tribunal should you desire to do so. I am also available to speak for you at the hearing if you with that kind of assistance.\textsuperscript{27}

To call this person a “personal representative” is a misnomer, considering that the person is not an advocate for the detainee, will not keep confidential things the detainee says in one-on-one meetings and will not represent the detainees’ interests at the CSRT hearing itself.

A study published by Seton Hall University School of Law based on review of all published CSRT transcripts found that the role of the Personal Representative was usually minimal and at times harmful:

1. In 78\% of CSRT cases reviewed, the Personal Representatives met with detainees just once before the CSRT hearing just one week before the hearing. In the majority of these instances (51\%), the meeting lasted for one hour or less.
2. Though the personal representatives have a right to comment on the decision by the CSRT members, they declined to do so in 98\% of the cases.
3. Some personal representatives (12\%) said nothing during the entire CSRT hearing; others (36\%) did not make any substantive statements during the hearing.
4. In the 52\% of cases where personal representatives did make substantive comments, those comments sometimes advocated against the detainee.\textsuperscript{28}

These statistics show the ‘personal representative’ is no substitute for defense counsel. To the contrary, records reviewed in the above study indicated that some detainees objected to the personal representative process suggesting it was another form of interrogation.

In Mr. Muhammad’s case, the personal representative did not advocate on the detainees’ behalf. He played more of an administrative role, producing appropriate forms at appropriate times.

\textit{The Right To Remain Silent}

Many of Mr. Muhammad’s comments serve to hurt his case rather than help it. All detainees are informed at the start of their hearing that “[y]ou may not be compelled to testify at this Tribunal. However, you may testify if you wish to do so.”\textsuperscript{29} The Personal

\begin{flushleft}27. Memorandum for Secretaries of the Military Departments Chairman of the Joint Chiefs of Staff under Secretary of Defense for Policy from the Deputy Secretary of Defense, “SUBJECT: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba,” July 14, 2006, Enclosure 3, p. 3.
Representative informs the detainee:

The Tribunal is examining one issue: whether you are an enemy combatant against the United States or its coalition partners. Any information you can provide to the Tribunal relating to your activities prior to your capture is very important in answering this question. However, you may not be compelled to testify or answer questions at the Tribunal hearing.\textsuperscript{30}

This is not the same as the Miranda rights of which criminal defendants must be informed. The detainee is not told that anything he says can, and will, be used against him in a court of law or that he has a right to an attorney, and that one will be appointed for him if he cannot afford one. As stated above, no lawyer is even allowed to attend a detainee’s Combatant Status Review Tribunal.

For many detainees, the right to remain silent is a Hobson choice when faced with the realization that saying nothing to try to defend himself may mean indefinite detention for many more years to come without any judicial forum to seek due process. This ‘choice’ would be seen as patently unfair and unconstitutional in the traditional American criminal justice system.

Even for detainees who seem eager to speak and who may have a plethora of evidence against them, the integrity of the criminal justice system depends on there being defense counsel to advise the defendant of his rights. The absence of a lawyer in the CSRT hearing process makes the right to remain silent a pseudo-right. One cannot know if a defendant would have made incriminating statements or not if provided a lawyer to advise him of all alternatives and of the repercussions for his choosing to speak.

In contrast with this system, the Nuremberg trials were scrupulous about providing defense counsel to advise defendants and zealously represent their interests at trial. Even the ‘worst of the worst,’ such as Herman Goering, received a very fair trial. Goring chose to testify but did so in a manner that tried to explain away even the most inculpatory evidence:

\begin{quote}
(prosecutor) MR. JUSTICE JACKSON: Now, I want to review with you briefly what the Prosecution understands to be public acts taken by you in reference to the Jewish question. From the very beginning you regarded the elimination of the Jews from the economic life of Germany as one phase of the Four Year Plan under your jurisdiction, did you not?

(defendant) GOERING: The elimination, yes; that is partly correct. The elimination as far as the large industries were concerned, because there were continual disturbances due to the fact that there were large industries, also armament industries, still partly under
\end{quote}
Jewish directors, or with Jewish shareholders, and that gave rise to a certain anxiety among the lower ranks.31

In Mr. Muhammed’s case, as in Goering’s, there may well be substantial evidence against him. But the lack of a lawyer taints the inculpatory statements Mr. Muhammed made. As stated in section II above, at one point Mr. Muhammad virtually admitted to being an enemy combatant. Since that is the essential question the CSRT is charged with answering, this is akin to a criminal defendant’s admitting guilt in the middle of a trial. Mr. Muhammed also admits to writing a very inculpatory statement:

Detainee: Yes. And I want to add some of this one just for some verification. It like some operations before I join al Qaida. Before I remember al Qaida which is related to Bnjinka Operation I went to destination involve to us in 94, 95. Some Operations which means out of al Qaida…..Other operations mostly are some word I’m not accurate in saying. I’m responsible but if you read the heading history. The line there [Indicating to Personal Representative a place or Exhibit D-c].

Personal Representative: [Reading] “Also, hereby admit and affirm without duress that I was a responsible participant, principle planner, trainer, financier.”

Detainee: For this is not necessary as I responsible, responsible. But with in these things responsible participant in finances.

President: I understand. I want to be clear, though, is you that were the author of that document.

Detainee: That’s right.

President: That is true?

Detainee: That’s true.32

Would Mr. Muhammed have made these statements if he had been represented by counsel? One will never know. But the contrast in due process between his case and that of Hermann Goering is striking. When Goering was convicted on all counts and sentenced to death by hanging, there was little doubt that he had had adequate due process at trial.

Use of Classified Evidence Violates Sixth Amendment

Mr. Muhammad is told, “You may be present at all open sessions of the Tribunal…” and that he “may examine documents or statements offered into evidence other than classified information, however certain documents may be partially masked for security
reasons.” The format of the CSRT hearings was that the detainee would be allowed to be present for the unclassified portion of the hearing, then the detainee would be removed and the hearing would continue with presentation of classified information.

The right to be present and to examine documents and statements is almost meaningless when the bulk of the evidence used to determine the detainee’s enemy combatant status is based on classified evidence the detainee is not allowed to see.

Former Guantanamo Bay chief military prosecutor Colonel Morris Davis told the New York Times in October 2007 that he had been pressured by Brigadier General Thomas W. Hartmann to use classified evidence against defendants in closed war crimes trials for detainees. The Times quoted Colonel Davis as saying, “[n]o matter how perfect the trial is, if it’s behind closed doors, it’s going to be viewed as a sham.” But Hartmann reportedly said to Davis in September 2007, “Who ever said we had to have open trials?” Colonel Davis resigned on October 5 after a bitter dispute over these issues.

According to the study of CSRT transcripts by Seton Hall University School of Law, the government never put on any witnesses during CSRT hearings to support the contention that the detainee was an enemy combatant. Following the CSRT hearing, a CSRT Return is created which contains a Recorder’s Exhibit List that cites every piece of classified and unclassified evidence considered by the panel. 48% of CSRT returns reviewed listed unclassified evidence; this leaves 52% of the hearings in which only classified evidence was produced. In 96% of hearings, detainees were not provided with any of the Government’s evidence in advance of the hearing other than the unclassified summary of evidence. As can be seen in the summaries of evidence discussed later in this article, these documents offer only generalized or conclusory accusations without indicating the source of the evidence or whether there was corroborating or conflicting evidence.

Some documents used in CSRT hearings are labeled For Official Use Only. These documents are considered classified. For Official Use Only documents were relied on by

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35. Ibid.
36. Ibid.
the Government in 83% of cases.\textsuperscript{40} When detainees requested all unclassified evidence, they received only the “For Official Use Only” records in 40% of the cases, with 60% of requests denied.\textsuperscript{41}

If defense counsel were allowed to represent detainees at CSRT hearings, there would likely be extensive pretrial motions litigating the use of classified evidence. The constitutional claim would be that the use of such evidence violates the detainee’s Sixth Amendment right of the U.S. Constitution to confront the evidence against him. This Sixth Amendment right is fundamental in criminal justice forums. The Court has stated:

The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution “to be confronted with the witnesses against him.” This right is secured for defendants in state as well as federal criminal proceedings under \textit{Pointer v. Texas}, \textit{380 U. S. 400} (1965). Confrontation means more than being allowed to confront the witness physically. “Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.” \textit{Douglas v. Alabama}, \textit{380 U. S. 415}, \textit{380 U. S. 418} (1965)…

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested…\textsuperscript{42}

The use of classified evidence also undercuts the Court’s opinion in \textit{Hamdi} that requires “a fair opportunity to rebut the Government’s factual assertion(s),”\textsuperscript{43} It is impossible to rebut evidence you haven’t seen. The dilemma is clear in this excerpt from one detainee’s CSRT transcript:

Detainee: This is not true. I did not help anybody and whoever is saying that I did, let them present any evidence, then somebody can tell me what that evidence is so that I can respond to it. If there is any evidence at all…

Detainee: That’s not true. Again, whoever has any evidence to provide, let them present it. If somebody submitted any evidence, I’d like to take a look at it to find out if that evidence is true….

Detainee: It’s not fair for me if you mask some of the secret information…. How can I defend myself?\textsuperscript{44}


Denial of the Right to Call Witnesses

All detainees are informed at the start of their CSRT hearing that “[y]ou may present evidence to this Tribunal, including the testimony of other witnesses who are reasonably available and whose testimony is relevant to this hearing. You may question witnesses testifying at the Tribunal.” While this right would seem to provide some due process, the application of this provision proved otherwise. In Mr. Muhammed’s case, he requested the presence of two witnesses: Ramzi bin al-shibh and Mustafa Hawsawi. These witnesses were intended to rebut some of the allegations listed in the unclassified summary of evidence. For example, paragraph c of that summary stated that “[i]n an interview with an al Jazeera reporter in June 2002, the Detainee stated he was the head of the al Qaida military committee.” Mr. Muhammed said he never told the reporter this. The first witness Mr. Muhammed sought to call, Mr. Al Shibh, another detainee at Guantanamo, was present during that interview and could supposedly verify that Mr. Muhammed never told the reporter he was the head of the Military Committee.

The President of the Tribunal denied this witness request stating:

This witness is not relevant in the President’s view for the following reasons. In the totality of the circumstances and given the nature and quality of the other unclassified evidence, the Detainee’s alleged statements as reported in al Jazeera are of limited value and negligible relevancy to the issue of combatant status. As such, any corroboration or contradiction by the proffered witness is not relevant. The creditability determinations with regard to R-2, which is the al Jazeera article, can be made by the Tribunal without the proffered testimony. As such, the Detainee’s request for the production of that witness is denied.

The second witness sought by Mr. Muhammed, Mustafa Hawsawi, would testify that the computer/hard drive referenced in the unclassified summary was not Mr. Muhammed’s property and that the place of the Mr. Muhammed’s capture was not Mr. Muhammed’s house. Ten of the 21 paragraphs in the unclassified summary of evidence provided by the Government dealt with information found on this computer.

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48. Ibid.
49. Ibid.
50. Ibid.
For example, paragraph d states that, “[a] computer hard drive seized during the capture of the Detainee contained information about the four airplanes hijacked on 11 September 2001 including code names, airline company, flight number, target, pilot name and background information, and names of the hijackers.” Other paragraphs discussed additional information found on the same hard drive: photographs of 19 individuals identified as the hijackers, the pilot license fees for Mohammad Atta and biographies of some of the hijackers, passport information and an image of Mohammad Atta, transcripts of chat sessions belonging to at least one of the hijackers, three letters from Usama bin Laden, spreadsheets describing money assistance to families of known al Qaida members, a letter to the United Arab Emirates threatening to attack if their government continued to help the U.S., summarized operational procedures and training requirements of an al Qaida cell, and a list of killed and wounded al Qaida martyrs.

What is conspicuously absent is any indication about exactly where this computer containing this inculpatory information was found. There is no evidence in the unclassified summary that would rebut Mr. Muhammed’s claim that the house in which he was arrested was not his nor was the computer his. The language in the unclassified summary says merely that the computer was “seized during the capture of the Detainee.”

Any defense attorney would point out the vagueness of the alleged connection between this computer and Mr. Muhammed. It would be logical to assume that if the Government had hard evidence that Mr. Muhammed used this computer, they would have produced it. There was no evidence that the house where Mr. Muhammed was arrested was his or that he had any belongings in the house. One would expect ample fingerprint evidence on a computer (particularly considering the arrest was the result of an unexpected raid). The failure to refer to fingerprints or any other forensic evidence linking Mr. Muhammed to that computer could mean that there was none, or, that someone else’s fingerprints were found on the computer.

Considering that almost half of the allegations in the unclassified summary were based on this computer, proof of ownership of that computer would be critical evidence in the case. Nonetheless, Mr. Muhammed’s sole witness on this issue was denied. The President stated:

> Whether the Detainee had actual legal title or ownership of the computer/hard drive or the house where the capture took place is irrelevant to the determination of the Detainee’s status as an enemy combatant. Based on the proffer, if true, Hawsawi’s testimony will not provide relevant information. The issue of ownership, while of

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54. Ibid.
some interest, is not relevant to status. What is relevant is possession, usage, connection and presence. Hawsawi’s testimony will not speak to any relevant information in regard to such points. As such, the request for the production of that witness is denied.”

Mr. Muhammed protested the denial of this witness saying, …This computer is not for me. Is for Hawsawi himself. So I’m saying I need Hawsawi because me and him we both been arrested same day. Same way, so this computer is from him long time…”

Mr. Muhammed’s witnesses were both precluded from testifying even though they were readily available to do so since they were both Guantanamo detainees at the time. The CSRT President explained, “[w]hether or not they may be available here on Guantanamo, is a second decision to be made, but only if I decide they are relevant. I have heard your arguments. I noted them. However, my ruling stands.”

Mr. Muhammed’s experience of not being able to present witness testimony is not unusual. According to the Seton Hall Law School’s study, 74% of the detainees who requested witnesses were denied all witnesses by the Tribunal. The reasons given by the Tribunal for these denials were that the witnesses were “not reasonably available”, “irrelevant” or because “the Tribunal would have been burdened with repetitive, cumulative testimony.” Some Detainees requested witnesses outside of Guantanamo. All such requests were denied. Of the requests for witnesses who were other detainees at Guantanamo, only 50% of these were allowed.

An inherent problem of having these tribunals at Guantanamo Bay is that it is difficult for detainees to rebut evidence when the people who possess important information are elsewhere. The fact that some fellow detainees at Guantanamo are available to testify is of limited value. In a typical criminal trial, defense counsel would think hard about calling another detainee since their credibility is automatically suspect due to their own circumstances.

Admissibility of Statements Obtained Through Coercion or Torture

By far the most incriminating evidence at Mr. Muhammed’s hearing were his own statements stating that he was responsible for more than 31 acts of terrorism or terrorist

57. Ibid.
59. Ibid.
60. Ibid.
61. Ibid.
plans. These included: the 1993 World Trade Center Operation; the 9/11 Operation; the Shoe Bomber Operation to down two American airplanes; the Filka Island Operation in Kuwait that killed two American soldiers; the bombing of a nightclub in Bali, Indonesia; planned attacks on the Library Tower in California, the Sears Tower in Chicago, the Plaza Bank in Washington state, and the Empire State Building; planned assassinations against several former American Presidents, including President Carter; the bombing of a hotel in Mombasa, Kenya; the responsibility for the training and financing of the assassination of Pakistan’s President Musharaf; and many more instances of terrorism.\textsuperscript{62}

Mr. Muhammed also admitted to the decapitation of kidnapped journalist Daniel Pearl though this admission was redacted from the initial transcript released.\textsuperscript{63} The Pentagon later released this part of the transcript, after the parents of Daniel Pearl had been contacted and informed of the statements. That redacted portion of the transcript said, “I decapitated with my blessed right hand the head of the American Jew, Daniel Pearl, in the city of Karachi, Pakistan… For those who would like to confirm, there are pictures of me on the Internet holding his head.”\textsuperscript{64}

The problem with Mr. Muhammed’s confessions is that interrogation methods used against him, such as water boarding, are generally considered torture. Use of torture is strictly prohibited under international law. Common article 3, section 1, of the four Geneva Conventions prohibits “[v]iolence to life and person, in particular murder of any kinds, mutilation, cruel treatment and torture”\textsuperscript{65}. It also prohibits “[o]utrances upon personal dignity, in particular, humiliating and degrading treatment.”\textsuperscript{66} The prohibition in the Conventions against these activities is absolute. Common Article 3 states that such acts “are and shall remain prohibited at any time and in any place whatsoever.”\textsuperscript{67} The Geneva Convention on the Treatment of Prisoners of War was ratified by the United States in 1955.

The United States, likewise, ratified the International Covenant on Civil and Political Rights on September 8th, 1992, which states in Part III, Article 7 that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”\textsuperscript{68} Article 10 further states that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”\textsuperscript{69}

\textsuperscript{64.} Ibid.
\textsuperscript{66.} Ibid.
\textsuperscript{67.} Ibid.
\textsuperscript{69.} International Covenant on Civil and Political Rights, Part III, art. 10, G.A. res. 2200A (XXI), 21
Article 5 of the Universal Declaration of Human Rights states that “[n]o one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment.”\textsuperscript{70} This document, crafted by a committee lead by Eleanor Roosevelt, was adopted by the United Nations General Assembly on December 10, 1948.\textsuperscript{71} Though not binding as a treaty is, this declaration forms part of the body of international customary law and, combined with the International Covenant on Civil and Political Rights, is referred to as the International Bill of Rights.

Finally, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by the United States on November 20th, 1994, requires all State Parties to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”\textsuperscript{72} Again, this prohibition is absolute, stating, “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.”

Other international documents barring torture include: the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;\textsuperscript{73} the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;\textsuperscript{74} the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;\textsuperscript{75} the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;\textsuperscript{76} the Inter-American Convention to Prevent and Punish Torture; and the Organization of African Unity, Guidelines and Measures for the Prohibition and the Prevention of

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\item Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 93, U.N. Doc. A/10034 (1975).
\item European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, E.T.S. 126, \textit{entered into force} Feb. 1, 1989.
\end{itemize}
Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa.\textsuperscript{78}

The Eighth Amendment to the U.S. Constitution, provisions of the U.S. Code, the Detainee Treatment Act and the Military Commissions Act all prohibit torture. The question becomes how one defines torture. The Convention Against Torture provides this definition of torture:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”\textsuperscript{79}

The Bush administration sought to redefine and narrow the definition of torture. A series of memos from White House legal counsel, known the “torture memos” sought to narrowly define what practices constituted torture.\textsuperscript{80} The most shocking torture memo was written by Assistant Attorney General Jay Bybee in collaboration with Deputy Assistant Attorney General John Yoo in August 2002. This memo argues that methods of interrogation would not be considered torture unless they resulted in ‘severe pain or suffering” bringing about “death, organ failure, or the permanent impairment of a significant body function.”\textsuperscript{81}

The Bybee memo also splits legal hairs around the issue of criminal intent stating that “severe pain and suffering must be inflicted with specific intent.” Attorney Bybee further explains:

As a result, the defendant had to act with the express ‘purpose to disobey the law” in order for the mens rea element to be satisfied… Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicted severe pain or suffering on a person within his custody or physical control.\textsuperscript{82}

\textsuperscript{78} Organization of African Unity, Guidelines and Measures for the Prohibition and the Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002) (Robben Island Guidelines).


\textsuperscript{80} A collection of these memos is found in the two inch treatise called \textit{The Torture Papers: The Road to Abu Ghraib}, edited by Karen J. Greenberg and Joshua L. Dratel, published by Cambridge University Press in 2005.


The U.S. government has acknowledged using water boarding against Khalid Shaikh Muhammed as well as against two other ‘high level’ detainees. Water boarding is the process of holding a detainee down, then pouring water nonstop into his mouth and nostrils. While some have referred to this as simulated drowning, others have said it is actual drowning that is merely stopped before the point of death.\(^83\) CIA officers reported to ABC News that they were trained to handcuff the prisoner and to use cellophane to cover his face to increase the distress.\(^84\) In 1968, the Washington Post published a front page photo of a U.S. soldier water boarding a North Vietnamese soldier who was pinned down by other U.S. soldiers. The soldier was court martialed within a month of the publication of the photo and expelled from the military for this conduct.\(^85\)

Yet Brigadier General Thomas Hartman, Guantanamo Legal Advisor, stated before a Congressional hearing that he was “not prepared to answer” whether water boarding was illegal.\(^86\) On November 8, 2007, while Michael Mukasey was undergoing the confirmation process for the position of Attorney General, he was asked if waterboarding was constitutional. He answered, “I don’t know what’s involved in the technique. If waterboarding is torture, torture is not constitutional.”\(^87\)

The water boarding of Mr. Muhammed by the CIA happened when he was detained in secret prisons for the year after his arrest on March 1, 2003, prior to his being transferred to Guantanamo in 2004. Coercive interrogation methods have also been used extensively at Guantanamo. A Pentagon spokesman stated that “[t]he United States operates a safe, humane and professional detention operation at Guantanamo that is providing valuable information in the war on terrorism.”\(^88\) But the International Red Cross has issued a report condemning the interrogation practices of humiliating acts, solitary confinement, temperature extremes, [and] use of forced positions.”\(^89\) The International Red Cross concluded that “[t]he construction of such a system, whose stated purpose is the production of intelligence, cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture.”\(^90\)

The transcript of Khalid Shaikh Muhammed’s CSRT hearing makes reference to his

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85. Ibid.
89. Ibid.
90. Ibid.
mistreatment during interrogation, though the concrete information about what that treatment was has been redacted from the published transcript. Exhibit D, which Mr. Muhammed’s Personal Representative says is “written statement regarding alleged abuse or treatment that the Detainee received,” is attached to the classified version of transcript.

One essential problem with confessions resulting from torture is that they are inherently unreliable. Mr. Muhammed discusses this issue with reference to information he gave implicating others in terrorist activities. He warned about ‘false witnesses’.91

CSRT President: People made false statement as a result of this [mistreatment]

Mr. Muhammed: I did also….. I told him yes…You have to be fair with people. There are many many people which they have never been part of the Taliban. Afghanistan there have been many people arrested for example people who have been arrested after October 2001…92

Interestingly, when the parents of Daniel Pearl were told what Mr. Muhammed had said about killing his son, they issued a statement questioning the reliability of the confession: “It is impossible to know at this point whether Khalid Sheikh Mohammed's boast about killing our son has any bearing in truth,” they said. “We prefer to focus our energy on continuing Danny's lifework through the programs of the Daniel Pearl Foundation, which aim to eradicate the hatred that took his life.”93

The lack of reliability of coerced testimony is part of the reason why the Court has held that involuntary confessions cannot be used in a criminal trial for any purpose. Specifically, the Court said in the case of Mincey v. Arizona:

[All criminal trial use against a defendant of his involuntary statement is a denial of due process of law “even though there is ample evidence aside from the confession to support the conviction.” (citations omitted)94

This constitutional principal is ignored in CSRT hearings.

Mr. Muhammed was facing criminal charges with a trial scheduled for September 2008 and his lawyers say they plan to move to exclude all statements resulting from torture if they are allowed to represent Mr. Muhammed at trial.95 Mr. Muhammed himself made

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92. Ibid.
95. Mr. Muhammed said at his arraignment that he prefers to represent himself, but defense counsel is waiting in the wings in case he changes his mind. Even if Mr. Muhammed chooses to be pro se at his trial, this is very different from being forced to be pro se at the CSRT hearing because defense counsel is not allowed in the room. Having access to due process and refusing it is different from being denied

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remarks at his arraignment on June 5, 2008 calling his trial “an inquisition”, adding that “all of this has been taken under torturing. You know that very well.”

The allegation of torture is not unique to Mr. Muhammed’s case. Of the hundreds of tribunal transcripts reviewed during the Seton Hall University School of Law, 18% of the detainees volunteered information about torture and coercion without being asked.

According to Department of Defense statistics, 558 CSRT hearings were conducted by the Department of Defense between July 2004 and March 2005. At that time, 520 detainees were found to be enemy combatants and 38 were found not to be and were released. As of June 2008, more than 500 detainees have been released. They have been transferred to their home countries (or a substitute country), where many have simply been released, some charged and sentenced on minor offenses. Some detainees who were released had been detained six years or more.

One detainee who was released was Habib Rahman, identification number ISN 907.

The allegations in Mr. Rahman’s case were as follows:

2. A senior Taliban commander, and Al Qaida supporter, in Gardez frequently visited Samoud at the Mousauwal Compound.
3. Samoud Khan has claimed to be on a jihad against the United States and instructed his men they must do the same.
4. The detainee engaged in hostilities against the United States or its coalition partners.
5. The detainee admitted to being on a jihad.
6. The detainee was instructed to fight to the death when American forces raided the Mousauwal Compound on 11 December 2002, but surrendered instead.
7. Just prior to the U.S. forces raid on the Mousauwal compound, the detainee instructed his compatriots to all provide the same false story if captured.

100. According to the Pentagon, more than 10 former Guantanamo detainees who were released were later killed or captured in fighting. Ibid.
Mr. Rahman’s response to these allegations was that he did work on this compound owned by the Commander, Samoud Khan, but he was simply the cook and he had nothing to do with fighting with the Taliban or Al Qaida. Mr. Rahman said, “No I didn’t want to fight with Americans. Totally I surrendered I never fought.” He denied ever saying he was on a jihad or that he told other people arrested with him to lie. While he did acknowledge having a gun, he said everyone in Afghanistan has a gun and he didn’t even know how to use it properly. He would just shoot the gun into the air for weddings and festival.

There was a significant amount of discussion with Mr. Rahman about whether he ever said that he was told to “fight to the death”. Mr. Rahman eventually acknowledged saying that “Samoud told me to fight”, explaining that:

First, when we were in Gardez, they had taken all our clothes off. I was naked with 8 other people with us when I made that statement at that time. Americans were beating us really hard, and they had dogs behind us and they said if we didn’t say this, they would release the dogs. After that, an American grabbed me by the throat and said, Has this happened to you?” and then I said “yes” and that is why I made the statement “Samoud told me to fight.”

Mr. Rahman was eventually released, on October 12, 2006, almost four years after his initial detention. It would seem that his story was eventually believed. The question remains, if there were adequate due process and testing of the Government’s evidence, might he have been released after a few months rather than after almost four years?

No Limits on use of Hearsay

Several factors contribute to these tribunals as poor instruments for discerning who is properly detained and who is not. One factor is the fact that there are no limits on the use of hearsay during CSRT hearings. It would appear that almost all the evidence is based on hearsay. The Seton Hall University School of Law study found that the Government failed to call a single witness in the unclassified portions of any of the 393 CSRT hearings reviewed. (Since the classified portions of the hearings are not a matter

June 15, 2008), 84.
104. Ibid.
105. Ibid.
of public record, there is no way to tell whether witnesses were ever called in that part of the hearing.) Thus, even though detainees were told at their CSRT hearing that they had the right to question witnesses,\textsuperscript{109} that right is meaningless in terms of questioning the prosecution’s evidence since no witnesses were called by the prosecution.

Limitless use of hearsay is completely contrary to well-established U.S. law. The reasons for this are sound: 1) if the actual person who made a statement is not there, they cannot be cross-examined, thus violating the defendant’s Sixth Amendment right to confront the witnesses against him; 2) If the evidence is hearsay, the original source of the evidence may not be known, making it difficult to judge the reliability of the information and whether there might be any bias on the part of the original speaker. The CSRT process however, says that

\textit{The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issues before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances.}\textsuperscript{110}

This policy results in cases, such as that of Mr. Rahman, where the detainee is never told the source of the allegations (i.e., some unidentified person reported that Mr. Rahman was fighting with Samoud Khan, that he was Samoud’s body guard as well as cook, that Mr. Rahman was associated with Al Qaida and the Taliban, and that Mr. Rahman instructed other people arrested with him to lie.) The detainee has no means to question the reliability of the informant so can offer no reason why the informant might have been dishonest.

This hearsay problem is further exacerbated by the fact that many detainees were arrested after an informant turned them in exchange for a reward. In 2002, the U.S. distributed flyers such as this one:

\textit{Get wealth and power beyond your dreams ... You can receive millions of dollars helping the anti-Taliban forces catch al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people.}\textsuperscript{111}


As one could predict, these rewards would likely increase the risk of innocent individuals being detained purely for the monetary gain of the informant. Only 8% of those detained were detained by U.S. forces. 66% were detained in Pakistan.

**Standard of Review is Preponderance of the Evidence Rather than Beyond a Reasonable Doubt**

Another factor contributing to the failure to discover wrongfully detained individuals is the relatively low standard of proof that is needed to declare a detainee an unlawful enemy combatant. Unlike criminal trials, in which the burden of proof is on the government to prove the defendant's guilt “beyond any reasonable doubt,” the standard of proof for CSRT hearings is “preponderance of the evidence” (more likely than not or greater than 50%). This standard is used in the American legal system when dealing with civil suits, but never in criminal trials where the liberty of the defendant is at stake.

The low standard of proof is even more problematic when combined with the fact that the majority of fact-finders are not lawyers or judges, but military officers with no legal training. According to one Judge Advocate General (JAG) officer who served on CSRT’s, the sentiment among JAG officers was that many of the CSRT officers did not understand the distinction between conclusory statements and evidence and that some CSRT members did not understand that the presumption was to be given to the evidence. This JAG officer did not wish to be identified but the content of his remarks was summarized in a declaration by an investigator in one of the Guantanamo Detainee cases.

If the standard of proof were not so low, perhaps Detainee Mohammad Atiq Al Harbi, (identification number ISN 33) would not have been found to be an enemy combatant after his CSRT hearing. The allegations against Mr. Al Harbi were:

2. The Detainee traveled from Kandahar to Khost, Afghanistan on a bus filled with wounded Taliban soldiers.

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113. Memorandum for Secretaries of the Military Departments Chairman of the Joint Chiefs of Staff under Secretary of Defense for Policy, SUBJECT: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, July 14, 2006, Enclosure 3, p. 6
114. “A New Guantanamo Whistleblower Steps Forward to Criticize the Tribunal Process,” Counter-Punch, October 10, 2007. http://www.andyworthington.co.uk/2007/10/a-new-guantanamo-whistleblower-steps-forward-to-criticize-the-tribunal-process/. (Note: A comment at the end this article indicates that Steve Wax, one of the lawyers for Guantanamo detainee Adel Hamad, wrote to the person who posted the article to point out that “The document filed with the court was a declaration by William Teesdale, an investigator and attorney in my office. It says that the major read and approved the contents [of the declaration]. It was not an affidavit from the major himself.”)
115. Ibid.
3. The Detainee helped with the needs of the wounded Taliban soldiers during the bus trip.
4. The Detainee was present in Kabul, during the U.S. air campaign there.
5. The Detainee was arrested [by] Pakistani authorities, in Pakistan.
6. At the time of his capture, the Detainee was in the possession of a Casio watch, model A159W (silver version of the F-91W).
7. This model of watch has been used in bombings that have been linked to al Qa’ida and radical Islamic terrorist improvised explosive devices.117

The unclassified evidence against Mr. Al Harbi made no mention of any witnesses or physical evidence linking him to Taliban forces.118

Mr. Al Harbi agreed he had traveled to Afghanistan to take his sister to her husband since Muslim culture did not allow her to travel by herself.119 He said he had injured himself in Afghanistan during a motorcycle accident.120 He denied fighting with the Taliban or helping the Taliban soldiers on the bus.121 He said he did have a watch with him at the time, but it was not a Casio watch.122 The Personal Representative in this case attempted to advocate for Mr. Al Harbi noting that he had researched Casio watches online and found them to be relatively inexpensive (i.e., only $18.95) and produced in large quantities.123 Mr. Al Harbi said the Pakistani authorities who detained him were arresting people with Arab features.124

Constitutional Rights under Brady not adequately enforced

A third factor resulting in innocent people being detained for years is inadequate enforcement of constitutional standards regarding disclosure of exculpatory evidence.
The Court has said, in the case Brady v. Maryland,\(^\text{125}\) that a criminal defendant has a right to view all evidence that would tend to exculpate him. This right is fundamental in criminal proceedings. A Brady violation can be grave enough to require a new trial for the defendant who was convicted without being allowed to view all exculpatory evidence. The CSRT process does not require strict compliance with the Supreme Court’s mandate in Brady, to the contrary, if such information is classified, the process allows for providing “an acceptable substitute” which “may include an unclassified or, if not possible, a lesser classified, summary of the information; or a statement as to the relevant facts the information would tend to prove.”\(^\text{126}\)

The problem with an ‘adequate substitute’ is that the substituted or withheld information could be the most valuable information needed by the detainee to try to establish his innocence. For example, if the name of the informant is withheld by the government, this could mean that the best avenue of defense is foreclosed. If the informant was a neighbor who had a vendetta against the detainee or someone who was known to turn people in to acquire the large monetary rewards that can come with such cooperation, this information would be the most crucial piece of evidence for the detainee and for a fair resolution of the CSRT hearing, but the information would never become known because the identity of the informant was withheld.

An affidavit from Lieutenant Colonel Stephen Abraham, whose job it was to certify that there was no exculpatory evidence, is particularly disconcerting on this issue. Mr. Abraham states:

\begin{quote}
I was tasked to review and/or obtain information relating to individual subjects of the CSRTs. More specifically, I was asked to confirm and represent in a statement to be relied upon by the CSRT board members that the organizations did not possess “exculpatory information” relating to the subject of the CSRT…. During my trips to the participating organizations, I was allowed only limited access to information, typically prescreened and filtered. I was not permitted to see any information other than that specifically prepared in advance of my visit… I was specifically told on a number of occasions that the information provided to me was all that I would be shown, but I was never told that the information that was provided constituted all available information. On those occasions when I asked that a representative of the organization provide a written statement that there was no exculpatory evidence, the requests were summarily denied….
\end{quote}

\(^{125}\) Brady v. Maryland, 373 U.S. 83 (1963).

\(^{126}\) Memorandum for Secretaries of the Military Departments Chairman of the Joint Chiefs of Staff under Secretary of Defense for Policy, SUBJECT: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, July 14, 2006, Enclosure 3, p. 3.

A failure to provide exculpatory evidence could easily explain how innocent detainees have remained incarcerated for many years.

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**Fifth Amendment Constitutional Protection Against Double Jeopardy Ignored**

Three of the CSRT hearings reviewed in the Seton Hall University School of Law study resulted in the detainees being found NOT to be enemy combatants. But these three were not simply released. Rather, new CSRT hearings were held in their cases, thus abandoning the bedrock prohibition against ‘double jeopardy’ fundamental to the American criminal justice system.

The Fifth Amendment of the U.S. Constitution provides that no person “shall be subject for the same offense to be twice put in jeopardy of life or limb”. This procedural bar to double jeopardy means that a defendant who is acquitted cannot be retried again for that same offense. The CSRT procedures include no double jeopardy prohibition.

Abdullah Mohammad Khan, identification number ISN 556, was one of these detainees whose first CSRT resulted in a finding that he was not an enemy combatant. As in Mr. Al Harbi’s case, a rehearing was held. This second hearing also resulted in a finding that he was not an enemy combatant. A third hearing led to a finding that he was an enemy combatant.

The allegations against Mr. Khan were:

1. When arrested by Pakistani authorities, the Detainee had a falsified Turkish passport that he had purchased from a Turk.
2. The Detainee attended a “physical fitness” camp in Jalalabad, Afghanistan for six months.
3. The Detainee was at the Khana Gulam Bacha Guesthouse on the Taliban front lines in Kabul, Afghanistan in late 1999 and early 2000.
4. The Detainee stated he had a Jamiat Al Islamiya identification card.
5. Jamiat Al Islamiya is designated as a non-governmental organization that supports terrorist activities.
6. The Detainee was arrested in Islamabad, Pakistan by Pakistani authorities while living in a house used by Arabs, and was later...

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129. Ibid.
130. U.S. Const. Amend. V.
132. Ibid.
133. Ibid. Note: The subsequent tribunals are called Administrative Review Board Proceedings (ARB’s), since they are reviewing the decisions of the Combatant Status Review Tribunal.
134. Ibid.
Mr. Khan agreed with some of the allegations but offered explanations. He acknowledged he had a fake Turkish passport to try to obtain work in Turkey to support his poverty-stricken family. He also acknowledged having a Jamiat Al Islamiya identification, but said it was fake, obtained only to make it less likely that the authorities would bother him in Turkey. Mr. Khan said the reference to a physical fitness camp was a mistranslation; he had attended a gym in Afghanistan to work out but had never attended any type of military training camp. Mr. Khan acknowledged staying in a guest house while traveling since it was unsafe to travel at night. He never knew the guest house owners were Taliban supporters.

In his original Combatant Status Review Tribunal, Mr. Kahn urged the Tribunal to check his story. Regarding the university ID, he said “[i]f you want to find out if I’m speaking the truth, you can actually request this from that Islamic university, and you would find out my ID was false and I never went there. If you show them a picture, they will tell you I am not a student over there.” Mr. Khan protested the allegations saying, “I am an innocent person that’s been held here three years in these conditions.”

Mr. Khan’s story highlights some of the procedural problems with CSRTs. First, without a lawyer involved in the CSRT, critical investigation that might have corroborated Mr. Khan’s story was never discovered in time for the CSRT hearing. If represented by competent counsel, there would have been a thorough investigation many months before the hearing. The university could have been contacted to determine whether Mr. Khan had ever been enrolled there. Mr. Khan’s friends and family could have been interviewed to verify his story regarding the false passport and his goal of finding a job in Turkey. This was what Mr. Khan was imploring the tribunal to do in his third hearing. He said, “[i]f you really want to find out the truth about me, then somebody has to go and check all the sources, which I have provided you, names and addresses of people back in my country. Somebody has to go there and actually check and talk with them. After that, all these things might be over.”

Presumption of Guilt Rather Than Innocence:

The lack of an attorney to undertake necessary investigation on the detainees’ behalf is all the more problematic when one considers that CSRT hearings are not based on a presumption of innocence. To the contrary, the regulations governing CSRT hearings

136. Ibid.
state that:

There is a rebuttable presumption that the Government Evidence, as defined in paragraph H(4) herein, submitted by the Recorder to support a determination that the detainee is an enemy combatant, is genuine and accurate.\textsuperscript{140}

This rebuttable presumption in favor of the government is completely contrary to more than a century of criminal justice in the United States. The Supreme Court articulated the concept of the defendant’s presumption of innocence in the 1894 case of \textit{Coffin vs. U.S}. The presumption of innocence is also well-established in international law. There are specific references to the presumption of innocence in article eleven, section one of the United Nations Declaration of Human Rights; article 6, section 2 of the European Convention for the Protection of Human Rights; and article 14, section 2 of the International Covenant on Civil and Political Rights.

The injustice of placing the burden on the defendant to prove his innocence is all the more grave in light of the fact that he has no counsel, no right to view classified evidence, no right to question the admission of unreliable hearsay, and limited right to call witnesses.

\textit{No Right to a Speedy Trial}

There are no rules requiring CSRT hearings happen in a speedy manner. In fact, some CSRT hearings did not occur until years after the detainee’s arrest. For example, Khalid Sheikh Muhammad was arrested on March 1, 2003 and did not have his CSRT hearing until more than four years later, on March 10, 2007.

This is contrary to the Sixth Amendment right to a speedy trial.\textsuperscript{141} The Court stated that the right to a speedy trial was “as fundamental as any of the rights secured by the Sixth Amendment”\textsuperscript{142}

\textit{The U.S. Supreme Court \& CSRT Hearings}

The Supreme Court’s recent opinion, Boumediene v. Bush, issued on June 12, 2008, held that Section 7 of the Military Commissions Act, which had suspended habeas corpus, was unconstitutional.\textsuperscript{143} The Court discussed the high risk of error at CSRT hearings as part of the reason why habeas corpus was a critical and necessary legal process.

\textsuperscript{140} Memorandum for Secretaries of the Military Departments Chairman of the Joint Chiefs of Staff under Secretary of Defense for Policy, \textit{SUBJECT: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba}, July 14, 2006, Enclosure 3, p. 3.

\textsuperscript{141} The Sixth Amendment states “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” U.S. Const., amend IV.


Commenting on one aspect of CSRT hearings, the Court stated:

The detainee can confront witnesses that testify during the CSRT proceedings… but given that there are in effect no limits on the admission of hearsay evidence- the only requirement is that the tribunal deem the evidence 'relevant and helpful,'… The detainee's opportunity to question witnesses is likely to be more theoretical than real. (citations omitted)\textsuperscript{144}

The Court further concluded:

Although we make no judgment as to whether the CSRT's, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is 'closed and accusatorial.'…And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.\textsuperscript{145}

Until the \textit{Boumediene} decision, the CSRT hearings were the only hearings\textsuperscript{146} the vast majority of detainees had any certainty of receiving since the Military Commission Act of 2006 had suspended detainees' rights to petition for writ of habeas corpus.\textsuperscript{147}

The importance of \textit{Boumediene} providing access to habeas corpus cannot be understated since the CSRT process provided only pseudo due process rights: the right to remain silent when silence could mean indefinite detention; the right to view the evidence against them but only unclassified evidence; the right to a 'personal representative' who has no duty of confidentiality and may advocate against the detainee; the right to call witnesses, though that right has been denied more times than not; the right to question any prosecution witnesses, though prosecution witnesses have apparently seldom, if ever, been called in the unclassified portion of the hearing; and the right to exculpatory evidence but in a qualified manner with officers acting in good faith appearing unable to discern whether exculpatory evidence actually exists.

However, the serious due process considerations in CSRT hearings cannot be repaired solely by the restoration of the writ of habeas corpus. Even with the possibility of petitioning for habeas corpus, there is still the serious risk, indeed, the likelihood, that innocent detainees might remain in detention for years before possibly being released without charge. According to Pentagon reports, as of May 2008, more than 500 detainees have been released from Guantanamo since the detention camp was opened.

\textsuperscript{144} Ibid. at 55.
\textsuperscript{145} Ibid. at 56.
\textsuperscript{146} Note: The Detainee Treatment Act of 1005 did provide an appeal process from the CSRT ruling, but the appeal process has a very narrow scope. Ibid. at 59.
\textsuperscript{147} As of mid-June 2008, only 15 of the 270 detainees then at Guantanamo faced criminal charges. Jeffrey Toobin, "Camp Justice: Everyone wants to close down Guantanamo, but what will happen to the detainees?," \textit{The New Yorker}, (April 14, 2008).
in 2002. Of these, 462 were repatriated to their home countries or resettled in third-party countries.\textsuperscript{148}

And, for those detainees who really may be ‘the worst of the worst’, the historical legacy of these pseudo-hearings will cast a shadow on the United States’ criminal justice system for generations to come. In the words of former Nuremberg Tribunal lead prosecutor Robert Jackson:

\begin{quote}
We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.\textsuperscript{149}
\end{quote}

The charade of the CSRT hearing is “a poisoned chalice.”


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U.S. Const., amend V.

U.S. Const., amend VI.
