No-Hearing Hearings: An Analysis of the Proceedings of the Combatant Status Review Tribunals at Guantánamo

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I. INTRODUCTION[1]

After the Supreme Court ruled on June 28, 2004, in *Rasul v. Bush*[2] and *Hamdi v. Rumsfeld*,[3] that the Guantánamo detainees were entitled to access to federal court through the writ of habeas corpus, the U.S. Department of Defense established processes to review the status of all detainees, many of whom had been held without any pro-

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[1] This Report, originally published on November 17, 2006, used government data obtained from Freedom of Information Act (FOIA) litigation to profile over 517 detainees held at Guantánamo. The primary sources used were the Combatant Status Review Tribunal (CSRT) files. Since this Report's initial publication, the detainee population at Guantánamo has been reduced to 171. *The Guantánamo Docket*, N.Y. TIMES, http://projects.nytimes.com/guantanamo/detainees/held (last visited Sept. 27, 2011). In addition, more information has been made available through later government releases and WikiLeaks. This Report was not updated based on WikiLeaks. For future reports by the Seton Hall University School of Law Center for Policy and Research (the "Center"), visit the Center's website at http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/Guantanamo-Reports.cfm.

[2] 542 U.S. 466, 473 (2004).

[3] 542 U.S. 507, 509 (2004).

ceeding for two and a half years. Within one month of *Rasul* and *Hamdi*, the Defense Department created the Combatant Status Review Tribunals (CSRTs) and established a process for hearings before the CSRTs.[4] Each CSRT was composed of three unidentified members of the military who presided over the hearings.[5] As soon as most of the CSRT hearings were completed, the government informed the district court in which the habeas proceedings were pending that, despite the Supreme Court's ruling, no further judicial action was necessary because the detainees received CSRT hearings.[6]

This Report analyzes the CSRT proceedings, comparing the hearing process that the Defense Department promised the detainees with the process actually provided. The Report is based on the records that the U.S. government produced for 393 of the 558 detainees who had CSRT hearings until 2004.

The most important documents in this record were produced by the government in response to orders by U.S. district court judges that the Department of Defense provide the entire record of the CSRT for review by counsel for at least 102 detainees.[7] These are described as habeas-compelled "full CSRT returns."[8] Without these documents, it would be possible only to review the process promised. With the 102 full CSRT returns, this Report can also compare the process promised with the process provided.

The results of this review are startling. The process that was promised was modest at best. The process that was actually provided was far less than the written procedures appeared to require. The de-

[4] Memorandum from Paul Wolfowitz, Deputy Sec'y of Def. to the Sec'y of the Navy, (July 7, 2004) [hereinafter Memorandum Establishing CSRT], *available at* http://www.defense.gov/news/Jul2004/d20040707review.pdf.

[5] *Id.* at 1.

[6] *See Rasul*, 542 U.S. at 484 (granting habeas corpus to Guantánamo detainees); *Hamdi*, 542 U.S. at 538 (leaving open the possibility that a properly constructed military tribunal that affords detainees the fundamental due process guarantees is constitutional). On February 9, 2006, the Department of Defense announced that the CSRTs were complete. Press Release, Office of the Assistant Sec'y of Def., U.S. Dep't. of Def., No. 124-06, Guantánamo Bay Detainee Administrative Review Board Decisions Completed (2006), *available at* http://www.globalsecurity.org/security/library/news/2006/02/sec-060209-dod01.htm.

[7] *See Combatant Status Review Tribunal (CSRT) & Admin. Review Bd. (ARB) Documents*, OFFICE SECRETARY DEF. & JOINT STAFF, U.S. DEP'T DEF.: FOIA REQUEST SERVICE CENTER, http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/index.htm(last visited Oct. 20, 2011)[hereinafter *CSRT Documents*] (containing CSRT and ARB records).

[8] At the time of this writing, only 102 full CSRTs were available. Since 2006, many more CSRT proceedings have taken place.

tainees were denied any right to counsel.[9] Instead, they were assigned a "personal representative" who advised each detainee that the personal representative was neither his lawyer nor his advocate and that anything that the detainee said could be used against him.[10] In contrast to the detainee's lack of counsel, the tribunal was required to have at least one lawyer and the procedures recommended that the recorder (prosecutor) be a lawyer.[11]

The assigned role of the personal representative was to assist the detainee with presenting his case.[12] In practice, any assistance was extraordinarily limited. The records of meetings between detainees and their personal representatives indicate that in 78% of the cases, the personal representative met with the detainee only once. The meetings were as short as ten minutes, and this included time for translation. Approximately 13% of the meetings were twenty minutes or less, and more than half of the meetings lasted no more than an hour.

During a meeting, the detainee was told the following:

- The CSRT proceeding was his opportunity to contest the government's finding that he was an enemy combatant.[13]
- The government had already found the detainee to be an enemy combatant at multiple levels of review.[14]
- The government's finding rested upon classified evidence that the detainee would not see.[15]
- The tribunal had to presume that the secret classified evidence was reliable and valid.[16]

In the majority of the CSRT hearings, the government rested on the presumption that the classified evidence was sufficient to establish that the detainee was an enemy combatant.[17] The government

[9] Memorandum from the Deputy Sec'y of Def. to the Sec'ys of the Military Dep'ts, et al., at Enclosure (1), C(3) (July 14, 2006) [hereinafter Memorandum Procedures CSRT], *available at* http://www.defense.gov/news/Aug2006/d20060809CSRTProcedures.pdf.

[10] *Id.*

[11] *Id.* at Enclosure (1), C(2).

[12] *Id.* at Enclosure (3), C.

[13] *Id.* at Enclosure (3), C(1)–(2).

[14] *Id.* at Enclosure (4).

[15] Memorandum Procedures CSRT, *supra* note 9, at Enclosure (3), C(4).

[16] *See id.* at Enclosure (3).

[17] *See, e.g.*, Unclassified Summary of Basis for Tribunal Decision at 1, Hicks v. United States, No. 02-CV-0299 (D.D.C. Oct. 1, 2004) [hereinafter Summary, Hicks], *available at*

never called any witnesses and rarely adduced unclassified evidence.[18] In the majority of cases, the government provided the detainee with no evidence, declassified or classified, that established that the detainee was an enemy combatant. Instead, the government provided the detainee merely with what it purported to be a summary of the classified evidence.[19] This summary was so conclusory that it precluded any meaningful response. The government then relied on the presumption that the secret evidence was reliable and accurate.[20]

In the minority of cases, the government produced declassified evidence to the tribunal.[21] Such declassified evidence did not bear directly on the question at issue. It consisted of letters from the detainee's family and friends asking for his release, portions of habeas corpus petitions submitted by the detainee's own lawyers on his behalf in a U.S. district court, and publicly available records that did not mention the detainee by name.[22] None of the declassified evidence introduced against any detainee contained any specific information about the government's basis for the detainee's detention as an enemy combatant.

Detainees who participated in CSRT proceedings were not able to confront all of the government's evidence. The government never called witnesses and did not typically produce any unclassified evidence. When such evidence was presented to the tribunal, in 93% of the hearings, the detainee never saw it. Regarding the detainees' ability to produce evidence, only 11% of the detainees were allowed to introduce any evidence of their own. The promised CSRT process provided that detainees could call witnesses,[23] but no witness from

http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_1-91.pdf.

[18] *See, e.g., id.*

[19] *See, e.g.*, Letter from Officer in Charge, CSRT, to Pers. Representatives (Sept. 7, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/000001-000100.pdf.

[20] With regard to classified evidence, the tribunal panel stated, "[t]he Tribunal also relied on certain classified evidence in reaching its decision." Summary, Hicks, *supra* note 17, at 1.

[21] *See, e.g.*, Unclassified Summary of Basis For Tribunal Decision at 1–2, Abdullah v. Bush, No. 05-301 (D.D.C. July 25, 2005), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_92-190.pdf; Unclassified Summary of Basis For Tribunal Decision at 1–2, Awad v. United States, No. 04-CV-1194 (D.D.C. Oct. 12, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_2991-3070.pdf.

[22] *See, e.g., id.*

[23] *See* Memorandum Procedures CSRT, *supra* note 9, at Enclosure (1), F(6).

outside Guantánamo ever appeared. The only witnesses the government allowed detainees to call were other detainees.[24] Therefore, the only witnesses that were allowed under the CSRT process were presumed enemy combatants testifying in favor of other presumed enemy combatants.

The promised CSRT process stated that detainees would be allowed to produce documentary evidence.[25] In operation, the only documentary evidence that detainees were actually allowed to introduce were letters from family and friends.[26] This was true even when the documentary evidence sought to be introduced was available and even when the documents were in the government's possession—such as passports. In these cases, the detainee insisted that the documents would prove that the charges against him could not be true, but none of the documents were permitted to be introduced.[27]

The detainee's personal representative was completely silent in 12% of the hearings, and in only 52% of the hearings did the personal representative make substantive comments. Sometimes, the substantive comments of the personal representative, however, advocated for the government and against the detainee.[28] At the end of the hearing, the personal representative had a final opportunity to make comments, but the personal representative explicitly chose not to do so 98% of the times.

In sum, while the promised procedures stated that detainees were allowed to present evidence (witnesses and documents), the on-

[24] *See, e.g.*, Memorandum from PR23 to CSRT Legal Advisor, Al Kandari v. Bush, No. 02-CV-0828 (D.D.C. Oct. 15, 2004) [hereinafter Memo, Al Kandari], *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_2737-2868.pdf; Unclassified Summary of Basis For Tribunal Decision at 1, Hassen v. Bush, No. 04-CV-1254 (D.D.C. Sept. 13, 2004) [hereinafter Summary, Hassen], *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_3444-3577.pdf.

[25] *See* Memorandum Procedures CSRT, *supra* note 9, at Enclosure (1), G(9)(C).

[26] *See, e.g.*, Summarized Detainee Statement at 1–2, Al Wadi v. Bush, No. 04-CV1227 (D.D.C. Oct. 12, 2004) [hereinafter Statement, Al Wadi], *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_444-565.pdf.

[27] *See e.g.*, Dep't of Def., Testimony of Detainees Before the Combatant Status Review Panel Set 16, at 1424–28, *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/Set_16_1363-1446.pdf.

[28] *See, e.g.*, Transcript of CSRT Record at 6–7, Al Hilal v. Bush, No. 05-1048 (D.D.C. Jul. 11, 2005), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_4818-4946.pdf.

ly evidence that the detainees were permitted to offer in the vast majority of the cases was their own testimony. As a result, the only option available to the detainee was to make a statement attempting to rebut what he could glean from the summary of classified evidence that he could not see. In 81% of the cases reviewed, the tribunals made the decision the same day as the hearing. Among the 102 records reviewed for this Report, the ultimate decision was always unanimous, and all detainees reviewed were ultimately found to be enemy combatants. It is true that government statements indicate that 38 of 558 detainees were ultimately found to not be enemy combatants, but no such determinations are found in the full CSRT records reviewed.

While all detainees whose CSRT records were reviewed for this Report were ultimately found to be enemy combatants, not all tribunals found a certain detainee to be an enemy combatant. On three occasions, a tribunal initially found that the detainee was not an enemy combatant.[29] In such cases, the detainee was never told of this decision. Instead, the tribunal's decision was reviewed at multiple levels in the Defense Department chain of command, and eventually a new tribunal was convened.[30] Some detainees, however, were still found to not be enemy combatants.[31] At least one detainee's record indicates that after a second tribunal determined that he was no longer an enemy combatant, the process was repeated, and his case was sent back for a third hearing after which the tribunal ultimately found him to be an enemy combatant.[32]

II. THE DATA

In response to *Rasul* and *Hamdi*, the Department of Defense created the CSRT system and processed each detainee.[33] This Report analyzes the data released by the Department of Defense about the CSRT proceedings in response to Freedom of Information Act (FOIA) requests and through discovery during habeas lawsuits. Subs-

[29] This fact is not formally published in any records but was discovered through a careful review of documents produced under court order in the habeas litigations. At least one example can be gleaned from the record of ISN 556. Memorandum from James R. Crisfield Jr., Legal Advisor, to Dir., Combatant Status Review Tribunal at 2839, Abdulla v. Bush, No. 05-1001 (D.D.C. Aug. 16, 2006), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_2737-2868.pdf.

[30] *See id.*

[31] *See id.*

[32] *Id.*

[33] *See* Memorandum Establishing CSRT, *supra* note 4.

tantive data regarding individual detainees has never been voluntarily released by the Department of Defense.

According to the available Defense Department data, until 2006, when this Report was compiled, there were 759 total detainees incarcerated at Guantánamo since its creation;[34] 558 of those detainees received hearings before the CSRT.[35] The Department of Defense presumably created a file for each of the 558 CSRT proceedings, which we will refer to as the "full CSRT record." Because the government has not released these files, except under court orders entered in the various habeas proceedings, the 102 full CSRT returns were the only full CSRT records that could be analyzed in this Report.

Each detainee was provided the right to appear before the CSRT.[36] At least 361 detainees chose to participate, and a "Summarized Detainee Statement" was prepared from their testimony in each case.[37] This Report refers to these "Summarized Detainee Statements" as "transcripts" although they are not verbatim records. A transcript was provided for those hearings in which the detainee was physically present and for those hearings in which the detainee had the personal representative read a statement into the record.[38] The Department of Defense initially refused to release any of these transcripts, but a FOIA lawsuit brought by the Associated Press succeeded and these documents were released.[39] This Report examines these 102 full CSRT returns and 356 transcripts as those were the only documents that the government had released at the time the Report was compiled.

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[34] *See List of Individuals Detained by the Dep't of Def. at Guantánamo Bay, Cuba from Jan. 2002 through May 15, 2006*, U.S. DEP'T DEF. (May 15, 2006), *available at* http://www.defense.gov/news/May2006/d20060515%20List.pdf. As of October 2011, there are 171 detainees still held at Guantánamo. *See The Guantanamo Docket: A History of the Detainee Population*, NYTIMES.COM, *available at* http://projects.nytimes.com/guantanamo.

[35] This Report does not consider the "high value detainees" transferred to Guantánamo Bay in September 2006. *See* Gerry J. Gilmore, *American Forces Press Service, High-Value Detainees Moved to Gitmo; Bush Proposes Detainee Legislation*, DEFENSE.GOV (Sept. 6, 2006), http://www.defenselink.mil/news/NewsArticle.aspx?ID=721.

[36] *See* Memorandum Procedures CSRT, *supra* note 9, at Enclosure (4).

[37] *See CSRT Documents*, *supra* note 7.

[38] *See, e.g.*, Summarized Unsworn Detainee Statement, Al Edah v. Bush, No. 05-280 (D.D.C. July 13, 2005), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_191-236.pdf.

[39] The Department of Defense released 356 transcripts through the FOIA request; there are five additional detainee transcripts among the 102 full CSRT returns reviewed in this Report. Therefore, a total of 361 transcripts existed.

Because only 356 transcripts were released, it can be concluded that 202 of the 558 detainees did not participate in the CSRT process. But because five of the 102 full CSRT returns contain transcripts that were not among the 356 FOIA-released transcripts, it is apparent that these 356 transcripts did not contain the records of all detainees who participated in the CSRT.

Although the 102 full CSRT returns contained sixty-nine returns with transcripts, eleven of the returns with transcripts contained only conversations between the personal representative and the tribunal. Therefore, it can be concluded that the 102 full CSRT records reviewed include records of fifty-eight detainees who appeared in the CSRT proceeding and forty-four detainees who did not physically appear. Additionally, thirty-eight full CSRT returns of detainees did not have transcripts released in the Associated Press FOIA request; no other information was released by the Department of Defense.

The 356 FOIA transcripts combined with the thirty-eight full CSRT returns total 394 detainee records, which make up our full sample set. These 394 records reveal that 324 detainees physically appeared before the Tribunal. The data collected on the thirty-eight detainees without FOIA-released transcripts constitutes the only information available about the 202 detainees whose transcripts were not produced by the FOIA request.

In short, of the entire 558 detainees at Guantánamo who participated in the CSRT process up until 2006, there was some documentation for 394 detainees: the 356 FOIA-released transcripts (sixty-four of which also have full CSRT returns) and the 38 full CSRT returns whose transcripts were not released by the FOIA.[40]

III. CREATION OF THE CSRTS

Rasul and *Hamdi* were decided on June 28, 2004.[41] The Department of Defense issued an order establishing the CSRTs on July 7, 2004[42] and an order implementing the process on 29, 2004.[43] Guan-

[40] The two different data sets upon which this Report is based have been compared with the profile of all of the detainees that was first made public on February 8, 2006. MARK DENBEAUX ET AL., A REPORT ON GUANTÁNAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEP'T OF DEF. DATA, (2008), *available at* http://law.shu.edu/news/Guantánamo_report_final_2_08_06.pdf. The correlation between the data previously analyzed and the data considered in this Report is very strong.

[41] *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

[42] Memorandum Establishing CSRT, *supra* note 4.

tánamo personnel hand delivered a letter to every detainee, advising him both of the upcoming CSRT and of his right, independent of the CSRT, to file a habeas corpus suit in a U.S. district court.[44] The entire CSRT procedure was promulgated in only thirty-two days.[45]

As the CSRTs were being convened in Guantánamo, the Department of Defense was responding to habeas proceedings in Washington, D.C. The response, beginning in August 2004, justified the CSRT as providing the appropriate hearing to which detainees were entitled under *Rasul*.[46] The goal was to demonstrate that, because a sufficient hearing had been held for each detainee, no federal court habeas hearings were required.[47]

According to the CSRT procedures established in the July 29, 2004 memorandum, prior to the commencement of any CSRT proceeding, the classified evidence relevant to that detainee had to be reviewed, a "summary of evidence" prepared, and a personal representative appointed for the detainee.[48] The personal representative then had to meet with the detainee, and then a tribunal would be convened.[49] According to the records reviewed by the Seton Hall Law research team, the first hearing was for detainee ISN 220[50] and was held on August 2, 2004. For that hearing, the personal representative met with the detainee on July 31, 2004—two days after the CSRT pro-

[43] Memorandum from Gordon England, Sec'y of the Navy, to the Sec'ys of the Military Dep'ts, et al. (Jul. 29, 2004) [hereinafter Memorandum Implementing CSRT], *available at* http://www.defense.gov/news/Jul2004/d20040730comb.pdf.

[44] While the right to proceed in federal court may have been extinguished by the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10 U.S.C.) at the time, the meaning and constitutionality of that statute is not addressed by the present Report. Since initial publication, the Supreme Court of the United States held that the detainees at Guantánamo are entitled to file habeas petitions and to participate in hearings. *See* Boumediene v. Bush, 553 U.S. 723 (2008).

[45] *See Combatant Status Review Tribunal (CSRT) Process at Guantanamo*, DEP'T DEF. (July 2007), *available at* http://www.defense.gov/news/Jul2007/CSRT%20comparison%20-%20FINAL.pdf.

[46] *See id.*

[47] *See id.*

[48] Memorandum Implementing CSRT, *supra* note 43.

[49] *Id.* at Enclosure (1), G(3).

[50] Mr. Abdullah Saleh Ati Ai Ajmi, ISN 220, was represented by counsel in habeas litigation. He was one of the thirty-five detainees who refused to participate in the CSRT process but whose full CSRT return was obtained by his attorney under court order in the habeas litigation. *See* Decl. of James R. Crisfield Jr., Al Ajmi v. United States, No. 02-CV-0828 (D.D.C. Sept. 15, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_1344-1475.pdf .

cedures were promulgated.[51] This was the only meeting between detainee ISN 220 and his personal representative; it lasted only twenty minutes, including translation time.[52] On Monday, August 2, 2004, two days after the meeting between the personal representative and the detainee, the CSRT was empanelled, the hearing was held, the classified evidence was evaluated, and the decision was issued.[53] Detainee 220 did not participate in his CSRT hearing.[54]

The remainder of the habeas detainees whose CSRT returns were among the 102 considered in this Report were processed rapidly: 49% of the hearings were held and decisions were reached by September 30, 2004; 70% by October 31, 2004; and 96% were completed by the end of November 2004. The haste of the tribunals can be seen not only in the scheduling of the hearing but also in the speed with which the tribunals reached verdicts. In 81% of the 102 full CSRT returns, the tribunal's decision was reached the same day as the hearing.

In addition, almost 40% of the final administrative decisions were made after the last tribunal decision. During this six weeks after the tribunals ended and the bulk of the decisions were made, thirty-five of the thirty-eight detainees who were found to no longer be enemy combatants were still detained.

IV. THE DECISION TO PARTICIPATE

Each of the 558 detainees who received a CSRT proceeding was advised on at least three occasions that he would also have the right to a habeas corpus proceeding in the United States District Court for the District of Columbia.[55] The Department of Defense order of July 7, 2004, directed that each detainee be informed within ten days that he was entitled to a CSRT proceeding and that each detainee was also

[51] *See* Detainee Election Form, Al Ajmi v. United States, No. 02-CV-0828 (D.D.C. Sept. 15, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_1344-1475.pdf.

[52] *Id.*

[53] Memorandum from James R. Crisfield Jr., Legal Advisor, to Dir., Combatant Status Review Tribunal, Al Ajmi v. United States, No. 02-CV-0828 (D.D.C. Sept. 15, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_1344-1475.pdf.

[54] Unclassified Summary of Basis for Tribunal Decision, Al Ajmi v. United States, No. 02-CV-0828 (D.D.C. Sept. 15, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_1344-1475.pdf.

[55] *See* Memorandum Establishing CSRT, *supra* note 4, at 1.

entitled, if the detainee so chose, to proceed with habeas litigation in a U.S. district court to challenge his detention at Guantánamo Bay.[56] Pursuant to this order, each detainee would receive a hand-delivered formal written notice of his rights.[57]

The English version of the notice, translated for and delivered to every detainee in accordance with the Defense Department order of July 7, 2004, provides that:

> The U.S. Government will give you an opportunity to contest your status as an enemy combatant. Your case will go before a Combatant Status Review Tribunal, composed of military officers. This is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held. . . .
>
> As a matter separate from these Tribunals, United States courts have jurisdiction to consider petitions brought by enemy combatants held at this facility that challenge the legality of their detention. You will be notified in the near future what procedures are available should you seek to challenge your detention in the U.S. courts. Whether or not you decide to do so, the Combatant Status Review Tribunal will still review your status as an enemy combatant.[58]

This document then informed each detainee that he would be accorded a CSRT, whether or not the detainee chose to participate.[59] The document also informed the detainee that the CSRT was only one of his legal rights and that the other was the right to file petitions with "United States courts."[60]

V. THE PERSONAL REPRESENTATIVE

The CSRT procedures provide that each detainee has to be assigned a "personal representative" and require that the personal representative meet with the detainee before the CSRT hearing.[61] The personal representative must advise the detainee of the CSRT process and remind the detainee, for a second time, that he has an independent right to habeas corpus.[62]

The records of meetings between detainees and their personal representatives indicate that in 78% of the 102 full CSRT returns, the

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[56] *Id.*

[57] Memorandum Procedures CSRT, *supra* note 9, at Enclosure (4).

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at Enclosure (1), C(3); *id.* at Enclosure (3).

[62] *Id.* at Enclosure (3).

detainee and the personal representative met only once. Such meetings were typically brief: 91% of these meetings lasted two hours or less, 51% lasted an hour or less, 6% lasted thirty minutes or less, 13% lasted twenty minutes or less, and 2% lasted ten minutes or less. The time spent in the meetings included the time spent translating and the time spent conveying specific information about the process, the personal representative's role, and the option of petitioning the federal court.[63] The length of these meetings did not leave much time for detailed communication, much for less meaningful consultation between the personal representative and the detainee.

At that initial meeting with each detainee, the personal representative had several tasks, including warning the detainee that the personal representative was not the detainee's lawyer and that nothing discussed during the meeting would be held in confidence:

> 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.[64]

This statement makes clear both that the detainee had no advocate in the process and that the detainee had the right to not participate in the process. After receiving this information, 32% of the detainees opted not to participate in the CSRT proceedings.

The meetings with the personal representatives typically occurred very shortly before the tribunal hearing.[65] The records of meetings between detainees and their personal representatives indi-

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[63] *See, e.g.*, Detainee Election Form, Modaray v. Bush, No. 05-301 (D.D.C. Jul. 28, 2005), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_815-893.pdf; Detainee Election Form, Al Warafi v. Bush, No. 04-CV-1254 (D.D.C. Oct. 12, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_815-893.pdf..

[64] *See* Memorandum Procedures CSRT, *supra* note 9, at Enclosure (3) (emphasis added).

[65] *Compare* Detainee Election Form, Hicks v. United States, No. 02-CV-0299 (D.D.C. Oct. 1, 2004) (a meeting with representative on September 17, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_1-91.pdf, *with* Combatant Status Review Tribunal Report Cover Sheet, Hicks v. United States, No. 02-CV-0299 (D.D.C. Oct. 1, 2004) (tribunal decision reached on September 22, 2004) [hereinafter Statement, Al Hilal], *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_1-91.pdf.

cate that for 24% of the detainees, the meeting with the personal representative was held the day of or the day before the CSRT proceeding. For 55% of the detainees, the meeting occurred between two days and a week before the hearing. Only 7% of the detainees met with their personal representatives more than two weeks prior to the CSRT proceeding.

In 52% of the cases, the personal representative made substantive statements to the tribunal. Many times, however, the representatives did not say a word (12%) and other times the representative made only formal non-substantive comments (36%). Furthermore, in a number of cases, the personal representative advocated for the government.

Detainees frequently expressed the view that the CSRT process was not an opportunity to "contest" their status as enemy combatants but rather another form of interrogation. Seven percent of the detainees who *did* physically appear in their CSRT proceeding made voluntary statements on the record indicating that they understood this to be a continuation of their interrogation and not a true hearing.

The documents show that some detainees objected to the personal representative's role as an aid to the tribunal rather than as an assistant to the detainee.[66] In 8% of all records reviewed, the detainees suggested, without being asked, that the personal representative or the tribunal were a form of interrogation rather than a hearing. In every occasion when the detainee objected to his personal representative serving as the government's agent against him, the detainee's objections were ignored.[67]

Contained in the records for detainee ISN 1463 is the following exchange:

> Detainee: My personal representative is supposed to be with me. Not against me. Now he is talking like he is an interrogator. How can he be an attorney? I said all of these allegations were fabricated and I told you I had nothing to do with them. It's up to the Recorder or Reporter to respond or provide the proof. I'm afraid to say anything that you might use against me. As you know, there is no attorney here today and I don't know anything about the law. I don't know which of these statements are going to be used for me or against me. Whoever is representing the Government needs to provide evidence.

[66] *See, e.g.*, Summarized Detainee Sworn Statement at 6, Al Hilal v. Bush, No. 05-148 (D.D.C. July 11, 2005), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_4818-4946.pdf .

[67] *See, e.g., id.*

> I cannot say anything that can be used against me. I am even afraid to say what my name is.
>
> Anything else I say, I am afraid is going to be used against me.
>
> I hope that you can forgive me.[68]

Although the CSRT procedure requires the personal representative to advise the detainee of the tribunal process and the detainee's rights under the process, the personal representatives on a number of occasions neglected to do this.[69]

Ali Ahmed Mohammed Al Rahizi, ISN 45, did not appear at his CSRT hearing.[70] Al Rahizi's personal representative received the "Summary of Evidence" against Al Rahizi on September 23, 2004[71] and met with Al Rahizi for twenty minutes on September 28, 2004.[72] According to the "Conclusions of the Tribunal" section of the "Unclassified Summary of Basis for Tribunal Decision," Mr. Al Rahizi declined to participate in his CSRT proceeding:

> The detainee understood the Tribunal Proceedings, but chose not to participate . . . . The Tribunal questioned the personal representative closely on this matter and was satisfied that the personal representative had made every effort to ensure that the detainee had made an informed decision.[73]

The tribunal's close questioning of the personal representative is problematic because the form that the personal representative presented to the tribunal stated that he had neither read the written procedures to the detainee nor left a written copy them with the detainee.[74]

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[68] *Id.* at 6–7.

[69] *See* Detainee Election Form, Al Rahizi v. Bush, No. 04-CV-1194 (D.D.C. Oct. 14, 2004) [hereinafter Election Form, Al Rahizi], *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_370-443.pdf.

[70] Unclassified Summary of Basis for Tribunal Decision at 1, Al Rahizi v. Bush, No. 04-CV-1194 (D.D.C. Oct. 14, 2004) [hereinafter Summary, Al Rahizi], *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_370-443.pdf.

[71] *See* Memorandum from Officer in Charge, to Personal Representative, Al Rahizi v. Bush, No. 04-CV-1194 (D.D.C. Oct. 14, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_370-443.pdf.

[72] *See* Election Form, Al Rahizi, *supra* note 69.

[73] Summary, Al Rahizi, *supra* note 70.

[74] Election Form, Al Rahizi, *supra* note 69.

According to the CSRT record, Mr. Al Rahizi's brother submitted a sworn affidavit on his behalf.[75] The tribunal declined to consider the sworn affidavit, determined that the detainee had chosen not to participate in the CSRT, and found Mr. Al Rahizi to be an enemy combatant.[76] The personal representative made no comment during the proceeding.[77]

At least once, the personal representative did not advise the detainee of his right to appear before the tribunal until after that hearing had already taken place and the tribunal made its decision. Every personal representative was required to complete a "Detainee Election Form" as soon as the representative finished the first meeting with a detainee.[78] In the case of Musa Abed Al Wahab, ISN 58, the CSRT "Decision Report Cover Sheet" concluded that the tribunal determined that the detainee was an enemy combatant following an October 20, 2004, hearing, in which the detainee chose not to participate.[79] There is nothing remarkable about this except for the fact that the Detainee Election Form was dated *October 25, 2004*.[80] It is not clear how the personal representative could have advised the tribunal that the detainee had affirmatively declined to participate when he had yet to meet with the detainee.

VI. BURDEN OF PROOF AND PRESUMPTION OF VALIDITY OF GOVERNMENT EVIDENCE

A. Burden of Proof

The published rules for CSRT proceedings formally place the burden of proof that the detainee is an enemy combatant upon the government, not the detainee: "Tribunals shall determine whether

[75] Affidavit of Abdullah Ahmed Muhammed al Rezehi, Admin. Review Bd., Round 1 Transcripts, *available at* http://projects.nytimes.com/guantanamo/detainees/45-ali-ahmad-muhammad-al-rahizi/documents/2.

[76] *Id.* at 2.

[77] *Id.*

[78] *See, e.g.*, Detainee Election Form, Al Wahab v. Bush, No. 05-520 (D.D.C. May 6, 2005) [hereinafter Election Form, Al Wahab], *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_444-565.pdf.

[79] Combatant Status Review Tribunal Decision Report Cover Sheet, Al Wahab v. Bush, No. 05-520 (D.D.C. May 6, 2005), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_444-565.pdf

[80] Election Form, Al Wahab, *supra* note 78.

the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant."[81] This language might seem inconsistent with the language of the notice that was read to each detainee to inform him of the CSRT procedures:

> The U.S. Government will give you an opportunity to contest your status as an enemy combatant. Your case will go before a Combatant Status Review Tribunal, composed of military officers. This is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held . . . .[82]

The language "an opportunity to *contest* your status as an enemy combatant"[83] might suggest that it is the detainee, and not the government, who bears the burden of proof to demonstrate that the detainee is *not* an enemy combatant. Indeed, the order also refers to the determination of combatant status made before the CSRT process: "Each detainee subject to this Order has been determined to be an enemy combatant *through multiple levels of review* by officers of the Department of Defense."[84] Further, the summary of evidence, which the personal representative provided to each detainee at the start of their first meeting, repeats this refrain. Each summary of evidence includes the following statement:

> The United States Government has *previously determined* that the detainee is an enemy combatant. This determination is based on information possessed by the United States that indicates that the detainee is . . . .[85]

In sum, while the burden of proof was placed formally on the government, the controlling documents clearly suggest the presumptive correctness of the detentions. A tribunal would have to find that "multiple levels" of military review were all in error in order to find a detainee to not be an enemy combatant. In any event, the debate about who bore the burden of proof may not be worth pursuing in light of the presumption mandated by the procedures that the evidence was valid. The presumption is detailed below.

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[81] *See* Memorandum Procedures CSRT, *supra* note 9, at Enclosure (1), G(11).

[82] *Id.* at Enclosure (4).

[83] *Id.* (emphasis added).

[84] *See* Memorandum Establishing CSRT, *supra* note 4 (emphasis added).

[85] *See, e.g.*, *See* Memorandum from Officer in Charge, to Pers. Representative, Al Rahizi v. Bush, No. 04-CV-1194 (D.D.C. Oct. 14, 2004) (emphasis added), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_370-443.pdf.

B. Presumption of Validity of Government Evidence

While the CSRT procedures formally placed the burden of persuasion on the government, they simultaneously mandate that the tribunal consider the classified evidence as presumptively valid:

> 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.[86]

The effect of this presumption of validity of classified evidence is to meet, if not lift, the government's burden of proving by a preponderance of the evidence that the detainee was properly classified as an enemy combatant. The detainee is presumed to be an enemy combatant based upon the classified evidence. Although the detainee may, in theory, rebut the presumption, the requirement that the detainee does so effectively shifts the burden of persuasion to him.

However objectionable it may be to place the burden of proof on the government with one hand and simultaneously presume that it is satisfied with the other, the CSRT procedures are even more problematic in light of their concomitant command that the detainee be denied access to the evidence itself.[87] The evidentiary presumption might in theory be rebuttable, but because the evidence is classified and kept secret from the detainee, he is unable to challenge, explain, or simply rebut it. The rebuttable presumption of validity becomes, in practice, an irrebuttable presumption.

This explains why, although the burden of proof was supposedly on the government, the government never had to present a single witness at any of the 393 CSRT hearings. Instead, it relied almost exclusively on the secret, and presumptively valid, classified evidence. In reality, the burden was on the detainee to prove that the classified evidence was wrong. Yet, the detainee was denied access to the evidence that might have enabled him to do so.

VII. THE HEARING

Each CSRT took place in a small room.[88] Armed guards brought the detainee—shackled hand and foot—to the room, seated him in a

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[86] *See* Memorandum Procedures CSRT, *supra* note 9, at Enclosure (1), G(11).

[87] *See id.*

[88] Photographs of the CSRT rooms are available at http://www.defense.gov/news/combatant_tribunalsarchive.html. *See also* Press Release, U.S. Dep't of Defense, First Military Commission Convened at Guantánamo Bay, Cuba (Aug. 24, 2004) [hereinafter First Commission], *available at* http://www.defense.gov/releases/release.aspx?releaseid=7667; Tim Golden, *For*

chair against the wall and chained his shackled legs to the floor.[89] The detainee faced the recorder (the prosecutor for this proceeding), the personal representative (seated beside the recorder), a paralegal, and the interpreter.[90] The three tribunal members, all military officers, sat to the right of the detainee behind the covered table.[91]

VIII. THE EVIDENCE

Typically, the government provided the detainee with only a document known as the "Unclassified Summary of the Evidence" that was marked R-1 by the recorder.[92] The boilerplate "Discussion of Unclassified Evidence" in most records reads: "Exhibit R-1 is the Unclassified Summary of Evidence. While this summary is helpful in that it provides a broad outline of what the tribunal can expect to see, it is not persuasive in that it provides conclusory statements without supporting unclassified evidence."[93]

The "Unclassified Summary of Evidence" often made it impossible for detainees to address its thrust. For example, the transcript of the proceeding for detainee ISN 1463 recounts:

> Detainee: That is not true. I did not help anybody and whoever is saying that I did, let them present their evidence. If I know that somebody presented any evidence, then somebody can tell me what that evidence is so that I can respond to it. If there is any
>
> . . . .
>
> Detainee: That's not true. Again, whoever has any evidence to prove, 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?[94]

The CSRT procedures accord a broad range of powers to the tribunal for the production of evidence. The tribunal has the power

Guantánamo Review Boards, Limits Abound, NYTIMES.COM (Dec. 31, 2006), *available at* http://www.nytimes.com/2006/12/31/us/31gitmo.html?scp=2&sq=describe+combatant+status+review+tribunals&st=nyt.

[89] *See, e.g., id.*

[90] Pictures of the rooms' layout are available at http://www.defense.gov/news/combatant_tribunalsarchive.html. (emphasis added)

[91] *See supra* note 90.

[92] *See, e.g.,* Unclassified Summary of Basis for Tribunal Decision at 2, Al Wadi v. Bush, No. 04-CV-1227 (D.D.C. Oct. 12, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_444-565.pdf.

[93] *See, e.g., id.*

[94] Statement, Al Hilal, *supra* note 66, at 3.

to order members of the U.S. military to appear as witnesses, the power to request civilian witnesses to testify,[95] and the power to order production of any document in the possession of the U.S. government.[96] Despite these powers, the government did not produce a single witness—military or civilian—during the unclassified portion of any of the 393 detainees' records. The CSRT procedures give the detainee a right to question witnesses against him,[97] but that right is only theoretical because the government never presented any witnesses.

A. Government Unclassified Documentary Evidence

The CSRT procedures anticipate that the government will produce unclassified evidence at the hearing. The procedures explicitly require that the personal representative advise the detainee of his right to see such unclassified evidence.[98] According to the 102 full CSRT returns, the government did not present any witnesses and rarely presented non-testimonial evidence to the detainee prior to the hearing. A review of the 361 transcripts reveals that the government may have shown the detainee some evidence before he began his statement in 4% of the cases. When the hearing began, 89% of the detainees had no facts to rebut, whether from witnesses or from documentary evidence. The same documents also reveal that the tribunal showed the detainee unclassified information in 7% of the hearings. It is unclear why the tribunal showed unclassified evidence in some cases but not in others.

As explained below, 49% of the 102 full CSRT returns contain some form of unclassified evidence presented by the government. This number is in stark contrast to the 4% of detainees who had access to unclassified information prior to their hearings and to the 7% of detainees who were shown unclassified information during their hearings.

Each CSRT return includes an "Unclassified Summary of the Basis for Tribunal Decision," including the unclassified evidence against the detainee.[99] Twenty-nine of the 102 full CSRT returns also contain

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[95] *See* Memorandum Procedures CSRT, *supra* note 9, at Enclosure (1), E(2).

[96] *Id.* at Enclosure (1), E(3).

[97] *Id.* at Enclosure (1), H(7).

[98] *Id.* at Enclosure (3).

[99] *See, e.g.*, Summary, Hicks, s*upra* note 17; Unclassified Summary of Basis for Tribunal Decision, Ruhani v. Bush, No. 05-2367 (D.D.C. Aug. 10, 2006), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_1-91.pdf; Unclassified Summary of Basis for Tribunal Decision, Wasiq v. Bush, No. 05-2386 (D.D.C. Aug. 11, 2006), *available at*

a recorder's "Exhibit List," which cites every piece of classified and unclassified evidence that the tribunal considers.[100] In addition, sometimes unclassified evidence is appended to the full CSRT returns.[101] These appended exhibits may or may not be listed in either the recorder's "Exhibit List" or the "Unclassified Summary of Basis for Tribunal Decision." Based on these three sources, unclassified evidence against detainees appears in 48% of the 102 full CSRT returns. Thus, for 52% of the CSRT hearings, the government had no unclassified evidence and relied solely upon the presumptively valid classified evidence to meet its burden of proof.

1. Types of Government Unclassified Evidence Presented to Tribunal

The government introduced five types of unclassified evidence in the CSRT hearing:

- documents from friends and family[102]
- submissions from habeas corpus litigation[103]
- publicly available documents either released by the Government or published by the press that name the detainee at issue[104]
- publicly available documents either released by the Government or published by the press that do not name the detainee[105]

http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_1-91.pdf.

[100] *See, e.g.*, Recorder Exhibit List for [REDACTED], Al Murbati v. Bush, No. 04-CV-1227 (D.D.C. Oct. 12, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_444-565.pdf.

[101] *See, e.g.*, Summary, Al Wadi, *supra* note 92.

[102] *See e.g.*, Answers to the Questions for the Family of Abd Alaziz Sayir Al Shamari, Al Shammeri v. United States, No. 02-CV-0828 (D.C.C. Oct. 15, 2004) [hereinafter Answers, Al Shamari], a*vailable at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_1344-1475.pdf.

[103] *See e.g.*, Amended Complaint, Al Odah v. United States, No. CV 02-0828 (D.D.C July 8, 2002), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_1344-1475.pdf.

[104] *See e.g.*, Executive Order 13224, Abdullah v. Bush, No. 05-301(D.D.C. July 25, 2005), a*vailable at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_92-190.pdf.

[105] *See e.g.*, Terrorist Organization Reference Guide, U.S. Bureau of Border Protection, Qadir v. Bush, No. 05-2370 (D.D.C. Jan. 4, 2007), *available at*

- non-publicly available documents that particularly concern the detainee[106]

For 47% of the detainees whose tribunal considered unclassified documents, this evidence consisted of documents and letters written by friends and family of the detainees. Correspondence written by family and friends generally lacks inculpatory value. Eighteen percent of the records contained habeas corpus pleadings. Motions taken from habeas corpus proceedings also lack inculpatory value. Of the full CSRT returns that considered unclassified documents, 29% contained public records that did not refer to the detainees. The inculpatory value of these documents is tenuous because the documents were used to establish that certain groups are terrorist organizations; they did not, however, directly accuse the detainee of any wrongdoing.[107] Of the full CSRT returns that reflected unclassified documents, 10% contained public records that identified the detainee by name. The inculpatory value of these documents is more apparent. An additional 14% of the sample set contained non-publicly available documents directly pertinent to the detainee. Included in this group were documents labeled "For Official Use Only" (FOUO),[108] discussed below, as well as Bosnian court investigation documents[109] and a mental health record.[110] The inculpatory value of these documents seems more apparent; however, there is no indication the detainees ever saw these documents.

Most unclassified documents in a detainee's full CSRT return did not allow the detainee to effectively contest his status as an enemy combatant, particularly when the detainee was not allowed to view this unclassified evidence.

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http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_1344-1475.pdf.

[106] *See, e.g.*, Answers, Al Shamari, *supra* note 102, at 3.

[107] *See, e.g.*, Unclassified Summary of Basis for Tribunal Decision, Mahnut v. Bush, No. 05-1704 (D.D.C. Oct. 27, 2004) [hereinafter Summary, Mahnut], *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_1893-2014.pdf .

[108] *See, e.g.*, Recorder Exhibit List, Hicks v. United States, No. 02-CV-0299 (D.D.C. Oct. 1, 2004) [Exhibit List, Hicks], *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_1-91.pdf.

[109] *See infra* note 144 and accompanying text.

[110] Unclassified Summary of Basis for Tribunal Decision, Mahdi v. Bush, No.05-665 (July 13, 2004) [hereinafter Summary, Mahdi] (mental health records), *available at*
http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_3291-3416.pdf.

2. Unclassified FOUO Evidence Withheld from Detainee

Unclassified evidence included, but was not limited to, documents labeled FOUO. These documents, however, were consistently treated as if they were classified throughout the CSRT process. For example, the record did not discuss these documents in the "Unclassified Summary of the Basis for Tribunal Decision."[111] The FOUO documents primarily consisted of interrogations of the detainee.[112] Without access to these FOUO documents, the detainee was not able to clarify the statements made, claim that the statements were made as a result of torture, or dispute whether the statements were made at all.

The existence and reliance upon FOUO evidence was not revealed in any of the 356 FOIA-produced transcripts. In most instances, the existence of FOUO evidence was revealed in the "Recorder's Exhibit List," which was produced only as part of the habeas-compelled full CSRT returns.[113] Consequently, but for the habeas petitions, the government's reliance on this variety of secret evidence would never have been revealed.

Recorder's exhibit lists were found for only 28% of the detainees' full CSRT returns. Exhibit lists, when present, however, show that the government relied upon unclassified FOUO evidence for 83% of the hearings. The record also shows that when the government relied upon unclassified FOUO evidence, this evidence was always withheld from the detainee. In essence, the detainees were not shown any of the evidence used against them, classified or unclassified. Not only was the FOUO evidence withheld from the detainees in violation of the CSRT procedures, but other declassified evidence was also withheld.

B. The Detainee's Opportunity to Present His Evidence

Records indicate that, other than the unclassified summary of evidence, as many as 96% of the detainees began the presentation of their cases without hearing or seeing any facts upon which the government based its determination that the detainee was an enemy combatant. Detainees presented their cases without knowing the facts they had to rebut.

[111] *See, e.g.*, Summary, Hicks, s*upra* note 17.
[112] *See, e.g.*, Exhibit List, Hicks, s*upra* note 108.
[113] *See, e.g., id.*

The CSRT procedures provided that each detainee would have the right to present evidence to the tribunal. The CSRT procedures provide that:

> (6) *The detainee may present evidence to the Tribunal*, including the testimony of witnesses who are reasonably available and whose testimony is considered by the Tribunal to be relevant. Evidence on the detainee's behalf (other than his own testimony, if offered) may be presented in documentary form and through written statements, preferably sworn.[114]

Of the detainees who chose to participate in their hearings, more than half (55%)[115] attempted to not only inspect the classified (or perhaps unclassified) evidence but also to produce their own witnesses or documentary evidence. Most requests for the production of evidence at the hearing, however, were denied.[116]

1. Witness Requests

One-third of detainees who participated in their hearings requested that witnesses testify on their behalf. Other detainees refused to participate because their requests were denied.[117] Among the records, only 26% of the detainees that requested witnesses were able to get *any* of those witnesses produced by the tribunal. Of the detainees who requested the testimony of other detainees at Guantánamo, 83% were denied.

Further inspection of the data reveals that only 4% of these detainees were able to obtain *all* of their requested witnesses, and 22% of these detainees were able to have only *some* of their witnesses produced. In total, 74% of the detainees who requested witnesses were denied the production of any witnesses by the tribunal. The tribunal denied witness requests if it deemed the witnesses either "not reasonably available," "irrelevant," or, in at least one egregious example, be-

[114] *See* Memorandum Implementing CSRT, *supra* note 43, at Enclosure 1, F(6) (emphasis added).

[115] Some detainees sought more than one kind of evidence, such as witnesses, non-testimonial evidence, or the opportunity to review classified evidence. The analysis that follows reviews the evidence requested and permitted without associating it with the total requests of any particular detainee.

[116] *See, e.g.*, Memorandum from Legal Advisor to Dir., Combatant Status Review Tribunal at 3, Begg v. Bush, 04-CV-1137 (D.D.C. Dec. 20, 2004), *available at* http://www.dod.mil/pubs/foi/detainees/csrt_arb/publicly_filed_CSRT_records_2869-2990.pdf.

[117] *See, e.g.*, Memo, Al Kandari, *supra* note 24.

cause "the Tribunal would have been burdened with repetitive, cumulative testimony."[118]

For example, ISN 277 requested seventeen witnesses. The tribunal president decided that the detainee could only have two of these witnesses because he determined that "all of the witnesses would probably testify similarly, if not identically."[119] The tribunal president gave no basis for the belief that the witnesses would testify similarly or identically, and, as ISN 277's personal representative pointed out to the tribunal, there was no basis in the CSRT procedures for denying a witness based on redundancy.[120]

Some detainees requested witnesses located outside Guantánamo, and some requested witnesses from within the base—but in either case, they called for the testimony of another *detainee*.[121] More than half of the detainees who requested witnesses requested the testimony of witnesses who were not at Guantánamo. *All requests* for the testimony of detainees not detained at Guantánamo were denied.[122] The detainees who asked for witnesses from inside Guantánamo were successful in producing some of those witnesses only 50% of the time.

Nineteen percent of the participating detainees requested witnesses from outside Guantánamo, but these requests were *never successful*. Thus, as the data shows, the only witnesses that any of the detainees were able to produce to testify on their behalf were other Guantánamo detainees.[123] The "Unclassified Summary of the Basis for Tribunal Decision" lists the evidence that was considered and the evidence that the tribunal did not consider.[124] The data shows that only 26% of the detainees who requested witnesses had witnesses whose testimony was considered by the tribunal. Broken down further, the data shows that the tribunal considered all witnesses testimony for those detainees who requested witnesses only in 4% of the cases. All of the witnesses considered were detainees testifying for

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[118] Summary, Mahnut, *supra* note 107, at 2.

[119] *Id.*

[120] *Id.*

[121] *See, e.g,* Summary, Hassen, *supra* note 24, at 2; Summary, Mahdi, *supra* note 110, at 2 (mental health records), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_3291-3416.pdf; Unclassified Summary of Basis for Tribunal Decision at 2–3, Al Kandari v. Bush, 02-CV-0828 (D.D.C. Oct. 15, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_2737-2868.pdf.

[122] *See, e.g.*, Summary, Hassen, s*upra* note 24, at 1.

[123] *See, e.g.*, *id.*

[124] *See, e.g.*, Summary, Hicks, *supra* note 17.

each other. In sum, the detainees were denied the right to produce any testimonial evidence other than, in some circumstances, the testimony of some of their fellow detainees.

2. Unclassified and Classified Evidence Requests

Twenty-nine percent of the detainees requested unclassified-documentary evidence prior to their hearings. For the detainees who requested unclassified evidence, it was only produced 40% of the time. Twenty-five percent of the detainees who requested this evidence had all of their evidence produced, while 15% of these detainees had only some of the requested evidence produced. The documentary evidence that the tribunal allowed consisted mostly of letters from parents and friends and were accorded little weight by the tribunal.[125]

During their hearings, more than 14% of the detainees requested the opportunity to view the classified evidence against them.[126] These requests were always denied.[127]

4. Evidence Detainees Were Permitted to Present

The tribunals denied more evidence than they permitted and denied almost all evidence that would be persuasive. As discussed previously, detainees' requests for witnesses not detained at Guantánamo were always rejected,[128] and detainees' requests to see any of the government's classified evidence were always denied.[129] Detainees' requests for testimony from other detainees were usually denied.[130]

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[125] *See, e.g.*, Statement, Al Wadi, *supra* note 26.

[126] An examination of the 361 available transcripts reveals that 18% made a request for classified evidence, but, for purposes of this section, analyzing all evidentiary requests, the 14% statistic corresponds to our sample set, the 102 full CSRT returns.

[127] *See* Tribunal Members Questions to Detainee at 12, Amin v. Bush, No. 02-CV0828 (D.D.C. Dec. 29, 2004) (on file with Center).

[128] *See, e.g.*, Unclassified Summary of Basis for Tribunal Decision at 1–2, Jarabh v. Bush, No. 04-CV-1194 (D.D.C. Oct. 1, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_1625-1730.pdf; *cf.* Summary, Hicks, *supra* note 17, at 3 (granting the detainee's witness request initially but never procuring the witness for the detainee).

[129] *See,* Memorandum Procedures CSRT, *supra* note 9, at Enclosure (1).

[130] *See, e.g.*, Unclassified Summary of Basis for Tribunal Decision at 2, Al Rawi v. Bush, No. 04-CV-1144 (D.D.C. Oct. 22, 2004) (denying request for detainee's witness), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_4103-4236.pdf; *cf.* Summary, Hassen, *supra* note 24, at 1–2 (granting detainee's witness request).

The detainees, however, were allowed to present their documentary evidence, at least in part, 40% of the time.

The picture of the type of evidence that was permitted is bleak. But, when the number of detainees who had any evidence to present upon their behalf is considered, the picture is bleaker still. Based upon the 361 available transcripts, for as many as 89% of detainees, no evidence was presented on their behalf. The evidence in support of the remaining 11% was limited to testimony from other detainees and letters from friends and families. Taken as a whole, 96% of the detainees were shown no facts by the government to support their detention as enemy combatants, and 89% of the detainees had no evidence of their own to present. The 11% who did proffer evidence were allowed to introduce only unpersuasive evidence: family letters and other testimony from other detainees.

5. Reasons for Denying the Detainees' Evidence

The CSRT procedures empower the tribunal to "[o]rder U.S. military witnesses to appear and to request the appearance of civilian witnesses if, in the judgment of the tribunal president those witnesses are *reasonably available*."[131] The procedures also permit the CSRT Tribunal to:

> request the production of such *reasonably available* information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings.[132]

The CSRT procedures do not define "reasonably available," and the detainee has no right to appeal a determination that certain evidence is either unavailable or "irrelevant." The reasons that the tribunals gave for the refusal to allow detainees to present evidence vary. The three most common reasons were:

- The evidence or witness was not "reasonably available."[133]
- The evidence or witness was not relevant.[134]

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[131] *See* Memorandum Procedures CSRT, *supra* note 9, at Enclosure (1), E(2) (emphasis added).

[132] *Id.* at Enclosure (1), E(3) (emphasis added).

[133] *See, e.g.*, Unclassified Summary of Basis For Tribunal Decision at 2, Al Hajj v. Bush, No. 04-CV-1166 (D.D.C. Oct. 30, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_5069-5181.pdf.

- The request for production of evidence or the witness was not made to the personal representative during the D-A meeting and was thus too late.[135]

The tribunals sometimes did not give any reason for denying evidence. Sometimes, the tribunals also refused to permit the introduction of documentary evidence in the possession of the government. For example, Al Harbi, ISN 333, appeared before a tribunal and identified documents that he said would exonerate him and explain that he was not an enemy combatant: "It is important you find the notes on my visa and passport because they show I was there for 8 days and could not have been expected to go to Afghanistan and engage in hostilities against anyone."[136]

During the proceeding for detainee ISN 680, the following exchange took place:

> *Questions to Recorder by Tribunal Members*
> Q: Are you aware if the passport is in control of the U.S. Government here in Guantánamo?
> A: No, sir, I'm not aware.
> *Questions to Detainee by Tribunal Members*
> Q: If we were to see a copy of your passport, what are the dates it would say you are in Pakistan?
> A: The date of my entry to Pakistan, the dates I have on my visa, they all exist there. Even in Pakistan, we were received by American investigators. We were interrogated by American interrogators in Pakistan.
> Q: How long have you been here at the camp?
> A: I really don't know anymore, but most likely 2 to 2 1/2 years.[137]

The passport was neither located nor produced, and the detainee was promptly found to be an enemy combatant.[138]

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[134] *See, e.g.*, Unclassified Summary of Basis For Tribunal Decision at 2, Al Raimi v. Bush, No. 04-CV-1194 (D.D.C. Oct. 1, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_977-1088.pdf.

[135] *See, e.g.*, Unclassified Summary of Basis For Tribunal Decision at 2, Mar'i v. Bush, No. 04-CV-1254 (D.D.C. Oct. 12, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_3071-3189.pdf.

[136] Summarized Sworn Detainee Statement at 3, Al Harbi v. United States, (D.D.C. Sept. 27, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/Set_16_1363-1446.pdf.

[137] Summarized Sworn Detainee Statement at 2, Hassan v. United States, No. 04-CV-1194 (D.D.C May 1, 2005), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_3417-3443.pdf.

> For Khi Ali Gul, ISN 928, the Tribunal President said:
>
> [W]e will keep this matter open for a reasonable period of time; that is, if we receive back from Afghanistan this witness request, even if we close the proceedings today, with new evidence, we would be open to introducing or re-introducing any witness statements we might receive.[139]

Khi Ali Gul requested that his brother be produced as a witness and provided the tribunal with his brother's telephone number and address.[140] Instead of calling the phone number provided, which might have produced an immediate result, the government instead sent a request to the Afghan embassy.[141] The Afghan embassy did not respond within thirty days, and the witness was not produced.[142] The tribunal then found that the witness was not "reasonably available," determined that the detainee was an enemy combatant, and never reopened the hearing.[143]

In another case, an Algerian detainee requested court documents from an earlier hearing in Bosnia at which the Bosnian courts acquitted him of terrorist activities.[144] The tribunal concluded that these official court documents were not "reasonably available" even though the "Unclassified Summary of the Basis for Decision" discussed another document from the same Bosnian legal proceedings.[145] The aspects of the Bosnian proceedings that the tribunal considered were not the records that the detainee requested.[146] Apparently, according to the government, some records from a formal Bosnian trial are "reasonably available" but others are not. The record provided no explanation as to why the government did not

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[138] *See generally id.*

[139] Summarized Sworn Detainee Statement at 2, Gul v. Bush, No. 05-00877(D.D.C. May. 31, 2005), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_4237-4315.pdf.

[140] *Id.* at 3.

[141] *Id.* at 2.

[142] *Id.*

[143] Unclassified Summary of Basis for Tribunal Decision at 2, Gul v. Bush, No. 05-00877 (D.D.C. May 31, 2005), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_4237-4315.pdf.

[144] Unclassified Summary of Basis for Tribunal Decision at 2, Al Hajj v. Bush, No. 04-CV-1166 (D.D.C. Oct. 30, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_5069-5181.pdf.

[145] *Id.* at 3.

[146] *Id.*

obtain the requested records. The tribunal found that this detainee, like the others, was an enemy combatant.[147]

In the case of Allal Ab Aljallil Abd Al Rahman Abd, ISN 156, the detainee sought the production of medical records from a specified hospital:

> During the hearing, the detainee requested that the Tribunal President obtain medical records from a hospital in Jordan. . . . The Tribunal president denied the request. He determined that, since the detainee failed to provide specific information about the documents when he previously met with his Personal Representative, the request was untimely and the evidence was not reasonably available.[148]

The detainee's failure to mention this request to his personal representative is not a reason to deny the evidence, at least according to the CSRT procedures.[149] CSRT procedures provide two reasons to deny requested evidence: that it is irrelevant and that it is "not reasonably available."[150]

VIII. TRIBUNAL EVALUATION OF THE EVIDENCE

Once the detainee leaves the hearing chamber, the tribunal is supposed to review and evaluate the classified evidence for the first time. What occurred after each detainee left the hearing was never recorded or at least no record has been released. While we have no access to the classified evidence, much of the classified evidence was apparently hearsay. The CSRT procedures permit the use of hearsay, but require the tribunal to first determine the reliability of the hearsay:

> 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 issue 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.[151]

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[147] *Id.* at 1.

[148] Unclassified Summary of Basis for Tribunal Decision, at 2, Al Rahman Abd v. Bush, No. 06-CV-1254 (D.D.C Oct 18, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_815-893.pdf.

[149] *See generally* Memorandum Procedures CSRT, *supra* note 9.

[150] Memorandum Procedures CSRT, *supra* note 9, at Enclosure (1), F(6).

[151] *Id.* at Enclosure (1), (G)7 (emphasis added).

The tribunal's basis for decision describes the rationale for determining that a detainee is an enemy combatant.[152] A review of the 102 full CSRT returns, however, shows that the tribunal apparently never questioned the reliability of hearsay. Three issues compound the severity of the tribunal's failure to evaluate the reliability of the hearsay. First, the source of the hearsay was usually anonymous; second, there was great confusion about the names of the detainees; and third, there was some evidence of the coercion of declarants.

A. Hearsay from Anonymous Sources

A legal adviser reviewed each tribunal decision.[153] It is not possible to definitively analyze the quality of the hearsay evidence because it is unavailable, but the statement of the legal adviser reviewing the tribunal's decision for ISN 552 demonstrates the problem:

> Indeed, the evidence considered persuasive by the Tribunal is made up almost entirely of hearsay evidence recorded by unidentified individuals with no first hand [sic] knowledge of the events they describe.[154]

Outside of the CSRT process, this type of evidence is more commonly referred to as "rumor."

In one instance, the personal representative made the following comments regarding the record of proceedings for ISN 32:

> I do not believe the Tribunal gave full weight to the exhibits regarding ISN [redacted]'s truthfulness regarding the time frames in which he saw various other ISNs in Afghanistan. It is unfortunate that the 302 in question was so heavily redacted that the Tribunal could not see that while ISN [redacted] may have been a couple months off in his recollection of ISN [redacted]'s appearance with an AK 47, that he was six months to a year off in his recollections of other Yemeni detainees he identified. I do feel with some certainty that ISN [redacted] has lied about other detainees to receive preferable treatment and to cause them problems while in custody. Had the Tribunal taken this evidence out as unreliable, then the position we have taken is that a teacher of the Koran

[152] *See, e.g.*, Summary, Hicks, *supra* note 17, at 1.

[153] *See, e.g.*, Memorandum from James R. Crisfield Jr., Legal Advisor, to Dir., Combatant Status Review Tribunal, Al Kandari v. United States, No. 02-CV-0828 (D.D.C. Oct. 22, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_2737-2868.pdf.

[154] *See, e.g., id.*

(to the Taliban's children) is an enemy combatant (partially because he slept under a Taliban roof).[155]

B. Possible False Identities or Misnomers

It is black-letter evidence law in a normal settings that, while hearsay may sometimes be admissible, the reliability of hearsay evidence always depends upon the reliability of the hearsay declarant.[156] Because the government's own records misidentified the detainees more than 150 times, the problem of reliability in the case of the detainees is apparent'.[157]

On April 19, 2006, the government published the names of the 558 detainees who had CSRT proceedings at Guantánamo.[158] On May 15, 2006, the government also published a list of 759 names that represented all those detainees who were detained at Guantánamo until then.[159] In addition, the government released transcripts and other documents related to administrative review board hearings that also contain detainee names.[160]

These three groups of records contain more than 900 different versions of detainee names. Adding other government documents, such as the full CSRT returns and other legal documents, the number rises to more than 1,000 different names. Yet, according to the government, only 759 detainees have passed through Guantánamo "from January 2002 through May 15, 2006."[161] The more than 1,000 different names do not mean that there were more than 1,000 detainees at

[155] Personal Representative Review of the Record of Proceedings, Ahmed v. Bush, No. 05-301 (D.D.C. July 25, 2005), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_92-190.pdf.

[156] *See* FED. R. EVID. 801–07.

[157] Documents showing a comparison of names throughout the CSRT and Administrative Review Board process are on file with the Center.

[158] *List of Detainees Who Went Through Complete CSRT Process*, FIDH, http://www.fidh.org/IMG/pdf/doc_7_-_detainee_list.pdf. (last visited Feb. 2, 2011).

[159] *List of Individuals Detained by the Department of Defense at Guantánamo Bay, Cuba from January 2002 Through May 15, 2006*, U.S. DEP'T DEF., http://www.dod.mil/pubs/foi/detainees/detaineesFOIArelease15May2006.pdf.Guantánamo (last visited Sept 1, 2011) [hereinafter *List of Individuals Detained*].

[160] The procedures provide that each prisoner found to be an enemy combatant must go through an administration review board process every year following the CSRT's conclusion that the detainee is an enemy combatant. Memorandum from the Deputy Sec'y of Def. to the Sec'ys of the Military Dep'ts, et al., at Enclosure (3) (July 14, 2006), *available at* http://www.defense.gov/news/Aug2006/d20060809ARBProceduresMemo.pdf (describing the ARB procedures).

[161] *List of Individuals Detained*, *supra* note 159.

Guantánamo, but it does establish the difficulty of identifying individuals in these circumstances.

If after more than four years of interrogation the government did not know the names of its own detainees, confusion about the identity of detainees clouded any analysis of the evidence at the CSRT hearings. In short, there should be considerable concern when a tribunal relies upon hearsay declarants who may be talking about someone other than the detainee to whom the declaration is supposedly directed. For example, one detainee responded to the claim that his name was found "on a document." The detainee stated:

> There are several tribes in Saudi Arabia and one of these tribes is Al Harbi. This is part of my names [sic] and there are literally millions that share Al Harbi as part of their name. Further, my first names Mohammad and Atiq are names that are favored in that region. Just knowing someone has the name Al Harbi tells you where they came from in Saudi Arabia. Where I live, it is not uncommon to be in a group of 8–10 people and 1 or 2 of them will be named Mohammed Al Harbi. If fact, I know of 2 Mohammed Al Harbis here in Guantánamo Bay and one of them is in Camp 4. The fact that this name is recovered on a document is literally meaningless.[162]

C. Possible Coercion

Apparently no tribunal considered the extent to which the government obtained any hearsay evidence through coercion. While the effects of torture, or coercion more generally, would obviously apply to inculpatory statements from the detainee himself, the possibility should also have been considered by a tribunal weighing all statements and information relating to the detainee which may have been, in the words of the Detainee Treatment Act of 2005, "obtained as a result of coercion."[163] This statute was not enacted until December

[162] Dep't of Def., *supra* note 27. Mohammad Atiq Al Harbi, ISN 333, stated that there were documents available to the United States that would prove that his classification as an enemy combatant was wrong. *Id.* Mr. Al Harbi also objected to anonymous secret evidence:

> It is important you find the notes on my visa and passport because they show I was there for 8 days and could not have been expected to go to Afghanistan and engage in hostilities against anyone. . . . I understand you cannot tell me who said this, but I ask that you look at this individual very closely because his story is false. If you ask this person the right question, you will see that very quickly. I am trusting you to do this for me.

Id.

[163] 10 U.S.C. § 801 (2006). The Detainee Treatment Act of 2005 provides in part:
b) Consideration of statements derived with coercion.

2005, after the CSRT process was complete, but indications of torture or coercion suffered by a detainee should have at least raised hearsay concerns, which the tribunal is required to consider.[164] The record does not indicate such an inquiry by any tribunal. Instead, the tribunal usually made note of allegations of torture and referred them to the convening authority.[165] This fact is less surprising than the fact that several tribunals found a detainee to be an enemy combatant before receiving *any* results from such investigation. While there is no way of ascertaining the extent, if any, to which coercion might have affected witness statements', 18% of the detainees alleged torture; in each case, the detainee volunteered the information rather than responding after been asked by the tribunal or the personal representative. Also, in each case, the panel proceeded to decide the case before any investigation was undertaken.

IX. ACTIONS OF THE CSRT WHEN A DETAINEE PREVAILED

Nevertheless, the detainees sometimes won—at least initially. The Department of Defense order of July 14, 2006, states that:

> The Director, CSRT, shall review the Tribunal's decision and may approve the decision and take appropriate action, or return the record to the Tribunal for further proceedings. In cases where the Tribunal decision is approved and the case is considered final, the Director, CSRT, shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies.[166]

If the director of the CSRT decides, he may send any decision back to the CSRT for further proceedings,[167] which means that the detainee can be subjected to multiple hearings until the government is satis-

> (1) Assessment. The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess—
> (A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and
> (B) the probative value (if any) of any such statement.

Id.

[164] Memorandum Procedures CSRT, *supra* note 9, at Enclosure 1, (G)7.

[165] *See, e.g.*, Unclassified Summary of Basis for Tribunal Decision at 3, Nechle v. Bush, No. 04-CV-1166 (D.D.C. Oct. 28, 2004), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_4947-5068.pdf.

[166] Memorandum Procedures CSRT, *supra* note 9, at Enclosure 1, (I)8.

[167] *Id.*

fied with the ruling. The additional hearings were always conducted outside the detainee's presence, and the detainee was never notified of his "victory" in the first proceeding.[168]

At least three detainees were initially found to not be enemy combatants and then subjected to multiple re-hearings until they were ultimately found to be enemy combatants.[169] Several detainees had second hearings, and at least one detainee, after the first and second hearings unanimously found him not to be an enemy combatant, had yet a *third* hearing—again in absentia—which finally found him to be an enemy combatant.[170] The government's record for one detainee whose proceeding was returned for a second hearing stated: "On 24 November 2004, a previous Tribunal unanimously determined that the detainee was not properly designated as an enemy combatant."[171]

The record continued: "On 25 January 2005, this Tribunal, upon review of all the evidence, determined that detainee #654 was properly [unanimously] designated as an enemy combatant."[172]

A more egregious record of a detainee twice subjected to tribunals is that of detainee ISN 250. The following excerpts present a vivid example of just how little was needed to determine that a detainee was not an enemy combatant. Detainee ISN 250 elected not to appear in person before the tribunal, but the tribunal considered his statement and unanimously found that he was improperly designated as an enemy combatant.[173] That decision, however, did not stand for long. The government's own legal sufficiency review as written by Commander James R. Crisfield, Jr., U.S. Navy, synopsized the processing of detainee ISN 250's case:

> A letter from the personal representative initially assigned to represent the detainee at Guantánamo Bay, Cuba, reflects the detainee's elections and is attached to the Tribunal Decision Report

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[168] *See supra* note 29–32 and accompanying text.

[169] *See supra* note 29–32 and accompanying text.

[170] *See supra* note 29–32 and accompanying text.

[171] Memorandum from Peter C. Bradford, Assistant Legal Advisor, to Director, Combatant Status Review Tribunal at 1, Alghazawy v. Bush, No. 05-2378 (D.D.C. Sept. 20, 2006), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_3190-3290.pdf..

[172] *Id.*

[173] Memorandum from James R. Crisfield Jr., Legal Advisor, to Dir. at 2, Combatant Status Review Tribunal, Al Oshan, No. 05-0520 (D.D.C. Feb. 8, 2005), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_1731-1808.pdf.

> as exhibit D-b. The original Tribunal proceedings were held *in absentia* outside Guantánamo Bay with a new personal representative who was familiar with the detainee's file. This personal representative had the same access to information and evidence as the personal representative from Guantánamo Bay. The addendum proceedings were conducted with yet a third personal representative because the second Personal Representative had been transferred to Guantánamo Bay. This Personal Representative also had full access to the detainee's file and original Personal Representative's pass-down information. The detainee's Personal Representatives were given the opportunity to review the respective records of proceedings and both declined to submit post-tribunal comments to the Tribunal.[174]

Despite the initial finding that the detainee was not an enemy combatant and the obvious difficulties reflected in this tortured process, Commander Crisfield concluded that "[t]he proceedings and decision of the Tribunal, as reflected in enclosure (3), are legally sufficient and no corrective action is required."[175] Commander Crisfield recommended approval of the decision of the subsequent hearing that found detainee ISN 250 to be an enemy combatant.[176]

The record of the third decision for yet another detainee, ISN 556, whose proceeding was returned twice, stated the following in a memorandum prepared after his third tribunal: "On 15 December 2004, the original Tribunal unanimously determined that the detainee should no longer be designated as an enemy combatant."[177] Following the initial hearing, the tribunal's membership was changed. The record continued:

> Due to the removal of one of the three members of the original tribunal panel, the additional evidence, along with the original evidence and original Tribunal Decision Report, was presented to tribunal panel #30 to reconsider the detainee's status. On 21 January 2005 that tribunal also unanimously determined that the detainee should no longer be classified as an enemy combatant.[178]

The tribunal's membership was subsequently changed yet again:

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[174] *Id.* at 3.

[175] *Id.*

[176] *Id.*

[177] Memorandum from James R. Crisfield Jr., Legal Advisor, to Director, Combatant Status Review Tribunal at 2839, Abdulla v. Bush, No. 05-1001 (D.D.C. Aug. 16, 2006), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/publicly_filed_CSRT_records_2737-2868.pdf.

[178] *Id.*

> Once again, additional information regarding the detainee was sought, found, and presented to yet a third tribunal. This additional additional [sic] information became exhibits R-23 through R-30. This time, the three members of the second tribunal were no longer available, but the one original tribunal member who was not available for the second tribunal was now available for the third. That member, along with two new members, comprised tribunal panel #34 and sat for the detainee's third tribunal. Following their consideration of the new additional information along with the information considered by the first two tribunals, this Tribunal determined that the detainee was properly classified as an enemy combatant.[179]

The records of other detainees suggest additional instances of rehearings. In these proceedings, the tribunal reconvened and considered an issue about the quality of the evidence, but there is no record of what transpired at the first hearing, why the second hearing occurred, or the effect of the issues of concern about the quality of the evidence.

X. BOTTOM LINE

The Secretary of the Navy described the CSRT as "a one-time review to determine if a person, a detainee, is or is not an enemy combatant."[180] Five hundred fifty-eight detainees had hearings before the CSRT from 2002 to 2006. As a result of the CSRT process, thirty-eight detainees, or 7% of the total, were released from Guantánamo having been found not to be enemy combatants. In contrast to these numbers, no detainee in the sample set reviewed in this Report was ultimately found either to not be, or to no longer be, an enemy combatant as a result of the CSRT—even though some were initially found to be either "non-enemy" combatants or "no longer" enemy combatants by a first (or even a second) tribunal.

The difference between a "non-enemy" combatant and one who is "no longer" an enemy combatant is not clear. The label "non-enemy combatant," however, implies that the government mistakenly detained the prisoners in the first instance, while "no longer enemy combatant" implies that the prisoner was once an enemy combatant, but his detainment at Guantánamo Bay successfully rehabilitated him. Despite these connotations, the government appears to consider the labels interchangeable.

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[179] *Id.*

[180] Gordon England, U.S. Sec'y of the Navy, Defense Department Special Briefing on Combatant Status Review Tribunals' (Mar. 29, 20050, *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2504.

For example, Secretary of the Navy Gordon England used both terms when he described the CSRT process on March 29, 2005.

> The Tribunals also concluded that 38 detainees were found to no longer meet the criteria to be designated as enemy combatants. . . . 520 enemy combatants, 38 non-enemy combatants. . . . It should be emphasized that a CSRT determination that a detainee no longer meets the criteria for classification as an enemy combatant does not necessarily mean that the prior classification as [an enemy combatant] was wrong.[181]

XI. CONCLUSION

This Report lays out the CSRT process, both as it exists on paper and as it was implemented at Guantánamo. While the procedures promised detainees an opportunity to present evidence in the form of witnesses and documents, in reality the only evidence permitted in the vast majority of cases was the testimony of the detainee. In most cases the tribunals returned decisions on the same day and among the 102 records reviewed for this Report, the ultimate decision was always unanimous, and almost all detainees reviewed were ultimately found to be enemy combatants. In its attempt to replace habeas corpus, the government instead created this no-hearing process.

[181] *Id.*