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presumably the requirements to be deemed an "enemy combatant" -- and that the detainee "may actually have no Al-Qaida or Taliban association." Kurnaz Factual Return, Exhibit R16 at 1-2.

In addition, a September 30, 2003 memorandum from Major [REDACTED] to Lieutenant

Colonel [REDACTED] revealed that "CITF [Criminal Investigative Task Force] has no definite link/evidence of detainee having an association with al Qaida or making any specific threat

toward the U.S.," and that "The Germans confirmed that this detainee has no connection to an al

Qaida cell in Germany." Kurnaz Factual Return, Exhibit R17. Yet another document the

detainee was not permitted to examine and use to contest his "enemy combatant" designation is a

May 19, 2003 memorandum from Commanding General Brittain P. Mallow to the General

Counsel of the Department of Defense. Among other exculpatory statements, the memorandum

discloses that "There is no indication that Kurnaz was in direct contact with a Taliban recruiter,"

that "CITF is not aware of evidence that Kurnaz was or is a member of al-Qaida," and that "CITF

is not aware of any evidence that Kurnaz has knowingly harbored any individual who was a

member of al-Qaida or who has engaged in, aided or abetted, or conspired to commit acts of

terrorism against the U.S., its citizens or interests." Kurnaz Factual Return, Exhibit R18.

These three classified documents call into serious question the nature and thoroughness of the prior "multiple levels of review" of "enemy combatant" status referenced in Deputy Secretary of Defense Paul Wolfowitz's July 7, 2004 Order establishing the CSRT system. At a minimum, the documents raise the question of what specific information could have been discovered between the May 19, 2003 memorandum stating that there was no evidence either that the detainee was a member of al Qaeda or was in direct contact with any Taliban recruiter, and the

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presumably the requirements to be deemed an "enemy combatant" - and that the detainee [REDACTED]

[REDACTED] Kurnaz Factual Return, Exhibit R16 at 1-2.

In addition, a September 30, 2003 memorandum from Major [REDACTED] to Lieutenant

Colonel [REDACTED] revealed that [REDACTED]

[REDACTED] Kurnaz Factual Return, Exhibit R17. Yet another document the

detainee was not permitted to examine and use to contest his "enemy combatant" designation is a May 19, 2003 memorandum from Commanding General Britain P. Mallow to the General Counsel of the Department of Defense. Among other exculpatory statements, the memorandum discloses that "There is no indication that Kurnaz was in direct contact with a Taliban recruiter," that "CITF is not aware of evidence that Kurnaz was or is a member of al-Qaida," and that "CITF is not aware of any evidence that Kurnaz has knowingly harbored any individual who was a member of al-Qaida or who has engaged in, aided or abetted, or conspired to commit acts of terrorism against the U.S., its citizens or interests." Kurnaz Factual Return, Exhibit R18.

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June 25, 2004 memorandum concluding that the detainee [REDACTED]

[REDACTED] Certainly, the CSRT record lacks sufficient explanation or identification of the [REDACTED] sources for the new evidence, and had the detainee received information regarding the existence and contents of the exculpatory documents, he could have challenged the tribunal to investigate these matters more carefully than it did.

Interpreted in a light most favorable to the petitioners, the CSRT's decision to deem Exhibit R19 the most credible evidence without a sufficient explanation for its rejection of conflicting exculpatory evidence in at least three separate documents supports the petitioners' allegation that the "CSRTs do not involve an impartial decisionmaker." Al Odah Petitioners' Reply to the Government's "Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss," filed in Al Odah v. United States, 02-CV-0828 (CKK), on October 20, 2004, at 23-24. But however the record in Kumaz is interpreted, it definitively establishes that the detainee was not provided with a fair opportunity to contest the material allegations against him.

The Court fully appreciates the strong governmental interest in not disclosing classified evidence to individuals believed to be terrorists intent on causing great harm to the United States. Indeed, this Court's protective order prohibits the disclosure of any classified information to any of the petitioners in these habeas cases. Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 344 F. Supp.2d 174 (D.D.C. 2004) at ¶ 30. To compensate for the resulting hardship to the petitioners and to ensure due process in the litigation of these cases, however, the protective order requires the disclosure of all relevant classified information to the petitioners' counsel who have the

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notwithstanding the fact that the Personal Representative may review classified information considered by the tribunal, that person is neither a lawyer nor an advocate and thus cannot be considered an effective surrogate to compensate for a detainee's inability to personally review and contest classified evidence against him. *Id.* at Enclosure (3), ¶ D. Additionally, there is no confidential relationship between the detainee and the Personal Representative, and the Personal Representative is obligated to disclose to the tribunal any relevant inculpatory information he obtains from the detainee. *Id.* Consequently, there is inherent risk and little corresponding benefit should the detainee decide to use the services of the Personal Representative.

The lack of any significant advantage to working with the Personal Representative is illustrated by the record of Kurnaz. Despite the existence of three exculpatory classified documents, the Personal Representative made no request for further inquiry regarding the undisclosed sources for information contained in the only classified document relied upon by the CSRT and did not make even a single comment highlighting the existence of contradictory classified evidence. Kurnaz Factual Return, Enclosure (5). Clearly, the presence of counsel for the detainee, even one who could not disclose classified evidence to his client, would have ensured a fairer process in the matter by highlighting weaknesses in evidence considered by the tribunal and helping to ensure that erroneous decisions were not made regarding the detainee's "enemy combatant" status. The CSRT rules, however, prohibited that opportunity.

In sum, the CSRT's extensive reliance on classified information in its resolution of "enemy combatant" status, the detainees' inability to review that information, and the prohibition of assistance by counsel jointly deprive the detainees of sufficient notice of the factual bases for

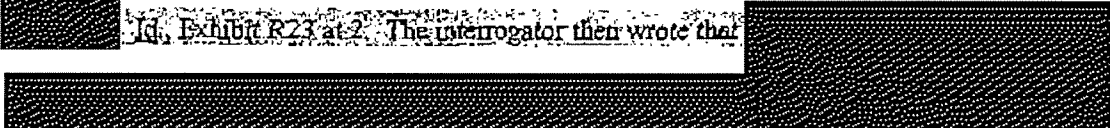
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Enclosure (3) at 1. In addition, although the detainee admits to briefly studying with JT, there is no unclassified evidence to establish that his studies involved anything other than the Koran.³⁵


The dearth of evidence establishing actual activities undertaken by the detainee in furtherance of terrorism is illustrated by classified Exhibit R23 attached to the factual return. In that document, dated March 15, 2002, an interrogator


Id., Exhibit R23 at 2. The interrogator then wrote that


Id. German authorities, however, subsequently informed the U.S.

that the detainee had no connection to al Qaeda. Id., Exhibit R17. Absent other evidence,³⁶ it

³⁵ In fact, classified evidence reviewed by the CSRT indicates that the petitioner was actually denied admission to the JT school in Lahore, Pakistan. Id., Exhibit R18 at 1.

³⁶ It is true that Exhibit R19 to the Kurnaz Factual Return does assert that the detainee  and the respondents urge this Court to uphold the detention of any petitioner, including Mr. Kurnaz, as long as "some evidence" exists to support a conclusion that he actively participated in terrorist activities. Motion to Dismiss at 47-51. Hamdi, however, holds that the "some evidence" standard cannot be applied where the detainee was not given an opportunity to challenge the evidence in an administrative proceeding, 124 S. Ct. at 2651, and Mr. Kurnaz was never provided access to Exhibit R19. Additionally, in resolving a motion to dismiss, the Court must accept as true the petitioner's allegations and must interpret the evidence in the record in the light most favorable to the nonmoving party. Because Exhibit R19 fails to provide any significant details to support its conclusory allegations, does not reveal the sources for its information, and is contradicted by other evidence in the record, the Court cannot at this stage of the litigation give the document the weight the CSRT afforded it.

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