

THE 14 MYTHS OF GUANTÁNAMO

**Senate Armed Services Committee
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Before habeas corpus was recognized for Guantánamo detainees, the Executive Branch of our government claimed loudly and often that those detained in Guantánamo were the worst of the worst; that they were captured on battlefields in Afghanistan shooting at Americans. Those in the Executive Branch of our government said also that those detained at Guantánamo possessed important information which we needed to acquire to protect our national security. Another Executive Department claim was that those detained at Guantánamo were held because of their membership in groups that were hostile to the United States.

After the Supreme Court, to its everlasting honor, recognized that habeas corpus applied to those detained at Guantánamo, the Executive Branch had to prepare documents which were thereafter released. A careful review of these documents, a review that assumes every word in the government's records to be true and a review that accords the government's records every benefit of the doubt when evaluating them, reveals that almost everything said by our highest officials about who was detained at Guantánamo and why they were detained was false.

Because habeas corpus was recognized for those detained at Guantánamo, we now know that our government's statements that said those detained at Guantánamo were the "worst of the worst" were false.

Because habeas corpus was recognized for those detained at Guantánamo, we now know that all our government's statements that the detainees they were captured on the battlefields of Afghanistan shooting at Americans were also false.

Because habeas corpus was recognized for those detained at Guantánamo, we now know that our government's statements that said those detained had important information critical to our national security, are belied by the efforts of those interrogating at Guantánamo.

Because habeas corpus was recognized for Guantánamo detainees, we now know that our government's statements that said the detainees were members of groups presenting a danger to the United States were grossly exaggerated.

Our government's records produced in response to habeas corpus reveal that "the worst of the worst" are not.

Our government's records produced in response to habeas corpus reveal that 55% of those detained at Guantánamo are not accused of committing a single hostile act. Our government's records reveal that at least 60% of those detained are neither "members of" nor "fighters for" al Qaeda or "members of" or "fighters for" the Taliban. Our government's records reveal that 60% of those detained are held only because they have an "association" with some group, whether al Qaeda, Taliban, or otherwise. Our government's records also reveal that the Taliban was the governing authority of Afghanistan at the time.

Our government's records produced in response to habeas corpus reveal that those detained at Guantánamo were not captured on the battlefields of Afghanistan shooting at Americans.

According to our government's records, 92% of those detained at Guantánamo were not captured by Americans; 66% were not even picked up in Afghanistan and only a handful of detainees were ever accused of shooting any weapons at Americans.

One of the Seton Hall Law School students asked me, "Where are the bad guys?" The student then showed me the government's evidence against a detainee who had been conscripted by the Taliban as an assistant cook. Our government's evidence against that detainee in its entirety states:

- a. Detainee is associated with the Taliban
 - i. The detainee indicates that he was conscripted into the Taliban.
- b. Detainee engaged in hostilities against the US or its coalition partners.
 - i. The detainee admits he was a cook's assistant for Taliban forces in Narim, Afghanistan under the command of Haji Mullah Baki.
 - ii. Detainee fled from Narim to Kabul during the Northern Alliance attack and surrendered to the Northern Alliance.

My student said, "OK, We have the Assistant cook. Where is Mr. Big? Where is the cook?"

All Americans should ask that question. I have no answer.

Because habeas corpus was recognized for those detained at Guantánamo, we now know that our government did not believe its own statements that the detainees at Guantánamo possessed information essential to our national security.

According to Department of Defense's reports, during the first 30 months of the detainees' detention at Guantánamo (from January 2002 until July 2004), each detainee was interrogated barely once a month. Only two conclusions can be drawn from this leisurely pace of interrogation: our government did not believe that the detainees possessed information critical to our national security, or the Department of Defense was too busy to perform expedited interrogations.

Because habeas corpus was recognized for those detained at Guantánamo, we now know that our government's statements that those detained at Guantánamo were members of groups hostile to the United States conflicts with State Department policies governing entry into the United States. Documents released pursuant to habeas corpus litigation reveal that the Department of Defense considered membership in any of 72 "enemy" groups to be grounds for detention at Guantánamo. The State Department permits members of 52 of those 72 groups entry into the United States. Hence 72% of the groups considered by the Department of Defense to be so hostile to the United States to warrant detention of their members at Guantánamo, the State Department welcomes to our shores.

THE EXECUTIVE BRANCH RESPONSE TO THE RECOGNITION OF HABEAS CORPUS WAS TO CREATE THE COMBAT STATUS REVIEW TRIBUNAL PROCEDURES

Immediately after recognition of habeas corpus for Guantánamo detainees, the Department of Defense created the Combat Status Review Tribunal ("CSRT") process. After holding detainees at Guantánamo for more than 30 months with no review, the Department of Defense created the CSRT process, implemented it and held its first hearing within 24 days. That first detainee's hearing was decided the same day it was held. The decision confirmed the detainee's enemy combatant status.

The Combat Status Review Tribunal process did not require our government to call witnesses or to produce any unclassified evidence. The CSRT process permitted our government to rely upon classified evidence presumed to be valid and withheld from the detainee. Detainees never heard any government witnesses and almost never saw any documentary evidence upon which our government relied in determining that the detainees were enemy combatants.

The detainees were never permitted to produce any witnesses at their CSRT hearing except for some of the fellow detainees requested. Only 4% of the detainees ever heard or saw any of our government's evidence against them. Only 11% of the

detainees were permitted to produce any evidence in their own defense at their CSRT hearings. During the CSRT process, the detainee was given an opportunity to speak and was then escorted from the hearing room. Immediately after removal of the detainee from the CSRT hearing room, the CSRT met and decided the case. The CSRT process confirmed the initial determination that every detainee was an enemy combatant.

The CSRT process found the assistant cook conscripted by the Taliban to be an enemy combatant. To our knowledge, the assistant remains detained at Guantánamo.

THE COMBATANT STATUS REVIEW TRIBUNAL PROCESS CAN NOT REPLACE AN IMPARTIAL JUDICIAL HEARING

The failures of the CSRT procedures cannot be cured by more process. The Executive Branch of our government cannot judge itself. The question of who is and/or who is not an enemy combatant must be determined by an impartial judge.

Combatant Status Review Tribunals for the detainees, no matter how designed and implemented, cannot be permitted to be the decision maker as to the legitimacy of those detained. The Executive Branch of our government has abused its power and has operated without oversight. The Executive Branch of our government held all detainees at Guantánamo without offering any review of detention for over 30 months. Only after habeas corpus was recognized for the detainees at Guantánamo did the Executive Branch quickly prepare a hearing process then implement it in a perfunctory manner. The Executive Branch abused its power in order to ratify its prior decisions as to who is and is not an enemy combatant. The Executive Branch decided that the conscripted assistant cook must be held at Guantánamo indefinitely.

Our legal system was not designed to trust the Executive Branch to detain people indefinitely. Our constitutional system requires checks and balances. Those detained at Guantánamo should have lawyers as advocates appearing before impartial tribunals to determine if they are enemy combatants. That is habeas corpus.

THE MYTHS

Because of the tight security imposed by the Department of Defense, the American public knows remarkably little about Guantánamo. What it does know is largely colored by dramatic statements of military and civilian Defense officials defending the system they have created; statements which often seemed designed to reduce a complicated and painful reality to a bumper-sticker bromide. Increasingly, these statements are being challenged by the reporting of a number of journalists and the

representations of attorneys for many of the detainees. And, as detainees are released, we even have evidence based on their individual experiences.

What the Seton Hall Guantánamo Project has attempted to do, however, is qualitatively different and ultimately more revealing. For example, in our first report we ignored everything the detainees said in their CSRTs. We ignored as well the contentions of their lawyers in court proceedings. Rather than relying on the fragmentary evidence provided by critics of the Defense Department, the Project used the DOD's own data to generate a series of largely quantitative reports about those who are being detained and their treatment, both in terms of their incarceration and in their review by the Combatant Status Review Tribunals (CSRTs). These reports, which can be found in full on the Seton Hall Law School webpage, http://law.shu.edu/news/guantanamo_reports.htm, are the result of the work of myself, my son, Joshua W. Denbeaux, and a truly remarkable group of students at Seton Hall Law School, whose names appear at the end of this Statement.

While far more information is available in the reports, this Statement attempts to identify the most prominent myths about Guantánamo and show how the Department of Defense's own records cast serious doubt about the accuracy of these perceptions.

Myth Number One: Guantánamo Holds the "Worst of the Worst."

Reality: *While there may be a few high-value prisoners, the average detainee is someone who poses little or no threat to the United States.*

The DOD repeatedly describes those detained in Guantánamo as the worst of the worst.¹ Additionally, on March 28, 2002, in a Department of Defense briefing, former Secretary of Defense Donald Rumsfeld said:

As has been the case in previous wars, the country that takes prisoners generally decides that they would prefer them not to go back to the battlefield. They detain those enemy combatants for the duration of the conflict. They do so for the very simple reason, which I would have thought is obvious, namely to keep them from going right back and, in this case, killing more Americans and conducting more terrorist acts.²

In reality, more than 55% of those detained in Guantánamo are *not* accused of ever having committed a single hostile act against the United States or its coalition

¹ The Washington Post, in an article dated October 23, 2002 quoted Secretary Rumsfeld as terming the detainees "the worst of the worst." In an article dated December 22, 2002, the Post quoted Rear Adm. John D. Stufflebeem, Deputy Director of Operations for the Joint Chiefs of Staff, "They are bad guys. They are the worst of the worst, and if let out on the street, they will go back to the proclivity of trying to kill Americans and others." Donald Rumsfeld Holds Defense Department Briefing. (2002, March 28). FDCH Political Transcripts. Retrieved January 10, 2006 from Lexis-Nexis database.

² Threats and Responses: The Detainees; Some Guantánamo Prisoners Will Be Freed, Rumsfeld Says, (2002, October 23). The New York Times, p 14. Retrieved February 7, 2006 from Lexis-Nexis database.

forces.³ In contrast to Secretary Rumsfeld's classifications, these detainees should be described as enemy non-combatants, or civilians.

Only 8% of the detainees were characterized by the DOD as "al Qaeda fighters."⁴ Of the remaining detainees, 40% have no definitive connection with al Qaeda at all and 18% have no definitive affiliation with either al Qaeda or the Taliban.⁵

Even the acts of hostility alleged against the remaining 45% are often very slight. This is true even though the Government's definition of a hostile act is not demanding. As an example, the following was the evidence the Government determined sufficient to constitute a "hostile act" by one of the 45% so accused. According to the military determination:

The detainee participated in military operations against the United States and its coalition partners.

1. The detainee *fled*, along with others, when the United States forces bombed their camp.
2. The detainee was captured in Pakistan, along with other Uigher fighters.⁶

A second example is even more powerful. What follows is the entire record for another detainee:

- c. Detainee is associated with the Taliban
 - i. The detainee indicates that he was conscripted into the Taliban.
- d. Detainee engaged in hostilities against the US or its coalition partners.
 - i. The detainee admits he was a cook's assistant for Taliban forces in Narim, Afghanistan under the command of Haji Mullah Baki.
 - ii. Detainee fled from Narim to Kabul during the Northern Alliance attack and surrendered to the Northern Alliance.⁷

It seems unlikely that the government actually believes that this kind of allegation establishes that the detainee is the "worst of the worst." The reality is that a very large fraction of the detainees seem to be, at most, a ragtag collection of "support" personnel for low-level foot soldiers.

³ Mark Denbeaux, *et. al.*, REPORT ON GUANTANAMO DETAINEES: A Profile of 517 Detainees through Analysis of Department of Defense Data (2006), http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* [Emphasis supplied].

⁷ *Id.*

Myth Number Two: Guantánamo holds fighters for al Qaeda and the Taliban.

Reality: Fewer than 10% conceivably fit that description.

Although it is frequently stated that those detained in Guantánamo are members of al Qaeda, the government's own documents show that that is not true. According to Defense Department records, 60% of those detained at Guantánamo are not even *alleged* to be “fighters for,” or “members of” either al Qaeda or the Taliban.⁸ These 60% are being held merely because they are “associated” with some group, al Qaeda, Taliban or otherwise.

In the regions of Afghanistan where the Taliban ruled, it would be almost impossible not to have some “association” with the Taliban, especially in the broad manner that the government has defined the term. Moreover, the nexus between such a detainee and such organizations varies considerably. While 8% are detained because they are deemed “fighters for” one of these groups (and therefore, conceivably, among the worst of the worst), another 30% are considered “members of” the groups, and therefore possibly more central to terrorist work.⁹ That leaves a large majority – 60% detained merely because they are “associated with” a group or groups the Government asserts are terrorist organizations. For 2% of the prisoners, their nexus to any terrorist group is unidentified.¹⁰

Myth Number Three: The detainees were captured by American troops on the battlefield in Afghanistan.

Reality: No more than 8% could possibly fit this description.

Secretary of State Condoleezza Rice claimed that the problem with closing Guantánamo is the question of what to do about “the hundreds of dangerous people who were picked up on battlefields in Afghanistan, who were picked up because of their associations with al Qaeda?”¹¹ She repeated an irresponsible myth that has been habitually cited by government officials, despite the fact that the government's own documents demonstrate its falsity. Her statement echoes that which Justice Scalia made, just prior to oral arguments in a case before the Supreme Court addressing the rights of detainees: “I had a son on that battlefield and they were shooting at my son and I'm not about to give this man who was captured in a war a full jury trial.”¹²

While it is typically believed that detainees were captured by American troops on the battlefields of Afghanistan fresh from shooting at American soldiers, American troops

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ John D. Banusiewicz, *Rice Responds to Call for Guantanamo Detention Facility's Closing*, AMERICAN FORCES INFORMATION SERVICE, May 21, 2006, <http://www.defenselink.mil/news/newsarticle.aspx?id=15706>.

¹² *Supreme Court: Detainees' Rights-Scalia Speaks His Mind*, NEWSWEEK, April 3, 2006, <http://www.msnbc.msn.com/id/12017271/site/newsweek/>.

captured only 8% of the detainees.¹³ Remarkably, 66% of those detained at Guantánamo were *not* captured in Afghanistan, much less on the battlefield.¹⁴ Rather, this group was handed over to the United States by Pakistan. Another 20% were delivered to the US by the Northern Alliance.¹⁵

While the identity of his captors does not prove that a detainee was not engaged in hostile acts against the US, there are serious reasons to doubt the reliability of a process that was driven by American-paid rewards to bounty hunters who were themselves typically far from any combat and often spoke different languages than their captives.

Myth Number Four: *The detainees are affiliated with groups that are all terrorist organizations.*

Reality: *Many of the detainees are held for affiliations which, even if true, would not prevent them from entry to the U.S.*

One of the bases for the detention of those held as enemy combatants in Guantánamo is their affiliation with one of 72 groups which the Defense Department had determined were terrorist organizations. However, State Department policies and procedures would let the members of 72% of those groups enter the United States.¹⁶

The Department of Defense identified 72 terrorist organizations in the Combatant Status Review Tribunals (“CSRT”). It considers affiliation with any one of these groups sufficient to establish that a Guantánamo detainee is an “enemy combatant” for the purpose of his continued detention.

Fifty-two of those groups, 72% of the total, are *not* on *either* the Patriot Act Terrorist Exclusion List or on two separate State Department Designated and Other Foreign Terrorist Organizations lists (jointly referred to as the State Department Other Lists).¹⁷ These lists are compiled for the purposes of enabling the government to protect our borders from terrorists entering the United States.

If DOD is correct in identifying all 72 groups as terroristic, then the State Department is allowing members of terrorist organizations free access into the United States. Conversely, if the State Department is correct that these groups are not a threat to national security, then many detainees at Guantánamo are being held because of a nexus with an organization that is no threat to the United States.

¹³ Mark Denbeaux, *et. al.*, REPORT ON GUANTANAMO DETAINEES: A Profile of 517 Detainees through Analysis of Department of Defense Data (2006), http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Mark Denbeaux, *et. al.*, SECOND REPORT ON GUANTANAMO DETAINEES: Inter- and Intra-Departmental Disagreements About Who Is Our Enemy (2006), http://law.shu.edu/news/second_report_guantanamo_detainees_3_20_final.pdf.

¹⁷ *Id.*

Myth Number Five: *Even if the detainees are not now a threat to national security, they have valuable information that can be used in America's War on Terror.*

Reality: *There is little interrogation taking place.*

The rationale for the detention of the detainees is: preventive detention in order to preclude these individuals from acting against US interests; and/or interrogation to obtain information important to our national security. For the 92% of the detainees who are *not* fighters, detention must rest upon the value that they have to our national security through effective interrogation. Startlingly, however, government documents reveal that, during the first 39 months of detention at Guantánamo (from January 11, 2002 through April 1, 2005), the DOD interrogated a detainee on average a little over once a month.¹⁸

Myth Number Six: *The government knows who it is holding.*

Reality: *After three or more years of detention, the government cannot correctly identify many of the detainees.*

There is reason to believe that after years of interrogation the interrogators do not know the correct names of those detained in Guantánamo. The DOD does not have an accurate list of even the names of the detainees at Guantánamo. According to the DOD, there have been 759 detainees at Guantánamo. A review of all of the government's lists and records, however, reveals over 1000 different names.¹⁹

While some of the duplication is undoubtedly the result of difficulties of transliterating Arabic to English, there are instances where individuals seem to have been held merely because they shared a name with someone else.

For instance, a detainee named Mohammad Al Harbi, ISN #333, was told that he was being detained because his name was on a list that the United States government contained the names of al Qaeda members. His response:

There are several tribes in Saudi Arabia and one of these tribes is Al Harbi. This is part of my names 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. In fact, I know of 2 Mohammed Al Harbis

¹⁸ This number is partially derived from the Department of Defense's Schmidt Report, <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>, which indicates approximately 24,000 interrogations were completed as of April 1, 2005, the date of publication. Given that the first detainees arrived January 11, 2002 and that government records indicate 558 detainees had CSRTs which were completed in early 2005; this comes to 43 interrogations per detainee over the 39 months between January 2002 and April 2005.

¹⁹ Mark Denbeaux, *et. al.*, NO HEARING HEARINGS CSRT: The Modern Habeas Corpus? (2007), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

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.²⁰

Myth Number Seven: The CSRT process is designed to identify “enemy combatants.”
Reality: The definition of “enemy combatants” is overly broad.

The CSRT begins with a kind of Orwellian double-speak: the CSRT’s mission is to determine whether a detainee is an “enemy combatant,” remarkably, however, one need not be either an enemy or a combatant to be an “enemy combatant” for purposes of the Tribunals. One can be an “enemy” merely by “association” with members of al Qaeda or the Taliban.²¹ Almost any person in the portions of Afghanistan under the Taliban’s control would satisfy the “association” requirement. As for being a “combatant,” we have already seen that most of the detainees are not alleged to have done anything that would normally qualify as “combat,” including not being found anywhere near a battlefield.

As a process designed to “confirm” the enemy combatant status which has already been determined through “multiple levels of review”²² by Defense Department officials, the CSRT ends predictably: In every single instance, the detainee is ultimately determined to be an enemy combatant. This is true even for the 38 detainees that were released or scheduled for release as a result of their CSRT as well as others that have been released. Such individuals are not freed because they have been found not to be enemy combatants. Rather, in a continuation of Orwellian diction, they are described as “no longer enemy combatants.” Given that one did not have to be a combatant in the first place to be designated as an “enemy combatant,” it is not clear what the DOD could possibly mean by classifying an individual as “no longer” such a person.

It is less surprising that the detainees were all ultimately found to be enemy combatants when it is realized that in three of the 66 contested cases available for review,

²⁰ *Id.*

²¹ In an August 13, 2004 News Briefing available at: <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2560>, Gordon England, Secretary of the Navy and former Secretary Rumsfeld’s designee for the tribunal process at Guantánamo stated that, “The definition of an enemy combatant is in the implementing orders, which have been passed out to everyone. But, in short, it means anyone who is part of supporting the Taliban or al Qaeda forces or associated forces engaging in hostilities against the United States or our coalition partners.” Enclosure (1) page 1 of the *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba* states “an ‘enemy combatant’ for purposes of this order shall mean an individual who is part of or supporting Taliban or al Qaida, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

²² Enclosure (1) page 1, Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba* (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>, [emphasis added].

the Tribunal found the detainee to be not/no-longer an enemy combatant.²³ In each case, the Defense Department ordered a new Tribunal convened, and the detainee was then found to be an enemy combatant. In one instance, a detainee was found to no longer be an enemy combatant by two Tribunals, before a third Tribunal was convened which then found the detainee to be an enemy combatant. A small mercy is the failure to inform detainees of their initial success – given that detainee wins are apparently reversed upon further review.

Myth Number Eight: *Detainees are given a meaningful opportunity to consult with a representative.*

Reality: *The “Personal Representative” is not the detainee’s advocate.*

Yet all of this is scarcely surprising given procedures that seem to have been designed to channel the CSRTs to this result. One hallmark of traditional adjudication is legal representation. While the prosecutor for the CSRT is a lawyer, the detainee is explicitly prevented from having a lawyer. He is allowed only a “Personal Representative,” who must not be a lawyer and must also advise the detainee that he is not functioning as his attorney:

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.²⁴

At that point, the Personal Representative asks the detainee if he would like the Personal Representative’s help.

After receiving this information, 32% of the detainees opted not to participate in the CSRT proceeding.²⁵ Those detainees who did chose to participate received almost no consultation with their Personal Representative. When they did meet, 78% of detainees met only once with their Personal Representative.²⁶ The meetings were typically brief: some lasted only 10 minutes; more than half lasted an hour or less and 91% lasted two hours or less.²⁷ In most cases, they met only once (78%) for no more than 90 minutes

²³ Mark Denbeaux, *et. al.*, NO HEARING HEARINGS CSRT: The Modern Habeas Corpus? (2007), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

²⁴ Enclosure (3) page 3, Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>, [emphasis added].

²⁵ Mark Denbeaux, *et. al.*, NO HEARING HEARINGS CSRT: The Modern Habeas Corpus? (2007), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

²⁶ *Id.*

²⁷ *Id.*

(80%) only a week before the hearing (79%).²⁸ Almost one quarter of the meetings took place the day of, or the day before the hearing.²⁹

During the hearing; the Personal Representative said nothing 12% of the time.³⁰ Even when the Personal Representative spoke, he made no substantive statements in 36% of the cases.³¹ In the 52% of the cases where the Personal Representative did make substantive comments, those comments sometimes advocated for the Government.³² At the end of the hearing, the Personal Representative failed to exercise his right to comment on the decision in 98% of the cases.³³ The Tribunal's decision was made on the same day as the hearing in 81% of the cases.³⁴

Myth Number Nine: *Detainees are given a meaningful opportunity to challenge the government's reasons for detention.*

Reality: *The Government never called a single witness and for 93% of the detainees presented no other evidence.*

The detainee is always presented with a "summary" of classified evidence, which functions more like an indictment or complaint than an evidentiary showing. It is the detainee's only basis to know the reasons the Government considers him to be an enemy combatant, but the CSRT Tribunal characterizes this summary as "conclusory" and not persuasive.

That would suggest that the real basis for the detention would emerge during the evidentiary stage. However, the Government did not produce any witnesses in any hearing. Further, it did not present any documentary evidence to the detainees in 93% of the cases.³⁵ In every case, the Government relied upon classified evidence, which was (1) not shown to the detainee and (2) presumed to be reliable and valid. All requests by detainees to inspect the classified evidence were denied.

The fact that detainees were only rarely allowed to see unclassified evidence is surprising, since the CSRT guidelines require that the detainee be allowed to see unclassified evidence. Unclassified evidence was submitted to the Tribunal in 48% of the cases, however detainees were only allowed to review this unclassified evidence 7% of the time.³⁶ Even so, the review of unclassified evidence may not be beneficial to the detainee since the most damaging evidence presented by the government is presumably classified.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Mark Denbeaux, *et. al.*, NO HEARING HEARINGS CSRT: The Modern Habeas Corpus? (2007), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

³⁶ *Id.*

Myth Number Ten: *Detainees were allowed to present evidence on their own behalf.*

Reality: *Detainees were not allowed to produce any witness evidence other than, in a very few cases, other detainees, and they were only allowed to produce pro forma evidence, such as letters, that were from relatives.*

All requests by detainees for witnesses not already detained in Guantánamo were denied. Requests by detainees for witnesses were denied in 74% of the cases.³⁷ In the remaining 26% of the cases, 22% of the detainees were permitted to call some witnesses and 4% were permitted to call all of the witnesses that they requested.³⁸ Among detainees who participated, requests to produce documentary evidence were denied 60% of the time.³⁹ When detainees requested documentary evidence, 25% of the time the detainees were permitted to produce all of their requested documentary evidence; and 15% of the time the detainees were permitted to produce some of their documentary evidence.⁴⁰

The only documentary evidence that the detainees were allowed to produce was from family and friends. In 89% of the cases no evidence was presented on behalf of the detainee other than the detainee's statement.⁴¹

While particular examples are collected in Seton Hall's *No Hearing Hearings* report, some instances stand out. For example, Mohammad Atiq Al Harbi (ISN #333) appeared before a Tribunal and identified documents available to the United States that would prove that his classification as an enemy combatant was wrong. There is no record that any such documents were ever considered or even sought by the CSRT. Similarly, there was a question as to Emad Abdalla Hassan's (ISN #680) passport, which he claimed would show the dates of his entry into Pakistan, but the passport was neither located nor produced, and the detainee was promptly found to be an enemy combatant.

In still a third instance, an Algerian detainee requested court documents from his hearing in Bosnia at which the Bosnian courts had acquitted him of terrorist activities. 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. And in a fourth case, Khi Ali Gul, ISN# 928, requested that his brother be produced as a witness and provided the Tribunal with his brother's telephone number and address in Afghanistan. Instead of calling the phone number provided, which might have produced an immediate result, the Government instead sent a request to the Afghan embassy. The Afghan embassy did not respond within 30 days and the witness was not produced. The witness was then found not to be reasonably available by the Tribunal, the detainee determined to be an Enemy Combatant, and the hearing was never reopened.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

Myth Number Eleven: The CSRT did not credit evidence obtained by coercion.

Reality: The CSRTs made no effort to ascertain whether evidence claimed to have been coerced was legitimately obtained.

The Detainee Treatment Act of 2005 was a strong statement by Congress that testimony obtained by “coercion” should play no part in the CSRT process.⁴² However, this statute was enacted in December 2005, after the CSRT process was complete. No Tribunal apparently considered the extent to which any evidence was obtained through coercion, and no review process resulted in reconsideration on this ground.

Obviously, the effects of claimed torture, or coercion more generally, would apply to inculpatory statements from the detainee himself and should have been weighed in any consideration of supposed admissions. Additionally, the possibility of coercion should also have been considered by a Tribunal weighing all statements and information relating to the detainee. This is related to, but not the same as, hearsay concerns, which the Tribunal is required to consider.⁴³

The record, however, does not indicate such an inquiry by any Tribunal. Instead, the Tribunal makes note of allegations of torture, and refers them to the convening authority. While further investigation may often have been warranted, it is surprising that several Tribunals found a detainee to be an enemy combatant before receiving any results from the investigation they had requested. While there is no way to ascertain the extent, if any, that witness statements might have been affected by coercion, fully 18% of the detainees alleged torture; in each case, the detainee volunteered the information rather than being asked by the Tribunal or the Personal Representative.⁴⁴ In each case, the panel proceeded to decide the case before any investigation was undertaken. At least 17 allegations by detainees of abuse were referred by the CSRT to the Department of Defense but were apparently then ignored and never investigated.⁴⁵

⁴² 109 P.L. 148. The Detainee Treatment Act of 2005 provides in part:

b) CONSIDERATION OF STATEMENTS DERIVED WITH COERCION.--

(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.

⁴³ See generally, Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

⁴⁴ Mark Denbeaux, *et. al.*, NO HEARING HEARINGS CSRT: The Modern Habeas Corpus? (2007), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

⁴⁵ Based upon DOD documents obtained through FOIA litigation initiated by the American Civil Liberties Union. Available at: <http://www.aclu.org/projects/foiasearch/pdf/DODDON000569.pdf>.

Myth Number Twelve: *The detainees are treated firmly but fairly.*

Reality: *Guantánamo treatment is, at best, harsh and dehumanizing, and it remains so for detainees even when they have been determined to be no longer enemy combatants.*

At Guantánamo, detainees are rarely treated as individuals. For example, every detainee, regardless of the charges against him and regardless of his status, must be shackled to the floor when being interviewed by counsel. This is true even for those detainees whom the United States has approved for release and who are awaiting transfer to another country.

For the vast majority of the detainees, the only contact with someone from the outside world has been his habeas counsel. The restrictions on the interaction between the detainee and that counsel coupled with Government imposed limitations on communication reinforce the detainee's isolation. No telephone calls are permitted. Letters may be sent, but require a series of steps that inhibit communication.⁴⁶ The only other possibility is to visit the detainee in Guantánamo. That requires pre-approval from the DOD, plane reservations, "theater" and country passes, passports, etc.

The camp is run as if all of the detainees are dangerous, angry and hostile. Once viewed as "the worst of the worst," they are treated accordingly even though the Government's own records of detainee behavior at Guantánamo demonstrate that the detainees are surprisingly well behaved and that their misbehavior is infrequent and relatively mild.

Over two years and eight months, there were 499 disciplinary violations for 759 detainees.⁴⁷ Even assuming no recidivism (obviously, an unlikely assumption), at least one third of the detainees never committed a Disciplinary Violation. The camp averages one disciplinary violation every two days.⁴⁸ For 736 of the 952 days covered by the Incident Reports (77% of the days), the Government has released no report of a disciplinary violation.⁴⁹ In fact there are far more days without disciplinary violations than even this number would indicate. That is because 46% of the disciplinary violations occurred during a 92-day hunger strike that followed allegations of Koran abuse by guards.⁵⁰

Government records reflect that detainees committed acts defined by the Government as "manipulative self-injurious behavior" more often than they commit disciplinary violations.⁵¹ The picture of detainee self-harm, including suicide attempts, is

⁴⁶ The letter must be (1) written in English and then translated; (2) mailed to a secure facility, (3) where it is reviewed (4) sent to Lynx airline which (5) holds it until some habeas counsel can pick it up and fly with it to Guantánamo, where (6) a military escort takes it to the camp and (7) it is given to the detainee. If the detainee wishes to respond, he asks for paper and writing implement, and the process begins in reverse.

⁴⁷ Mark Denbeaux, *et. al.*, THE GUANTANAMO DETAINEES DURING DETENTION: Data From Department of Defense Records (2006), http://law.shu.edu/news/guantanamo_third_report_7_11_06.pdf

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

far more serious than disciplinary violations, both in the number of incidents and in the seriousness of harm. The detainees attempt suicide or self-harm with far greater frequency than they violate other disciplinary rules. A comparison of detainee self-destructive acts, such as attempted suicides and other self-harm, with detainee disciplinary violations is striking.

Detainees committed 460 acts of “manipulative self-injurious behavior” in 2003 and 2004, an average of one such act every day and a half (1: 1.59 days).⁵² Detainees committed 499 disciplinary violations over 2 years and eight months, an average of one incident every two days (1:1.91 days).⁵³ Put another way, there are more “hanging gestures” by detainees than there are physical assaults on guards, based upon 120 “hanging gestures” for 2003 and 95 assaults and 22 attempted assaults for the 2 years and 8 months of reported disciplinary violations.⁵⁴

More than 70% of the disciplinary violations, including “assaults,” are for relatively trivial offenses, and even the most serious are offensive but not dangerous.⁵⁵ Nearly half (43%) of the reported Disciplinary Violations were for spitting at staff.⁵⁶ The disciplinary reports reveal that the most serious injuries sustained by guards as a result of prisoner misconduct are a handful of cuts and scratches.

Myth Number Thirteen: *The CSRT process is viewed as legitimate fact finding by the military.*

Reality: *The result is preordained and the processes are disregarded throughout, to the detriment of the participating military personnel as well as the detainees.*

The process begins by an affirmation that each detainee has been repeatedly found to be an enemy combatant though many levels of review. It would take an unusually independent officer sitting on a CSRT to declare that many of his predecessors in the detainment process were all in error. As to each detainee, the Government provides what it denominates as a “summary of evidence.” Each summary contains the following sentence:

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....⁵⁷

[Emphasis supplied].

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Mark Denbeaux, *et. al.*, NO HEARING HEARINGS CSRT: The Modern Habeas Corpus? (2007), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

Since the Government had “previously determined” that each detainee at Guantánamo Bay was an enemy combatant prior to a CSRT hearing, the “summary of evidence” released by the Government at the CSRT is not the Government’s *allegations* against each detainee but a summary of the Government’s *proofs* upon which the Government found that each detainee, is in fact, an enemy combatant.

These perfunctory hearings, with their preordained results are disposed of summarily, even though former Secretary Rumsfeld in February 2004 said:

The circumstances in which individuals are apprehended on the battlefield can be ambiguous, as I'm sure people here can understand. This ambiguity is not only the result of the inevitable disorder of the battlefield; it is an ambiguity created by enemies who violate the laws of war by fighting in civilian clothes, by carrying multiple identification documentations, by having three, six, eight, in one case 13 different ...aliases.... Because of this ambiguity, even after enemy combatants are detained, it takes time to check stories, to resolve inconsistencies or, in some cases, even to get the detainee to provide any useful information to help resolve the circumstance.⁵⁸

Even though the bases upon which detainees are detained are ambiguous, complicated and obtained during disorder, the detainees always lose and they always lose very quickly and perfunctorily. Every detainee is found to be some form of enemy combatant. Even those detainees that were eventually scheduled for released based on a CSRT never lose their enemy combatant status.

Myth Number Fourteen: *Habeas Corpus is not needed because the CSRT process can be cured.*

Reality: *More, less, different or better CSRT procedures can not cure defects of unfair and rigged decision making.*

Whether because of bad faith, or incompetence; these problems in combination with incurable structural deficiencies, make it clear that the CSRTs are irreparably flawed. The only cure for these defects is judicial fact finding and impartiality.

It is clear from the government’s own documents that we wrongly hold many detainees and the process makes no distinction between who does or does not belong in Guantánamo. No discrimination was made. All were detained.

However, compelling evidence exists that is far more egregious: the process will not find for the detainees regardless of the evidence.

⁵⁸ *Defense Secretary Rumsfeld Speaks to Miami Chamber of Commerce*, CNN, February 13, 2004, available at: <http://edition.cnn.com/TRANSCRIPTS/0402/13/se.02.html>.

The only question now is what can be done. The courts must be allowed to entertain habeas corpus petitions for those detained there. There is no administrative short cut.

Seton Hall's reports have quantified the available data contained in the government's own records. Yet there are facets of the CSRT process that cannot be evaluated. CSRT Tribunal decisions cannot be evaluated due to secret evidence and secret Tribunal deliberations. Therefore it is impossible to conclude whether the irreparable problems with the CSRT are caused by bad faith and/or incompetence. However there is data contained in the government's own CSRT records of an alarming number of instances in which the process of judging the detainees violated acceptable standards of fairness.

The evidence of disturbing evaluations of detainees are contained in several specific instances in which the CSRT has found against the detainee **after** having been advised that the evidence, the process and/or the results were not warranted.

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 (to the Taliban's children) is an enemy combatant (partially because he slept under a Taliban roof).⁵⁹

The Detainee was found to be an enemy combatant on the above record despite the Personal Representative's description of the evidence.

Another example involves the review of the Legal Advisor. The Legal Advisor is assigned by the Department of Defense to oversee the propriety of the CSRT process in each case. The failure of the CSRT process is demonstrated by the statement of the Legal Advisor in reviewing the Tribunal's decision for ISN #552:

⁵⁹ Mark Denbeaux, *et. al.*, NO HEARING HEARINGS CSRT: The Modern Habeas Corpus? (2007), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

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

The detainee was nonetheless found to be an enemy combatant after the Legal Advisor made his report.

In addition to these two examples, there are at least four Tribunals among the 66 contested CSRTs available for review which further demonstrates the fundamental flaws of the CSRT process. Two detainees each won one hearing before being found to be enemy combatants and one detainee won two hearings before eventually being found to be an enemy combatant. In each case the process was continued because of the actions of DOD officials above the CSRT process.

It must be noted that in each instances in which a detainee was first found to not be an enemy combatant, the detainees was never told of the finding nor that his case was being reconsidered. Therefore in each of the detainees succeeding CSRT proceedings the detainee was not present and not able to testify, despite having done so successfully in his initial, successful CSRT proceeding.

Anecdotal evidence such as these has its limitations. However, these six examples (the Personal Representative's and the Legal Advisor's objection to the evidence and the four reversed CSRT findings) are out of 66 contested CSRT proceedings and are not trivial. It is not possible to determine whether these incidents are aberrations because the government has withheld the other records of the CSRT proceedings that would allow such a quantitative analysis. These other records are currently being sought by Seton Hall under a pending FOIA application.

In addition to the six instances that are already referenced, instances in which the CSRT administrative process denied detainees the right to produce exculpatory evidence on their behalf are also significant. Denials of requests for exculpatory evidence like passports, medical records, foreign court proceedings, and outside witnesses seem to be the rule rather than the exception.

Another failure of the CSRT process can be found within those hearings (48% of those available to be reviewed) in which the Tribunal secretly considered documentary evidence that the detainee was entitled to see but was never shown.

Whatever the limitations of these data, it presents a picture which does not inspire confidence in those who have administered the process of determining who is and who is not an enemy combatant.

CONCLUSION

I do not believe that everyone in Guantánamo is an innocent person; I believe that there are likely some truly dangerous people there. None of the Guantánamo Bay Bar Association is naïve. All of us want a trial to determine whether our client is the right person. If so, so be it. One of the tragedies of Guantánamo, however, is that none of us – the Bar Association or Congress or the American public – can have any confidence that any of the CSRTs have in fact identified those that are still worth detaining and those that are not.

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