

COMBATANT STATUS REVIEW TRIBUNALS: AN ORDEAL THROUGH THE EYES OF ONE “ENEMY COMBATANT”

by
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Tom Johnson has experienced firsthand the unnerving frustration of representing a client who has been denied fair adjudicative process. As counsel for a former Guantanamo Bay detainee, the author was exposed to the short-comings of the Combatant Status Review Tribunals (CSRTs) endorsed by Congress to provide administrative review of the status of the detainees at Guantanamo Bay. In his critique of the CSRT process, Johnson tells the story of how his client, Ihlkham Battayev, detainee number 84, was captured, kidnapped, and ultimately detained by the United States without ever being provided full and fair process to determine his status as an enemy combatant. This Article details Ihlkham’s inability to comprehend how a “country of justice” could fairly and accurately determine the guilt or innocence of the detainees through a process that he considered “nothing but theater.” The critique emphasizes the lack of procedural protections afforded the detainees at Guantanamo Bay, specifically, the inability of the detainees to understand the CSRT process, to rebut the government’s presumption of enemy combatant status, and to offer evidence of innocence. The author proposes that a new system be implemented to protect the rights of detainees. This new system would implement the necessary procedures to offer the detainees a fair process, including narrowing the definition of “enemy combatant,” providing the detainees with access to counsel, granting judges the authority to decide the fate of the detainees, and providing for greater transparency in the process as a whole.

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I. INTRODUCTION

During my first visit to Guantanamo Bay Naval Station, my client, Ihlkham Battayev, asked me a question I have never sufficiently answered, either to him or to me.¹ He asked me: "How could this have happened?" He went on:

I grew up in the Soviet Union, where people would just disappear. We always heard that America was a country of justice. I was told that people received fair trials in America and that your government didn't make people disappear. But your soldiers snatched me away from my wife, children, and family, and nobody can tell me when my trial is. What happened to freedom and justice?

Ihlkham's point was clear and inescapable. Although the United States has represented fairness and justice to many people around the world, neither seemed to exist for the men imprisoned at Guantanamo Bay. In that respect, I had no good answer for him. I paused, and finally said, "I don't know, Ihlkham, but I have faith that there will be justice here."

I went on to give Ihlkham a simplistic explanation of our three-branch system of government and the balancing between the branches. I explained that, under the American system, both the courts and Congress could counteract a Presidential abuse of power. Briefly

¹ At Perkins Coie LLP, Mr. Battayev was represented by a team comprising myself, Paul T. Fortino, Cody M. Weston, and Susan K. Roberts. The thoughts and commentary expressed in this Article are my own, and I do not purport to speak on their behalf.

summarizing the Supreme Court’s holdings in *Hamdi* and *Rasul*,² I told him that the federal courts had set the stage for either habeas review of his detention or, at the very least, some meaningful process. Although I didn’t go so far as to imply that he should expect quick progress in furtherance of his release (as if, after more than three years in custody, he would have believed such an assertion), I’ll confess that I also did not convey the grim reality that he could be there indefinitely.

Whether I was being patriotic, naive, or both, I was—quite clearly—wrong. Since the June 2004 “terror opinions,” the federal courts have been slow to act. And instead of checking the Executive in any meaningful way, Congress has actually blessed the current administrative process at Guantanamo Bay: the Combatant Status Review Tribunals (CSRTs).³

The CSRTs, which classify detainees as either “enemy combatants” or not, are the real story for the majority of the men imprisoned at Guantanamo Bay. Although the legality of the military commission process provided the vehicle for the Court’s most recent detainee case,⁴ and is the process that receives the most press, so long as the war on terror continues CSRT determinations may serve as the basis upon which

² See *Hamdi v. Rumsfeld*, 542 U.S. 207 (2004) (providing that enemy combatants could be detained for the duration of hostilities); *Rasul v. Bush*, 542 U.S. 466, 483–84 (2004) (holding that foreign nationals imprisoned at Guantanamo Bay could challenge their custody through habeas corpus).

³ Since June 2004, Congress has passed two pieces of legislation affecting the rights of detainees at Guantanamo Bay. The first, the Detainee Treatment Act, or “DTA,” purports to strip the right of habeas corpus from at least certain detainees. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739, 2740 (codified at 10 U.S.C. § 801). Instead of plenary habeas review in federal courts, the DTA confers jurisdiction on the United States Court of Appeals for the District of Columbia “to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.” *Id.* § 1005(e)(2)(A). The DTA also limits the D.C. Circuit’s scope of review to the consideration of “whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals” and whether the use of the Secretary’s standards and procedures is consistent with “the Constitution and laws of the United States” to “the extent [those laws] are applicable.” *Id.* § 1005(e)(2)(C).

Following the Supreme Court’s decision in *Hamdan*, where the Court determined that the DTA did not deprive federal courts of jurisdiction over habeas cases pending in court when the legislation was enacted, Congress passed, and President Bush signed, the Military Commissions Act of 2006, or “MCA.” Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600 (codified at 28 U.S.C. § 2241(e)(1)). The MCA purports to strip habeas jurisdiction from all cases filed by detainees at Guantanamo Bay.

⁴ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764–69 (2006) (holding that the Detainee Treatment Act of 2005 did not deprive the courts of jurisdiction over habeas cases pending in federal court when the act was enacted).

detainees will ultimately remain incarcerated.⁵ Most detainees will never be tried before a military commission and, even if a detainee is acquitted in that setting, the government would likely argue that the detainee's enemy combatant status justifies continued detention under the current paradigm.⁶

In light of the Court's recognition in *Hamdi* of the military's right to detain enemy combatants until the cessation of hostilities, the CSRT determination carries a heavy sentence in the Global War on Terror. As this war has been defined so broadly, and defined to last for decades,⁷ a CSRT confirmation of enemy combatant status could amount to nothing less than lifetime imprisonment.

During one of my visits to Guantanamo Bay, Ihlkham asked that, as opposed to solely relying on legal theory, we argue his case from the perspective of "fairness and justice." He was adamant that the process he received did not meet this threshold. Indeed, Ihlkham's CSRT experience is a good example of how these tribunals, in addition to not providing a fair proceeding, do not properly do what they were established to accomplish.

Ihlkham's tribunal can best be described (in his words) as nothing but "theater." Though he faced lifetime detention, he understood almost nothing about what was unfolding before him. He was asked to participate in a process that he did not understand, a process in which he could not meaningfully participate.

In this Article, I critique the CSRT process from the perspective of detainee number 84, Ihlkham Battayev. I evaluate the features of the CSRT process and attempt to show why these features, from the perspective of a prisoner incarcerated at Guantanamo, fail to provide any semblance of fair process. Finally, putting aside the question of habeas corpus, and thus assuming that the CSRTs are the only process to which

⁵ While each detainee at Guantanamo Bay receives a CSRT proceeding to determine, or rather confirm, the detainee's status, very few detainees will ultimately be tried before military commissions. Since the passage of the MCA, only three detainees have been charged before a commission. See U.S. Dep't of Def., Commission Cases, <http://www.defenselink.mil/news/commissions.html>. The first, against David Hicks, resulted in a guilty plea and a sentence of nine months imprisonment. The other two cases—those against Omar Khadr and Salim Hamdan—were dismissed without prejudice on jurisdictional grounds in June 2007.

⁶ This is, of course, not to suggest that the consequences of the military commissions are not grave, as they carry the death penalty. Dep't of Def., Fact Sheet, Military Commissions (Feb. 2, 2007), <http://www.defenselink.mil/news/d2007OMC%20Fact%20Sheet%2008%20Feb%2007.pdf>. However, the number of detainees who will receive military commissions is estimated to be very low.

⁷ On August 26, 2007, U.S. Army Chief of Staff General George Casey, regarding the struggle against Islamic extremism, remarked, "It's going to be an ideological struggle that I think is going to play out over the next several decades." *War on Terrorism Could Last Decades, Army Chief Says*, INT'L HERALD TRIB., Aug. 26, 2007, available at <http://www.iht.com/articles/ap/2007/08/26/news/CB-GEN-Puerto-Rico-Guard-Conference.php>.

the detainees—as enemy combatants—are entitled, I attempt to provide the framework for how those tribunals should look consistent with their stated purpose.

II. THE NATURE OF COMBATANT STATUS REVIEW TRIBUNALS

The Department of Defense created the CSRT process nine days after the Supreme Court issued its “terror decisions” in June 2004. The CSRT process was, as admitted, created in reaction to the Court’s decisions in *Rasul* and *Hamdi*.⁸ The government concluded that since the Supreme Court appeared unwilling to support its view of Guantanamo Bay, the government needed to create some form of process for detainees that would satisfy judicial scrutiny.⁹

A. Overview

The CSRTs are a non-adversarial administrative review of the detainees’ presumed status as enemy combatants.¹⁰ The tribunals are charged with determining whether the detainees are still “enemy combatants.”¹¹ Thus, in each tribunal, the detainee carries the burden of contesting his prior designation as such.¹²

⁸ U.S. Dep’t of Def., News Transcript, Defense Department Background Briefing on the Combatant Status Review Tribunal (Jul. 7, 2004), <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2751>.

⁹ Beginning in late 2001, the United States Department of Justice began advancing the theory within the Bush Administration that federal courts would not have jurisdiction over the detainees at Guantanamo Bay, Cuba. In a memorandum entitled “Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba,” dated December 28, 2001, Patrick Philbin and John C. Yoo “conclude[d] that the great weight of legal authority indicate[d] that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay].” THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 29 (Karen J. Greenberg & Joshua L. Dratel eds., 2005). Acting under this assumption, the government advanced the idea that Guantanamo Bay, at least for the men kept as detainees there, was beyond the reach of U.S. laws, or a “legal black hole.” Kermit Roosevelt, *Why Guantanamo?*, Oct. 5, 2006, <http://jurist.law.pitt.edu/forumy/2006/10/why-guantanamo.php>.

¹⁰ Memorandum from Gordon England, Sec’y of the Navy, Enc. (1), § B (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> (regarding “Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba”).

¹¹ *Id.*

¹² The order establishing the CSRTs stated that the detainees subject to this order had “been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense. . . . [and that they had] the opportunity to contest designation as an enemy combatant in the proceeding.” Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy 1 (July 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (regarding the “Order Establishing Combatant Status Review Tribunal”).

Each tribunal consists of three “neutral” commissioned officers.¹³ Only one of the tribunal members is required to be a lawyer, and there is no requirement that the remaining tribunal members should have any legal or investigative experience.¹⁴ The detainees are not provided the assistance of a lawyer. Instead, as discussed below, detainees are given a “Personal Representative.”¹⁵

Despite the Supreme Court’s endorsement of a limited definition of enemy combatant in *Hamdi*, the CSRTs expanded the definition greatly. Instead of requiring that the person actually be “engaged in an armed conflict against the United States,” the CSRTs widen the definition of enemy combatant to include anyone who has “directly supported hostilities in aid of enemy armed forces.”¹⁶ The scope of the enemy combatant definition under the CSRTs is also wide enough to include individuals who “support[ed],” not just the Taliban and al-Qaeda, but also undefined “associated forces.”¹⁷

B. *Lack of Procedural Protections*

Procedurally, the tribunals contain minimal protections:

1. *Evidence*

The tribunals are given the task of “determin[ing] whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant.”¹⁸ There is a rebuttable presumption that the government’s evidence is “genuine and accurate,” and the tribunal members are instructed to base their decision on information presented by both the military and the prisoner.¹⁹ The tribunals are “not bound by the rules of evidence such as would apply in a court of law,”²⁰ but are instead asked to consider any evidence they deem “relevant and helpful” to the issue before them.²¹

2. *Access to Evidence*

As noted above, both sides are allowed to present evidence. Both sides are not, however, given access to the other party’s evidence. Although the government has access to whatever evidence the detainee

¹³ *Id.* at 1. The three commissioned officers are not judges, and they cannot properly be considered neutral because, unlike military judges in courts-martial proceedings, CSRT tribunal members are not insulated from their command. *See* 10 U.S.C. § 837 (2000) (prohibiting command influence on courts-martial judges).

¹⁴ *See* Memorandum from Gordon England, *supra* note 10, Enc. (1), § C(1).

¹⁵ *See infra* Part II.C.

¹⁶ *Compare Hamdi*, 542 U.S. 507, 516 (2004), *with* Memorandum from Gordon England, *supra* note 10, Enc. (1), § B.

¹⁷ *See* Memorandum from Gordon England, *supra* note 10, Enc. (1), § B.

¹⁸ *Id.*

¹⁹ *Id.* §§ G(11), H(5)–(7).

²⁰ *See* Memorandum from Paul Wolfowitz, *supra* note 12, at 3.

²¹ *Id.*

submits, the detainee is not allowed to view any classified evidence presented to the tribunal by the government. Obviously, as a prisoner confined to his cell at Guantanamo Bay, without a lawyer, and subject to whatever mail rules the military chooses for that particular detainee, a detainee has limited (if any) access to information outside the base.

3. Witnesses

The detainee is told that he may call witnesses at the tribunal. The detainee’s ability to call witnesses is, however, limited to only those witnesses who are “reasonably available.”²² Notably, members of the U.S. Armed Forces are not reasonably available to the extent their “commanders” determine that their “presence at a hearing would *affect* combat or support operations.”²³

Detainees are given the opportunity to examine the witnesses who testify on the government’s behalf. The government has, however, never relied on testimony in a CSRT proceeding.²⁴

4. Tribunal Record

The tribunal must consider all evidence before it.²⁵ Obviously, the government—the entity in control of scheduling the hearing—would have sufficient time to develop its evidence. The detainee is, however, given minimal notice of the hearing, and thus has almost no time to prepare a defense of the allegations.²⁶

C. No Access to Counsel

Importantly, detainees are not given access to a lawyer to counteract the lopsided nature of these proceedings. In place of a lawyer, detainees are provided a “Personal Representative,” or “PR.” The chief role of the PR is to “assist[] the detainee in connection with the review process.”²⁷ The PR is, however, explicitly instructed to inform the detainee that he or she is not the detainee’s advocate in the proceeding.²⁸ Basically, then,

²² *Id.* at 2.

²³ *Id.* at 3 (emphasis added).

²⁴ Mark Denbeaux & Joshua Denbeaux, *No-Hearing Hearings, CSRT: The Modern Habeas Corpus? An Analysis of the Proceedings of the Government’s Combatant Status Review Tribunals at Guantánamo* (2006), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

²⁵ See Memorandum from Paul Wolfowitz, *supra* note 12, at 2.

²⁶ The tribunal procedures dictate only that after the detainee is informed of the proceeding, the tribunal must be conducted within 30 days. There is no notice requirement to ensure that the detainee is given sufficient time to prepare for the hearing. Thus, under the procedures, the detainee could be informed of the process on one day and brought before the tribunal on the next day. See Memorandum from Gordon England, *supra* note 10, Enc. (1), § G.

²⁷ Memorandum from Paul Wolfowitz, *supra* note 12, at 1.

²⁸ See Memorandum from Gordon England, *supra* note 10, Enc. (3), § D.

it seems that the PR's chief function is to visit the detainee before the hearing and read the list of charges.

III. HOW THE CSRT PROCESS FAILED IHLKHAM

A. *Ihlkham's Journey from Abay to Guantanamo Bay*

Although there are likely some very dangerous men at Guantanamo Bay—men the United States should fear—the evidence is that the vast majority are not.²⁹ A study of tribunal transcripts by Professor Mark Denbeaux revealed, contrary to governmental assertions,³⁰ that:

- Only 8% of the men held at Guantanamo Bay were even accused of being al Qaeda fighters;³¹
- Less than 50% of the detainees were determined to have committed hostile acts against the United States or its coalition allies;³²
- Only 5% of the people there were actually caught by U.S. forces;³³
- Over 85% of the people there were caught by Pakistani forces or the Northern Alliance and turned over to the United States (at a time when the United States was offering a bounty for suspected terrorists).³⁴

Based on these figures, Ihlkham Battayev was squarely in the majority.

Ihlkham Battayev, a citizen of Kazakhstan and native Uzbek, was, in early 2001, a father of three living in southern Kazakhstan.³⁵ After losing his job coaching soccer a few years prior, he began selling fruit and other agricultural products at market. Oftentimes, he would travel to larger cities in order to purchase food in volume for subsequent sale at his local market in Abay.

On one such trip to Dushanbe, Tajikistan in January 2001, a Tajik man named Kari approached offering to sell Ihlkham fruit from his private orchard. Ihlkham agreed, and Kari drove Ihlkham to a farm well outside of town.

²⁹ Army linguist Erik Saar estimated that, “[a]t best” only a “few dozen” of the detainees had any connection to terrorism. *60 Minutes: Inside the Wire* (CBS television broadcast May 1, 2005), as reported by *Torture, Cover-Up at Gitmo?*, CBS NEWS.COM (May 1, 2005), <http://www.cbsnews.com/stories/2005/04/28/60minutes/main691602.shtml>.

³⁰ As former Secretary of Defense Donald Rumsfeld stated in 2002, “They are among the most dangerous, best trained vicious killers on the face of the earth. . . . They are not POW’s.” Eric Umansky, *Documenting, a Problem?*, SLATE, Jan. 28, 2002, <http://www.slate.com/id/2061235>.

³¹ Mark Denbeaux & Joshua Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data 2* (2006), http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 2–3.

³⁵ Interviews with Ihlkham Battayev, former detainee, Guantanamo Bay Naval Base, in Guantanamo Bay, Cuba (2005–2006).

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After Ihlkham reached the farm, a truck containing a group of armed men arrived. Kari spoke with the men, and gestured toward Ihlkham. The men turned their guns toward Ihlkham and motioned for him to get in the truck. Eventually, after being held captive by these men for two days, Ihlkham was handed over at gun point to men wearing Russian uniforms. These uniformed men placed Ihlkham on a helicopter that flew from Tajikistan to a Taliban training camp in north-central Afghanistan.

Kept in a small building at the camp, Ihlkham was repeatedly told to take up arms for the Taliban against the Northern Alliance. He refused. After more than one month of resisting these demands, Ihlkham was taken to a Taliban safe house outside Konduz. There, he was directed to assist the cook making meals for the Taliban fighters who stayed in the house. Not free to leave the house, Ihlkham remained there throughout the spring and summer months of 2001.

Prior to September 11, Ihlkham knew nothing of a plot to attack the World Trade Center in New York. In October 2001, however, U.S. fighter planes and bombers raced through the air dropping bombs around Konduz. The Taliban living in the house with Ihlkham suddenly fled. Sensing the opportunity to get home to his family in Kazakhstan, Ihlkham hopped on a truck he was told was bound for Herat. Ihlkham figured that, from Herat, he could find his way home to Kazakhstan through Iran or Uzbekistan.

On its way to Herat, the truck that Ihlkham rode in was stopped by loyalists of the Uzbek warlord, Rashid Dostum. Dostum’s soldiers took the men in the truck, including Ihlkham, prisoner. Eventually, Dostum handed many of the men over to the United States government, probably for a payment of money.³⁶ The United States was making bounty payments and General Dostum, who was later implicated in the deaths of thousands of detainees, was the recipient of many.³⁷ After a few weeks in the captivity of General Dostum, Ihlkham and others were handed over to the U.S. military. During December 2004, in the bitter cold mountain air, Ihlkham was kept at an airbase near Kandahar in an exposed shipping container with a roof made of barbed wire.

Importantly, throughout his ordeal in Afghanistan, according to Ihlkham, the U.S. military never provided any process to determine his status as an enemy combatant. Although he was interrogated, and asked his name and country of origin, he was never given any type of a proceeding to determine whether he was a soldier or fighter. As Ihlkham recalled to me, he spent almost no time talking to any Americans prior to

³⁶ The United States paid large sums of money for detainees. As Professor Denbeaux has reported, the U.S. military dropped leaflets over much of northern Afghanistan. One leaflet promised “[W]ealth and power beyond your dreams. . . . You can receive millions of dollars helping the anti-Taliban forces catch al-Qaida and Taliban murders [sic].” See Denbeaux & Denbeaux, *supra* note 31, at 15.

³⁷ AFGHAN MASSACRE: THE CONVOY OF DEATH (Atlantic Celtic Films 2003).

his transport to Guantanamo. He was sent to Guantanamo without having any opportunity to explain why he should not be taken away from his wife, children, and family for five years.

*B. Ihlkham's CSRT: "Nothing But Theater"*³⁸

During the first months of his experience at Guantanamo Bay, Ihlkham was kept in a chain-link cage in Camp X-Ray. He slept on the ground with a blanket that covered only a portion of his body. Eventually, during the summer months of 2002, he was moved to Camp Delta, a semi-permanent facility.

During his first three years at Guantanamo, Ihlkham was interrogated dozens of times. In those first few years, he was often kept in solitary confinement immediately prior to or after interrogation sessions. After awhile, interrogations were a routine part of his week.

His interrogators repeatedly asked Ihlkham the same questions in different ways. They often accused him of being a member of the Taliban and the Islamic Movement of Uzbekistan (IMU).³⁹ He denied both accusations, proceeding to tell the story of his capture myriad times. Over time, he was interrogated less often, and he spent his days isolated in a cellblock away from both his fellow countrymen and the other ethnic Uzbeks.

Finally, in late summer 2004, guards brought him a piece of paper itemizing a number of allegations. The sheet, which was written in Uzbek, alleged that Ihlkham: (a) was a member of the Taliban; (b) had trained at a Taliban camp; (c) was a member of the Islamic Movement of Uzbekistan; (d) was a cook for the Taliban; (e) had fought the Northern Alliance; and (f) had funneled money to the Islamic Movement of Uzbekistan from Kazakhstan. Because these same assertions (with the exception of one)⁴⁰ had been made during interrogations on numerous

³⁸ Much of the information in this section concerning Ihlkham Battayev's CSRT comes from the author's notes from interviews with Ihlkham while he was detained at Guantanamo Bay.

³⁹ The IMU was a radical Islamic organization, started by Takhir Yuldashev and Juma Namangani, dedicated to the creation of a Taliban-like government over much of Uzbekistan and Krygystan. GREG CHILD, *OVER THE EDGE: THE TRUE STORY OF FOUR AMERICAN CLIMBERS' KIDNAP AND ESCAPE IN THE MOUNTAINS OF CENTRAL ASIA* 40–41, 70–80 (Villard Books 2002). On September 25, 2002, the United States classified the IMU as a Foreign Terrorist Organization. See Press Release, Richard Boucher, U.S. Dep't of State, Redesignation of the Islamic Movement of Uzbekistan as a Foreign Terrorist Organization (Sept. 25, 2002), <http://www.state.gov/r/pa/prs/ps/2002/13708.htm>.

⁴⁰ Although Ihlkham's interrogators frequently questioned him about his relationship to the Taliban and the IMU, prior to his CSRT he had only once been questioned about the alleged funneling of money to the IMU from Kazakhstan. As Ihlkham recalls, on the one occasion when he was asked about this, he was told that he had been caught in Tajikistan with \$600 dollars in cash. He adamantly denied this,

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occasions, Ihlkham's immediate thought was that this document was an interrogation summary. Initially he did not understand that the document represented assertions against him that he was required to rebut in an upcoming proceeding.

Some time later, Ihlkham was taken to a room where a man in a blue uniform, with the assistance of an interpreter, read the document to him. Although Ihlkham did not know it then, the man in the room was his Personal Representative, tasked with assisting Ihlkham in appearing before a CSRT. The man explained that Ihlkham would be taken before a group of people and that he would be asked questions related to the statements on the sheet of paper. The man told Ihlkham that he would be given the opportunity to speak if he chose. Importantly, the man did not explain that the proceeding had any consequence for Ihlkham in terms of his status.

The next day, guards came to Ihlkham's cell. They escorted him to a small structure very similar to the ones in which he had been interrogated on numerous past occasions. Inside the building were three officers: an Uzbek translator, an attendant with a tape recorder, and the man from the prior day. The officer in the middle explained to Ihlkham that this was a tribunal to determine whether he could be sent home to his family. Although still suspicious that the proceeding was a ruse, Ihlkham at that point decided that he should make a statement to the three officers.

Ihlkham proceeded to explain that he was not, as alleged, a member of the Taliban. Ihlkham then addressed the nature of the proceeding, stating:

It has been mentioned that it is my choice to answer your questions or not, and according to that I believe you are still going to make your own decisions. I believe it is worthless for me to answer your questions anyway, because you are going to make your own decisions. I told you everything.

Ihlkham then requested a lawyer two times. The officer told Ihlkham that he was not entitled to a lawyer and that "it would be beneficial to him to allow the tribunal members to ask questions." Still confused about his lack of counsel, Ihlkham nonetheless agreed to answer questions from the panel members.

The panel members then proceeded to ask Ihlkham questions regarding his kidnapping and time in Afghanistan. He asserted, as he had in each of his interrogations, that he had been taken against his will to Afghanistan and that he had refused the Taliban's demands that he fight on their behalf.

Finally, Ihlkham said: "I believe after 9/11 America became very aggressive and that's probably the reason I'm here." The panel

and did not hear anything about it in subsequent interrogations. By the time the charges were read to him, this number suddenly ballooned to \$60,000 in cash.

concluded. The hearing set to determine his fate had lasted less than thirty minutes. The tribunal issued its finding to Ihlkham about five weeks later and determined that Ihlkham was an “enemy combatant.”⁴¹

C. Lessons from Ihlkham Battayev’s CSRT

Ihlkham’s experience exemplifies some of the most glaring problems associated with these tribunals. Not only was Ihlkham uninformed about the process, but he had no reasonable means at hand to gain an understanding in order that he could meaningfully rebut the presumption that he was an “enemy combatant.” Without any ability effectively to rebut the presumption, the proceeding’s result was all but certain.

1. Fundamental, and Quite Understandable, Mistrust

Most importantly, Ihlkham had a deep mistrust of the process rendering him unable to utilize whatever meager protections were at his disposal. Throughout, Ihlkham was suspicious that the tribunal was a ruse. If it was not just another creative form of interrogation, it was then a made-up process to make it appear that he was getting a trial.

The mistrust is entirely understandable. After all, by this time, Ihlkham had been bound, blindfolded, and flown around the world. As of the time of his tribunal, he had been held by the Americans under terrible conditions for almost four years. During this time, he had been interrogated dozens of times by the same Americans he was now being asked to trust.

The personal representative, who repeatedly said he was not Ihlkham’s lawyer, merely read the same allegations that other interrogators had read Ihlkham on numerous other occasions. The tribunal’s setting also bred suspicion as it occurred in the same type of small building in which Ihlkham had met his interrogators before. Although his principal interrogator was not in the room, Ihlkham actually saw him outside the building as he was brought into the building.⁴² Although he felt he had nothing to hide, and had repeatedly told his interrogators the story of his capture by the Taliban, his understandable suspicions regarding the character of the proceeding affected his ability to advocate on his behalf.

Ihlkham’s mistrust of the process is evident in the transcript of his CSRT hearing. At the beginning of the hearing, he states, “I believe it is worthless for me to answer your questions anyway, because you are going to make your own decisions.” His comment to me that the tribunal was “theater” sums it up from his perspective: the tribunal attendees were

⁴¹ Of the first 558 CSRTs, only thirty-eight detainees were found to be “not/no longer to be enemy combatants.” Denbeaux & Denbeaux, *supra* note 24, at 6.

⁴² The presence of his interrogator alone bred suspicion that the tribunal was some enhanced form of interrogation.

there for no other purpose than creating an impression for an unseen audience that would use the pre-determined result for its own purpose.

Ihlkham had, after all, concluded that it was pointless for him to advocate on his own behalf (other than politely answering the tribunal president’s questions) because he had already told interrogators everything he could offer. Long before the date of his tribunal, Ihlkham had concluded that arguing his case to interrogators at any length would be ineffective in securing his release. Each time he had taken the time to dissect the assertions made against him, his interrogators had argued back to him that his story was not credible. He was repeatedly left frustrated that they did not believe the principal portion of his story: he had been kidnapped in Dushanbe, Tajikistan by people loyal to the Taliban, perhaps the IMU, and conscripted at gunpoint to fight for their cause (which he refused to do).

2. *Utter Lack of Comprehension of the Proceeding*

In addition to a general mistrust of the process, it is also clear that Ihlkham had no comprehension of what the tribunal was there to accomplish. He repeatedly asked for a lawyer, and even remarked that he had been led to believe that a lawyer would be present during his questioning.⁴³ Finally, it is clear that he did not understand the very presumption in place, as he questioned the tribunal president’s statement that he “still” posed a threat to the United States.⁴⁴

3. *No Legitimate Ability to Offer or Rebut Evidence*

With respect to witnesses, Ihlkham did not have any real ability to call a witness that the tribunal would consider “reasonably available.” He had no idea who the men who kidnapped him were; they did not show him identification. Other than providing a general direction, which he had provided during interrogation, he could not state the location of Kari’s farm outside Dushanbe. Moreover, the men at the Taliban safe house were known to him only by nicknames or single names. He did not know where they were from, who their families are, or how he could even begin to get in touch with them. Certainly, Ihlkham figured, the United States government would not take the time to track down men he could not even identify—to the extent they were even alive.

Even if Ihlkham had made a request of the tribunal, there is little doubt that whomever he wanted, for whatever purpose, would not have been brought before his tribunal. The CSRT transcripts are almost devoid of any instance where witness testimony was heard.⁴⁵ Although in some cases other detainees were allowed to testify, this could not have helped Ihlkham as he knew of no other detainee who was with him

⁴³ Interviews with Ihlkham Battayev, *supra* note 35.

⁴⁴ *Id.*

⁴⁵ See Denbeaux & Denbeaux, *supra* note 24, at 26–29.

during his Konduz ordeal in the summer of 2001.⁴⁶ All of Ihlkham's witnesses would have been "off the island," and no tribunal heard testimony from a detainee's witness located outside of Guantanamo Bay.⁴⁷

The CSRT history is replete with examples of detainees who made unfulfilled requests for witness testimony. For instance, Abdullah Mujahid requested the presence of four witnesses he claimed could substantiate his case for release. Formerly an Afghan provincial police commander, Mujahid was accused by the United States of being fired because of suspicions that he was colluding with anti-government forces, i.e. the Taliban.⁴⁸ He sought the testimony of four witnesses in Afghanistan, all determined by the tribunal not to be available.

In 2006, a group of Boston Globe reporters actually sought to determine whether they could easily find the witnesses.⁴⁹ Within days, the reporters found three of the four witnesses (the fourth had died). Each confirmed Mujahid's story. Incredibly, one of the witnesses was right under the DOD's nose, teaching at the National Defense University in Washington, D.C.

Neither could Ihlkham have presented documentary evidence to support his case. After all, he did not have any documents to offer. Everything he had on his person (which was not much) was taken from him upon his capture by General Dostum's men. His Kazakh papers had been taken long before by his kidnappers in Tajikistan. Other than a small library with a limited number of books (none in his native language), he certainly had no access to any documents while at Guantanamo Bay.

4. *Necessity of Counsel*

In light of Ihlkham's circumstance, the assistance of counsel was necessary for him to receive fair process. In addition to creating a sense of trust in the process, a lawyer, with the ability to decipher and analyze the evidence presented, could have articulated to a finder of fact a well documented case for the reasonableness of Ihlkham's story. Without this, Ihlkham's story seems almost fanciful.

Although the story of Ihlkham's capture, kidnapping, and detention may have weighed heavily in the tribunal's mind, there is plenty of evidence to corroborate important parts of the story. For instance, during early 2001, the Russian military, as they had on three occasions since 1999, was transporting the IMU from central Tajikistan to the Afghan

⁴⁶ Indeed, query how helpful the corroborating testimony of another detainee, himself considered an enemy combatant, would be in this situation.

⁴⁷ Denbeaux & Denbeaux, *supra* note 24, at 28.

⁴⁸ Transcript of Abdullah Mujahid Tribunal, Summarized Unsworn Detainee Statement 1-2, 3, 5, http://www.defenselink.mil/pubs/foi/detainees/csrt/Set_41_2665-2727.pdf.

⁴⁹ Farah Stockman & Declan Walsh, *Detainees Not Given Access to Witnesses*, BOSTON GLOBE, June 18, 2006, at A1, *available at* http://www.boston.com/news/world/asia/articles/2006/06/18/detainees_not_given_access_to_witnesses?mode=PF.

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border.⁵⁰ And, there has been speculation that Russia was at the time providing some type of aid to the IMU.⁵¹ The IMU had a history of kidnapping people for its cause, and it was actively supporting the Taliban’s mission at that time.⁵²

Moreover, as we were later able to present to his annual review board, numerous witnesses were available to provide testimony on his behalf.⁵³ His former employers corroborated his employment history. Local officials in Abay were available to testify that he had never been in trouble with authorities. Finally, his neighbors and school officials were able to testify to his good moral character and his lack of affiliation with radical Muslim organizations.

Ihlkham failed to present any of this evidence because he could not possibly have known of its existence or lacked the ability under the system to present it. Indeed, he did not request any evidence because he did not know what to ask for and, in any event, he concluded that none would be forthcoming. He was, after all, a minimally educated man with absolutely no knowledge of the tribunal system (indeed, he had no knowledge of the Kazakh system either).

D. No Ability to Prepare

Even if he could have called witnesses, and had some legitimate access to other evidence, Ihlkham simply did not have time to prepare for the hearing. He was visited by his Personal Representative and received the list of charges within days of his hearing. Without a lawyer skilled in dissecting and parsing available evidence, he was doomed. Because the events at issue took place years earlier and thousands of miles away, Ihlkham needed sufficient time to gather and develop the evidence necessary in order to present a thorough defense.

⁵⁰ AHMED RASHID, *JIHAD: THE RISE OF MILITANT ISLAM IN CENTRAL ASIA* 178 (Yale Univ. Press 2002).

⁵¹ *Id.* Fiona Hill of the Brookings Institution referenced the IMU’s relocation of its operation to Afghanistan in her testimony to Congress in October 2003, ironically the same month as Ihlkham’s CSRT. See Daniel Kimmage, Compilation, *The Growth of Radical Islam in Central Asia*, ASIA TIMES ONLINE, Mar. 31, 2004, http://www.atimes.com/atimes/Central_Asia/FC31Ag02.html.

⁵² *Id.*; see also CHILD, *supra* note 39.

⁵³ The Department of Defense has also created an annual review process, called the Administrative Review Boards, to determine, on an annual basis, whether detainees should continue to be detained, be transferred for detention elsewhere, or released. Press Release, U.S. Dep’t of Def., Guantanamo Bay Detainee Administrative Review Board Decisions Completed (Feb. 9, 2006), <http://www.defenselink.mil/releases/release.aspx?releaseid=9302>. Attorneys are not allowed to attend these proceedings, and there is no assurance that materials submitted to these boards are considered.

IV. A POSSIBLE SOLUTION

What rights the detainees have is obviously a contentious issue, as it has spawned hundreds of habeas cases and at least three trips to the Supreme Court. The administration obviously has its view of the process due the detainees, as I am sure each lawyer for each detainee has his or her own view. Viewing the CSRTs through the eyes of my client, however, it seems that there are straightforward changes that must be made to the present system. Even if the Supreme Court determines that the present DTA system is adequate to protect the rights of detainees, certain changes seem essential to achieve even the military's stated objectives in forming these proceedings.

If the purpose of the tribunals was, as originally stated, to "determine, in a *fact-based proceeding*, whether the individuals detained by the [military] are properly classified as enemy combatants," then shouldn't the tribunals allow the detainees a real ability to develop the factual record?⁵⁴ Furthermore, as the tribunals were supposed to provide the detainee the opportunity to "contest such designation," wouldn't it benefit the process for this ability to be something of actual consequence?⁵⁵

A. *The Fallacy of Article 5 Similarity*

Before addressing the necessary features for such a process, it is important to dispel the government's theory regarding the similarity between this situation and the historical situations where Geneva Convention, Article 5 tribunals occurred. Article 5 tribunals are hearings brought for the purpose of resolving any "doubt" as to the status of detainees currently being held.⁵⁶ As the Department of Defense has asserted, the CSRTs were created with Article 5 tribunals in mind. But the applicability of Article 5 process to the situation here seems misleading.

First, Article 5 tribunals employed in past conflicts provided prisoners with more limited process because of the nature of those past conflicts. Simply stated, we are in a new paradigm, and the conflict at hand is much different. Although both sides of the argument have tried to use the "new paradigm" argument to their advantage,⁵⁷ in this situation the argument seems to fit. We are not talking here about a war where

⁵⁴ See Memorandum from Gordon England, *supra* note 10, at 1 (emphasis added).

⁵⁵ *Id.* at 1.

⁵⁶ Geneva Convention Relative to the Treatment of Prisoners of War art. 5, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁵⁷ For instance, the government has argued that these conflicts constitute a new paradigm to the extent that the Geneva Conventions, signed decades ago, contemplated armies with, among other things, uniforms with badges or other identifying marks. In this conflict, however, the government argues that enemies such as the Taliban do not wear common identifying uniforms.

both sides will sit down and hammer out an armistice on the deck of an aircraft carrier; here there is no discernable Appomattox.⁵⁸ Given that this war is global and, as opposed to past wars, may last for generations, it seems only appropriate that the process with which someone could be detained indefinitely would be somewhat substantial.

Secondly, in the historical context (in the Vietnam War, for instance), Article 5 tribunals were conducted on the battleground. In those situations, the accused had the great benefit of actually being able to call witnesses with knowledge of the situation. If a man, with no identification, was captured during Vietnam, he could meaningfully request the presence of someone in a nearby neighborhood, field, or village. Here, where the detainees have been removed from the battlefield (and are in fact halfway around the world), it would seem that there should be some greater form of assistance provided with respect to mounting a case; especially, as noted above, when the stakes are so high.

Finally, more limited protections (i.e. more limited than a full trial) were provided in past Article 5 tribunals because the proceedings were conducted in the theater of war. Soldiers in the midst of a fight, with possible enemy activity in the area, may not have had time to conduct an entire hearing (e.g. with discovery, documents, time to prepare arguments, etc.), and it may have been dangerous to do so. Here, though, the military has all the time in the world to do it right, and there is certainly no danger at Guantanamo Bay (Jack Nicholson’s testimony in *A Few Good Men*, notwithstanding).

B. *Necessary Procedures for Detainee Tribunals*

With the realities of the current paradigm in mind, there are a number of changes that should be made to the current system. These changes would address the major deficiencies evident in the CSRTs.

1. *Narrow the Definition of Enemy Combatant*

First, the very definition of enemy combatant must be narrowed and made clear. The current definition of enemy combatant is entirely overbroad. As the court in *In re Guantanamo Detainee Cases* concluded, the definition of “enemy combatant” utilized in the CSRT proceedings is unworkable and vague.⁵⁹ Read literally, the current definition could include lawyers who provide assistance to detainees with their habeas petitions.

In order to balance the interests of fairness and security properly, the definition of enemy combatant should be changed to include only

⁵⁸ The phrase “no discernable Appomattox,” is attributed to my law partner, David Symes.

⁵⁹ *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 474–75 (D.D.C. 2005) (observing that the present definition would encompass a little old lady in Switzerland who accidentally contributed to the wrong charity).

those persons who directly and voluntarily engaged in hostilities against the United States or its allies. The definition should include only those persons who gave direct support to a known terrorist organization and who actively engaged in hostilities in furtherance of this support. Someone like Ihlkham, who neither directly aided the Taliban nor did any act willingly, should not be included. Without such a clarification, the cells of Guantanamo could perhaps be filled with citizens of Afghanistan who indirectly aided the Taliban by no fault (or voluntary act) of their own.

2. Access to Counsel

Based on Ihlkham's experience, the assistance of counsel is essential to a fair proceeding. The men at Guantanamo have been detained for years, under incredible pressures, away from any civilized setting. They are in an unfamiliar environment, operating within a legal environment that is confusing and unknown to them. Not only that, but in light of the fact that much of the evidence is not available to them for review, and they have the burden of rebutting a presumption of guilt, it seems ridiculous to suggest that they should be in a situation where they do not have someone to advocate on their behalf.

There would seem to be two legitimate objections to the presence of counsel: (a) the misuse of classified information; and (b) the propensity of lawyers to create side issues as a distraction. The first is easy. Each lawyer presently representing a detainee is required to get a clearance to see the evidence. The government conducts tens of thousands of these checks every year, and it would seem that this should not be an impediment. As to the second reason, it cannot be denied that lawyers representing clients will often go to great lengths to gain advantage for their clients. But there also can be little argument that with a fairer, more transparent process, defense lawyers would be less inclined to pursue myriad challenges to the process and more inclined to get to the task of developing a defense based on the facts of a given case.

3. Tribunal Members

Judges should determine the fates of the detainees. Whether they are military judges or federal judges, it only seems appropriate that these tribunals be conducted in the first instance before lawyers who are accustomed to weighing evidence and making difficult calls regarding the admissibility of evidence. Furthermore, to the extent that military personnel sit in judgment of detainees, it is essential that the arbiter of fact and law is, as are military judges, insulated from the chain of command.

4. Transparency

The documents provided to us regarding Ihlkham were, in many respects, suspect in their support of the assertions made against Ihlkham. Although some of it was classified, and cannot be explained in any detail, I will say that much of the information was in great need of scrutiny and

rebuttal. Any process for the detainees should contain some real opportunity to challenge the evidence. Ihlkham never had the opportunity to challenge the classified evidence, and with so much on the line this is unfathomable.

Furthermore, there have been serious questions raised about the military’s gathering, review, and massaging of the evidence presented. Lieutenant Colonel Stephen Abraham, a reserve officer assigned to work on the tribunals, submitted an affidavit in federal court questioning the legitimacy of the evidence offered before the tribunals.⁶⁰ Colonel Abraham, a lawyer, testified that the information utilized by the CSRT tribunal members was often assembled by military officers with no investigative, intelligence, or military background.⁶¹ This information was oftentimes “outdated,” “generic,” and “rarely specifically relat[ed] to the individual subjects of the CSRTs or to the circumstances related to those individuals’ status.”⁶²

The questionable nature of the evidence presented is precisely the reason that the detainees need the ability to challenge all of the evidence. Without this ability, the hearing is just a one-sided affair with a predestined outcome. The detainees’ lawyers must be given the opportunity to see and question the evidence brought against their clients.

Although the government may have some legitimate concern that some evidence may compromise security and intelligence methods, there are myriad ways to protect this information. Indeed, the government has successfully prosecuted a number of high-profile terrorism suspects using these protections. In each of these cases, judges used their discretion to balance the interests of the state’s security with the individual rights of the prisoner.

V. EPILOGUE

Ihlkham is now safely home in Kazakhstan. One day last December, he was summarily notified that he would be going home. As quickly as he arrived at Guantanamo Bay, he was gone. We do not know why his classification changed, or what occurred, but he is now with his wife and children.

The debate regarding the detainees will continue. There are still approximately 300 men at Guantanamo Bay (including, now, the fourteen “high value detainees”)⁶³ and the construction of a new prison

⁶⁰ Reply to Opposition to Petition for Rehearing ¶ 23, at vii, *Al Odah v. United States*, No. 06-1196 (June 22, 2007) (declaration of Stephen Abraham, Lieutenant Colonel, United States Army Reserve).

⁶¹ *Id.* ¶ 5 at ii.

⁶² *Id.* ¶ 8 at ii–iii.

⁶³ In September 2006, President Bush announced the transfer of fourteen “high-value detainees,” who had presumably been kept at so-called “black sites” around the

last year would suggest that many of them will be there for quite some time. Although in the absence of judicial intervention it is unlikely that there will be changes to the CSRT system, it seems that the integrity of the system could be enhanced by making changes to the CSRT process. These changes would not seem to impact, in the least, the ability of our nation to fight the battle against terrorism.

Furthermore, in addition to fairness concerns, changes to the system are necessary to alleviate concerns voiced about our country's treatment of foreign nationals. In a world where the flames of terrorism are fueled by the perception of unbridled national power, the fight against terror is partially waged by the treatment of the accused.

While the constitutionality of habeas review and the Military Commissions Act is debated in the federal courts,⁶⁴ it is essential to take a look at what the current process provides. Putting aside even the question of whether these tribunals are an adequate substitute for habeas, and further whether they provide the type of process that Justice O'Connor discussed in *Hamdi*,⁶⁵ it is difficult to see how the CSRTs even come close to what we should want for these detainees as a reflection of our societal values. After all, we are, as Ihlkham described, known as a "country of justice."

world, to Guantanamo. Jonathan Karl, "High-Value" Detainees Transferred to Guantanamo, ABC NEWS, Sept. 6, 2006, <http://abcnews.go.com/International/story?id=2400470>.

⁶⁴ The Supreme Court recently accepted certiorari in *Boumediene v. Bush* (06-1195), which may well address the adequacy of the DTA process. See *Boumediene v. Bush*, 127 S. Ct. 3078 (2007).

⁶⁵ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) ("We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.").