

Standards and Procedures for Classifying “Enemy Combatants”: Congress, What Have You Done?

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SUMMARY

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I. INTRODUCTION

As an alumna of The University of Texas School of Law, it is quite an honor to be here—in the month of my ten-year class reunion—addressing an issue that is as contemporary as it is controversial, and which has consumed half of my legal career already. Indeed, it was roughly five years ago (March 2002) that I began representing Kuwaiti citizens detained at Guantánamo. In those early post-9/11 years, our government kept everything about Guantánamo a secret, from who was detained there to how they were treated. Not even the small handful of lawyers representing detainees were allowed to visit or communicate with their clients, who, according to the Administration, had no legal rights under domestic or international law. When I began down this road five years ago, Guantánamo was literally a “legal black hole.”¹ The Supreme Court changed much of that in June of 2004 when it

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1. This characterization of Guantánamo was originally coined by Lord Johan Steyn, who was one of the first high-ranking officials to criticize the Guantánamo detentions. Lord Johan Steyn, Lord of Appeal

ruled in my case, *Al Odah v. United States*, joined with *Rasul v. Bush*,² that the detainees were entitled to bring habeas corpus petitions in federal court to challenge their detention. But after two years of fighting with the government over the meaning of *Rasul*, Congress abruptly passed the Military Commissions Act of 2006 (“MCA”),³ which ostensibly strips the Guantánamo detainees of the right to challenge *any* aspect of their detention, including the right to habeas corpus. Remarkably, we are almost exactly where we were five years ago, except that now, Congress has weighed in and approved of Guantánamo as a virtual law-free zone.

What do I mean by “law-free zone”? “Law-free” implies the absence of law. Despite the availability of our great criminal justice system, courts martial, the Constitution, the Geneva Conventions, and other international law treaties under which the U.S. has legal obligations, both the Administration and Congress have declined to apply those legal paradigms at Guantánamo. Yet Congress has approved *some* type of framework for the continued detention of hundreds of individuals and the potential detention of hundreds more of non-U.S. citizens, including legal U.S. residents, in the “global war on terror.” The fact that some manufactured framework exists, however, does not change Guantánamo’s status as a legal black hole; indeed, the manufactured framework exacerbates the situation by giving the Guantánamo detentions a veneer of legality.

What is the framework Congress has conceived? What are its consequences? And is it the appropriate mechanism for containing and preventing “terror”? To answer these questions and think critically about the concepts that make up that framework—enemy combatant, combatant status review tribunals, military commissions, etc.—let us first consider the larger setting in which they occur, that is, the “global war on terror.” Zbigniew Brzezinski, National Security Advisor to President Jimmy Carter, wrote recently that the “war on terror” has created a “culture of fear in America.” The Bush administration’s elevation of these three words into a national mantra since the horrific events of 9/11 has had a pernicious impact on American democracy, on America’s psyche, and on U.S. standing in the world.⁴ Mr. Brzezinski pointed out that the phrase itself is meaningless, defining neither a geographic context nor our presumed enemies, and he went on to state, in the most critical terms, that the “vagueness of the phrase was deliberately (or instinctively) calculated by its sponsors.”⁵ Mr. Brzezinski further noted that the very vagueness of the phrase accomplished one major objective: “[i]t stimulated the emergence of a culture of fear.”⁶ This, he wrote, was a self-inflicted wound greater than anything imagined by the perpetrators of the 9/11 attacks.⁷

It is hard to disagree with Mr. Brzezinski. The Guantánamo detentions and other “war on terror” policies, such as extraordinary rendition and “extreme interrogation,” have done little to help stem terrorism—rather, they have fueled it. But, perhaps more significant to our discussion today is his use of the term “vague”

in Ordinary, Twenty-seventh F.A. Mann Lecture, Guantánamo Bay: The Legal Black Hole (Nov. 25, 2003), available at http://www.barhumanrights.org.uk/pdfs/FA_Mann_lecture1Dec03.pdf.

2. *Rasul v. Bush*, 542 U.S. 466, 484 (2004). Further citations to *Al Odah* will be to *Rasul* as well.

3. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

4. Zbigniew Brzezinski, *Terrorized by ‘War on Terror’: How a Three-Word Mantra Has Undermined America*, WASH. POST, Mar. 23, 2007, at B01.

5. *Id.*

6. *Id.*

7. *Id.*

to characterize the “war on terror.” For example, exactly who is the “enemy” in this war? Is it al Qaeda, terrorists, unlawful combatants, or all Muslims? Where is the war? Afghanistan, Iraq, the world? How are we fighting it? With weapons, detention, torture? And lastly, when will it end? Secretary of Defense Donald Rumsfeld recognized when he testified before Congress in 2002 that “[t]he war on terrorism began in Afghanistan, to be sure, but it will not end there. It will not end until terrorist networks have been rooted out, wherever they exist. . . . It will not end until our people—and the people of the world’s free nations—can once again live in peace and free from fear.”⁸

The “war on terror” has been intentionally saturated with language that connotes war, such as “enemy combatant” and “detention,” the meanings and boundaries of which have been left intentionally vague and blurry. Such imprecision has allowed us to largely accept the Administration’s conduct and policies that are associated with these concepts. And so now it seems we use “enemy combatant” and other such phrases in our daily lexicon in the same casual way we use the phrase “global war on terror.” Yet none of these phrases define anything concrete.

The very vagueness of this “war” and its components has led to the effective sanctioning of unchecked arrest and detention. Armed with these meaningless terms, the United States can pick up almost anybody, anywhere in the world, detain them in harsh conditions, and subject them to extreme interrogation for as long as necessary. Thus, the Administration has successfully conceived a “new kind of war” in which it can assert all of the powers associated with the laws of war, but abide by none of its constraints.

To be sure, terrorism is a real threat, and we are in a war of some kind. But as we go forward and analyze these “wartime” concepts and the legislative framework that has been implemented, we ought to think hard about the context in which they occur and how we are defining these concepts. It is easy to suggest that all “enemy combatants” should be “detained” until the end of the “war on terror,” but somewhat more difficult to determine what that suggestion really means. Such a determination is needed before deciding what approach or framework is appropriate.

II. “IN THE BEGINNING”

In assessing whether Congress got it right regarding the procedures for the Combatant Status Review Tribunals (“CSRTs”) and the Administrative Review Boards (“ARBs”), let us look at what these procedures mean in practice. How do they play out, or, more accurately, how *did* they play out? Neither the Detainee Treatment Act of 2005 (“DTA”)⁹ nor the MCA set forth procedures for the CSRTs and ARBs that were subsequently applied to the Guantánamo detainees. Rather, Congress, by passing the DTA and the MCA after very few hearings on the matter, approved procedures that *had already been* applied to over 400 Guantánamo

8. *Progress In Afghanistan: Hearing on Operation Enduring Freedom Before the S. Comm. on Armed Services*, 107th Cong. (2002) (statement of Donald H. Rumsfeld, U.S. Sec’y of Def.), available at http://www.senate.gov/~armed_services/statemnt/2002/July/Rumsfeld2.pdf (last visited July 26, 2007).

9. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) [hereinafter DTA].

detainees.¹⁰ Given the circumstances surrounding the initial capture of the detainees and the available Department of Defense (“DoD”) data regarding the CSRTs and ARBs, it is clear that members of Congress had no real understanding of the procedures they had approved, and no knowledge of how the tribunals and boards were conducted or their actual results.

As mentioned, I have been involved in the Guantánamo litigation since early 2002, representing Kuwaiti detainees in *Al Odah v. United States*.¹¹ At that time, the Administration was asserting to counsel involved in the litigation and to the public that the detainees were captured on the battlefield in Afghanistan as a result of the U.S. invasion.¹² This was used to justify the detentions in the first instance as well as to detain the captives without access to courts. This practice of holding detainees appears similar to a traditional, and therefore acceptable, wartime paradigm. Yet even then we knew the Administration was misleading us all. We had learned from a secret U.S. military source in a counter-terrorism unit that the U.S. military actually had not directly captured many of the Guantánamo detainees, but that in fact many had been picked up by Afghani and Pakistani military, local authorities, and tribesmen.¹³ We also learned that many Arab Muslim “terrorist suspects” in the area were being turned over to the U.S. military for bounties paid by the United States.¹⁴ Furthermore, based on the Administration’s own remarks, we knew that most of the “captured” individuals were not wearing uniforms, but were wearing civilian garb.¹⁵ Indeed, that was the primary reason given by the Administration for its wholesale designation of the detainees as “enemy combatants,” depicting such combatants as unlawful, and therefore undeserving of prisoner-of-war status.¹⁶

Why are all these factors relevant? When people in a conflict zone wearing civilian clothing are picked up by unreliable third parties and turned over for large amounts of cash, the chances that the wrong people have been captured are

10. All Guantánamo detainees, who were still at Guantánamo, had been through the CSRT procedures when Congress passed the DTA and the MCA, with the exception of the 14 “high-value detainees.” These 14 detainees were transferred out of CIA custody in unknown locations to Department of Defense custody at Guantánamo shortly before the MCA went to the Senate floor for a vote. 152 Cong. Rec. 510, 017 (2006).

11. *Rasul*, 542 U.S. at 466.

12. Respondents’ Reply in Support of Motion to Dismiss, *Al Odah v. United States*, No. 02-CV-828 (CKK) (D.D.C. June 14, 2002); Respondents’ Motion to Dismiss Petitioners’ First Amended Petition for Writ of Habeas Corpus, *Rasul v. Bush*, No. 02-0299 (CKK) (D.D.C. Mar. 18, 2002); Mike Allen and Glenn Frankel, *Bush Halts Military Proceedings Against 3*, WASH. POST, July 19, 2003, at A15; Linda D. Kozaryn, *Pakistan-India Conflict Concerns U.S. Military*, AMERICAN FORCES PRESS SERVICE, May 28, 2002, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=44007>; News Transcript, DoD News Briefing—Sec’y Rumsfeld & Gen. Meyers, Mar. 28, 2002, available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3380>.

13. Author’s conversations with Lieutenant Colonel Anthony Christino III (ret.) (2002, 2003); see also DAVID ROSE, GUANTÁNAMO: THE WAR ON HUMAN RIGHTS 43–48 (2004).

14. Philip Smucker, *Bounty Hunting in a Land of Tribal Loyalists*, CHRISTIAN SCI. MONITOR, Jan. 10, 2002, available at <http://www.csmonitor.com/2002/0110/p1s2-wosc.html>; see also leaflets distributed by U.S. Forces in Afghanistan advertising rewards, available at www.psywarrior.com/Herbafghan.html (last visited Oct. 9, 2007).

15. See generally statement by the U.S. Press Secretary, The James S. Brady Briefing Room, Washington D.C. (Feb. 7, 2002); see also Posting of John Bellinger to *Opinio Juris*, *Unlawful Enemy Combatants*, <http://www.opiniojuris.org/posts/1169000173.shtml> (Jan. 17, 2007, 06:01 EST) [hereinafter Bellinger]; John Zarella, *Rumsfeld, senators: Detainees treated well*, CNN, Jan. 28., 2002, <http://archives.cnn.com/2002/WORLD/americas/01/27/rumsfeld.guantanamo/index.html>; White House Press Briefing, Jan. 9, 2002.

16. See Bellinger, *supra* note 15.

significant. Under these circumstances, one would think that a fairly stringent process would be utilized to determine whether such persons really were “enemy combatants” or merely innocent civilians. Yet we learned from our source in the counter-terrorism unit that, contrary to past practice, the U.S. military employed no meaningful process near the time of “capture” or when they were handed these individuals.

U.S. Army Regulation 190-8, chapter 1-6, is modeled after the Article 5 tribunals of Geneva Convention III and provides for a status-determination hearing to be done at or near the time of capture of an individual in armed conflict so that witnesses and evidence are readily available.¹⁷ These “Article 5 hearings” have been employed by our military to determine combatant/civilian status ever since they became part of U.S. military regulations.¹⁸ They, or something akin to Article 5 hearings, were used in Vietnam, the first Gulf War, and in the conflicts in Panama, Kosovo, and Bosnia for the same reason that they should have been used in the conflict in Afghanistan and Pakistan: civilians become caught up in zones of armed conflict and while some may be combatants, others are simply innocent civilians. The military, however, on directives from the White House, did not employ such status determination hearings in the Afghan conflict or elsewhere.¹⁹ Rather, scores of men were sent to Guantánamo on hearsay, sometimes double or triple hearsay, from our allies in Afghanistan, Pakistan, and other parts of the world.²⁰

It was not until two years later, in *Rasul v Bush*,²¹ when the detainees won the right to challenge their detention, that the Administration sought to implement some process. Although the Supreme Court held that the detainees had a right to challenge their detention through habeas hearings in *federal civilian courts* before an impartial judiciary, the Administration, rather than participate in such hearings, established an extra-judicial process: the CSRTs. That was the first time any sort of meaningful process was used to determine whether the hundreds of individuals at Guantánamo were combatants or innocent civilians.²² These men had already been detained for over two years without access to counsel, many in solitary confinement for lengthy periods, subject to “extreme interrogation methods,” and all in conditions far worse than those given to many convicted felons.²³ Some of these

17. Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8 ch. 1-6, Dep’t. of the Army, the Navy, the Air Force and the Marine Corps, AR 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1 (Oct. 1, 1997), available at http://www.usapa.army.mil/pdffiles/r190_8.pdf; see also DEP’T. OF THE ARMY, MILITARY POLICE INTERNMENT/RESETTLEMENT OPERATIONS, FM 3-19.40 1-37, Ch. 3, 4 (Aug. 1, 2001), available at <http://www.globalsecurity.org/military/library/policy/army/fm/3-19-40/index.html>.

18. Based on numerous conversations the author has had with active and retired individuals serving in the U.S. Armed Forces; see Major James F. Gebhardt, *The Road to Abu Ghraib: U.S. Army Detainee Doctrine and Experience*, Military Review (Jan.–Feb. 2005), available at <http://usacac.army.mil/cac/milreview/download/english/JanFeb05/Bgeb.pdf>; Center for Law and Military Operations, *Law and Military Operations in Kosovo: 1999–2001* (Dec. 15, 2001); Lt. Col. Kevin H. Govern, *Sorting the Wolves from the Sheep*, MILITARY POLICE, Oct. 2004 at 35, available at <http://www.wood.army.mil/MPBULLETIN/pdfs/Oct%2004%20pdfs/Govern.pdf>.

19. Based on conversations the author had with Lt. Christino; see also JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 83–84 (2006).

20. Based on conversations the author had with Lt. Christino; see also ROSE, *supra* note 13, at 43–48.

21. *Rasul*, 542 U.S. at 466.

22. The word “meaningful” is not meant to be understood as being “adequate” or “effective.”

23. Based on author’s numerous visits to Guantánamo prison and discussions with her clients then detained there; Jim Cohen, *Camp 6 at Guantánamo – Cleared Men, Harsh Facility*, *The National Law*

“men” were actually children when they were first taken to Guantánamo; my current client, Omar Khadr, was barely sixteen years of age upon his arrival at GTMO. All were subject to a CSRT that, when all was said and done, merely confirmed that it was a wholly inadequate procedure for determining who these men really were.

III. THE “CSRTs”

The Department of Defense established the CSRTs in July of 2004,²⁴ and by the end of the year a majority of the detainees had been pushed quickly through the proceedings.²⁵ The procedures were rife with features that make the description “kangaroo-court proceeding” well-deserved; they most certainly violated the Due Process clause of the Constitution.²⁶ Most notably, the CSRTs provide: (1) evidence procured by torture could be considered;²⁷ (2) hearsay evidence could be considered;²⁸ (3) classified evidence that the detainee is not allowed to see could be considered and carried a presumption of reliability;²⁹ and (4) despite all of the aforementioned, the detainee was not entitled to a lawyer.³⁰ In sum, pursuant to a CSRT, a detainee could be determined to be an “enemy combatant” based on second-hand statements of unknown individuals that were produced as a result of torture and that the detainee never has an opportunity to see and respond to.

Sounds like old-school Soviet justice. If you are skeptical of such a result occurring here in the U.S., the available data speaks for itself. Professor Mark Denbeaux of Seton Hall Law School and his son, Joshua Denbeaux, using solely Department of Defense data, compiled a report illustrating how the CSRT proceedings actually transpired.³¹ Among the most alarming findings are:

(1) The government did not produce any witnesses in any hearing;³²

(2) The government did not present any documentary evidence to the detainee prior to the hearing in 96% of the cases,³³

Journal, Feb. 26, 2007; *see also* Amnesty International, *Cruel and Inhuman: Conditions of isolation for detainees at Guantánamo Bay* (Amnesty International, Working Paper No. AMR 51/051/2007, Apr. 5, 2007), available at <http://web.amnesty.org/library/index/engAMR510512007>.

24. Paul Wolfowitz, Deputy Sec’y of Def, *Order Establishing Combatant Status Review Tribunal* (July 7, 2004), available at www.defenselink.mil/news/Jul2004/d20040707review.pdf; Gordon England, Sec’y of the Navy, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba* (July 29, 2004) [hereinafter England, *Implementation of CSRT*], available at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

25. Mark Denbeaux et al., *No-Hearing Hearings, CSRT: The Modern Habeas Corpus? An Analysis of the Proceedings of the Government’s Combatant Status Review Tribunals at Guantánamo* 10–11 (Seton Hall Public Law Research Paper No. 951245, 2006), available at <http://ssrn.com/abstract=951245>.

26. The government has always asserted, even after *Rasul*, that the detainees are not entitled to any rights or protections under the Constitution.

27. *See* England, *Implementation of CSRT*, *supra* note 24.

28. *Id.*

29. *Id.*

30. *See id.*

31. Denbeaux, *supra* note 25, at 2–3.

32. *Id.* at 2–3, 5, 21.

33. *Id.* at 2–3, 25.

- (3) The detainee’s only knowledge of the reasons the government considered him to be an enemy combatant was a conclusory summary of the classified evidence;³⁴
- (4) All requests by the detainees to inspect classified evidence were denied;³⁵
- (5) The government’s classified evidence that the detainee could not see was presumed reliable and valid;³⁶
- (6) All requests by the detainees for witnesses not detained in Guantánamo were denied;³⁷
- (7) Requests by the detainees for witnesses detained in Guantánamo were denied in 74% of the cases;³⁸
- (8) Requests by the detainees to produce documentary evidence were denied in 60% of the cases;³⁹
- (9) Instead of a lawyer, the detainee was assigned a “personal representative” who had no obligation of confidentiality and who, in most cases, met with the detainee only once (78%) for not more than 90 minutes (80%) only a week before the hearing (79%);⁴⁰
- (10) At the end of the hearing, the personal representative failed to exercise his/her right to comment on the decision in 98% of the cases;⁴¹
- (11) In cases in which the detainee alleged torture, the allegation was referred without consideration by the tribunal to DoD for investigation, and the tribunal went on to decide the case without waiting for the result of any investigation;⁴²
- (12) The tribunal’s decision was made on the same day as the hearing in 81% of the cases; and⁴³

34. *Id.* at 2, 5, 21.

35. *Id.* at 2.

36. Denbeaux, *supra* note 25, at 2, 19–20.

37. *Id.* at 2, 5, 26–29.

38. *Id.* at 3, 26–29.

39. *Id.* at 3, 30.

40. *Id.* at 3, 4, 14–18.

41. Denbeaux, *supra* note 25, at 3.

42. *Id.* at 39.

43. *Id.* at 3.

(13) In some cases, where the tribunal initially found the detainee to be “no longer an enemy combatant” (“NEC”), DoD ordered a new tribunal convened and the detainee was then found to be an enemy combatant.⁴⁴

Additionally, as proof that a detainee is an enemy combatant, the tribunal relied on the following as “evidence”: associations with organizations (members of which would be allowed in to the United States), possession of money, possession of rifles, use of a guest house overseas, possession of a Casio watch, and the wearing of olive drab clothing.⁴⁵

The most common occurrence in a CSRT proceeding was a detainee’s deep dismay at having to respond to bare-bones accusations allegedly supported by evidence that he was not allowed to see. The following excerpts from the transcript of the CSRT of detainee ISN# 1463 provide a glimpse of the utter inability of the detainee to respond, an event that occurred frequently in numerous other CSRTs:

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

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

Detainee: It’s not fair for me if you mask some of the secret information. . . . How can I defend myself?⁴⁶

Regarding the ability of the detainee to gather exculpatory evidence, the provision that allows detainees to call witnesses or request documents if “reasonably available” was used to deny their requests for such evidence in so many situations as to make the word “reasonable” ludicrous. As mentioned, the Seton Hall Report concluded that no witnesses outside Guantánamo were “reasonably available,” witnesses actually detained at Guantánamo were more often than not deemed not “reasonably available,” and mere documents were “reasonably available” in only 40% of the CSRTs.⁴⁷ For example:

In another case, 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. The aspects of the Bosnian proceedings which the

44. *Id.* at 3, 6, 37–39.

45. Mark Denbeaux et al., *Report on Guantánamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data 17* (Seton Hall Public Law Research Paper No. 46, 2006), available at <http://ssrn.com/abstract=885659>.

46. Denbeaux, *supra* note 25, at 21.

47. *Id.* at 28–30.

Tribunal considered were not the records that the detainee requested. Apparently, according to the Government, some records from a formal Bosnian trial are “reasonably available” but others are not. There was no explanation in the record to explain why the Government did not obtain the requested records. This detainee, like the others, was determined to be an enemy combatant.⁴⁸

Let me end this section with my own client’s story. Recently, I reread the CSRT materials in the case of Omar Khadr. His tribunal made this conclusion: “Because the unclassified evidence consisted only of the Unclassified Summary of the evidence and the FBI redacted information statement, the Tribunal relied exclusively on classified information in reaching its decision.”⁴⁹ Omar—just shy of age 18 at the time of his CSRT—declined to participate, and without any consideration for his age or competency, and despite the fact that he had been at Guantánamo since he was 16, the tribunal determined him to be an enemy combatant *in absentia*, based entirely on evidence that he never would have been allowed to see.

It is perhaps not surprising, but certainly disconcerting, that out of the 558 CSRT proceedings conducted, only 38 detainees were determined to be “non-enemy combatants.”⁵⁰ These are the proceedings that Congress approved when it passed the DTA and the MCA. It was not until after the detainees had been through their CSRTs that Congress concerned itself with some of the inadequacies of the procedures by adding a provision in the DTA requiring the tribunal to assess whether any statements had been procured by torture or coercion, though it still does not preclude such statements altogether.⁵¹ Too little, too late. The majority of the detainees had already been determined to be ECs through a process that required no such assessment. Furthermore, the DTA severely limits the scope of the judicial review of those past CSRTs such that the D.C. Circuit Court essentially has no role in determining whether any statements that are the basis of an EC determination were procured by torture.

There are around 340 men at Guantánamo today.⁵² The government has repeatedly stated that only 70–80 detainees will ever be charged with war crimes and face military commissions.⁵³ But even if they are acquitted, they will not necessarily be released because they are still “enemy combatants” pursuant to their CSRT determination, and therefore subject to detention—young Omar included. Thus, all of the men at Guantánamo face the possibility of life imprisonment on account of their “enemy combatant” status—a status that resulted from the procedures and proceedings I have just described. Now, answer these questions: how much due

48. *Id.* at 33.

49. Attachment to Declaration of James R. Crisfield Dated Sept. 14, 2004, Unclassified Summary of Basis for Tribunal Decision, *reprinted in* Transcript of Record of the Combatant Status Review Tribunal of Omar Khadr, O.K. v. Bush, 377 F. Supp. 2d 102 (D.D.C. 2005) (No. Civ.A.04-1136 (JDB)).

50. Denbeaux, *supra* note 25, at 39.

51. DTA § 1005 (b)(1).

52. Josh White & Joby Warrick, *U.S. to Allow Key Detainees to Request Lawyers*, WASH. POST, Sept. 28, 2007, at A01.

53. Vince Crawley, *Bush Signs Military Commissions Act to Try Terrorist Suspects*, USINFO.STATE.GOV, Oct. 16, 2006; Jim Garamone, *Bush Says Military Commissions Act Will Bring Justice*, American Forces Press Service, Oct. 17, 2006; *Terrorism and the Law: In Washington, a Need to Right Wrongs*, (July 15, 2006).

process should be required in these circumstances, and did Congress get it right by approving a process that had little or no such protections, and that resulted in proceedings that even Kafka couldn't imagine?

IV. THE "ARBs"

The Administrative Review Boards ("ARBs") were established by the DoD on May 11, 2004 and implemented a few months later.⁵⁴ An ARB is an annual proceeding provided to a Guantánamo detainee to determine whether he should continue to be detained, be transferred to the custody of another country, or be released despite his "enemy combatant" status.⁵⁵ The board assesses whether the detainee continues to "pose a threat" to the U.S. or its allies and whether there are "other factors bearing upon the need for continued detention."⁵⁶ "Pose a threat" is not defined in the implementing order and "other factors" may include, but are not limited to, the likelihood that the enemy combatant may be subject to trial by military commission and whether the enemy combatant is of continuing intelligence value.⁵⁷ Thus, even if the detainee is no longer dangerous, his detention can continue in the harshest of conditions merely because he *may* know something. This is a fairly expansive reach of executive power and one likely not seen since the internment of Japanese-Americans during World War II. Moreover, this reach is contrary to the Supreme Court's holding in *Hamdi v. Rumsfeld*, in which Justice O'Connor stated unequivocally, "[w]e agree that indefinite detention for the purpose of interrogation is not authorized."⁵⁸

To some degree, the ARBs suffered a similar fate as the CSRTs. That is, by passing the DTA and the MCA, Congress essentially approved of procedures that *had already been* applied to the Guantánamo detainees who had undergone one, if not two, ARBs prior to the passage of the DTA. There is, however, a significant distinction between the CSRTs and the ARBs. The CSRT hearing is a singular event, and the resulting status determination is essentially irreversible.⁵⁹ Once an enemy combatant, always an enemy combatant. The ARBs, on the other hand, occur on an annual basis. If Guantánamo continues to function as it currently does, the detainees will be subject to more such ARB reviews. Yet, despite the likelihood of future ARBs and the glaring contradiction between the ARB order and the *Hamdi* holding, Congress did not see fit to change the ARB procedures or purpose

54. Paul Wolfowitz, Deputy Sec'y of Def. OSD Order 06942-04, *Administrative Review Procedures for Enemy Combatants in the Control of the Dep't of Def. at Guantánamo Bay, Cuba* (May 11, 2004) [hereinafter *Deputy Sec'y Def. OSD Order*], available at www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf; Gordon England, Secretary of the Navy Designated Civilian Directive, *Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba* (Sept. 14, 2004) [hereinafter *Sec'y of Navy Civilian Directive*], available at <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf>.

55. *Deputy Sec'y Def. OSD Order*, *supra* note 54; *Sec'y of Navy Civilian Directive*, *supra* note 54.

56. *Deputy Sec'y Def. OSD Order*, *supra* note 54, at 7.

57. *Id.* at 1-2.

58. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

59. MARGULIES, *supra* note 19, at 169. The DoD has only recently decided to redo the CSRT of one detainee and is considering redoing the CSRTs of other detainees in response to a court order requiring the Government to produce information relating to the detention. See William Glaberson, *U.S. Mulls New Status Hearings for Guantánamo Inmates*, N.Y. TIMES, Oct. 15, 2007, at A16.

in the DTA to reflect this ruling. Thus, men can continue to be detained on account of their potential intelligence value. In a positive move, however, Congress included a provision in the DTA requiring future ARBs to assess whether any statement derived from or relating to the detainee was obtained as a result of coercion.⁶⁰ Yet, it does not preclude such a statement from being considered by the board in determining whether the detainee should be released.

Notwithstanding these features that seemingly make the ARBs more reasonable than the CSRTs, the results of the past ARBs are disturbing and worth reviewing. These results do not demonstrate that the DoD took the ARBs seriously, that the procedures were applied fairly, or that they will be applied fairly in the future. For example, the ARB regulations require that a detainee be provided notice and a written unclassified summary in advance of the board proceeding.⁶¹ Given the legal concept of “notice,” one might expect that “reasonable” notice is required under ARB regulations. Yet some of my former Kuwaiti clients relayed to me that they received notice only one or two days prior to their impending ARB. Further, they all relayed to me that they never received official notice of the outcome of their ARBs though they were told by their interrogators or guards that they would “continue to be detained.” Despite these facts, eight of my original twelve Kuwaiti clients have been released.⁶² Of the twelve, eleven were determined to be enemy combatants, as one was released before the CSRTs and ARBs were even created. Seven were released many months after their first and second ARBs, and four who are supposed to return home soon had their last ARB over a year ago. None of my former clients were ever told that their ARB had resulted in a determination that they were no longer dangerous or that they had no intelligence value.

More significantly, the ARBs have no authority to actually make the determination whether the individual before them should continue to be detained, transferred, or released. The following exchange illustrates the insignificance of the ARBs:

Detainee: There is question [sic], when will you give me the answer?

Presiding Officer: What we do is, we will make a recommendation to the Designated Civilian Official in Washington, D.C. At this point I cannot tell you how long it will take. It is an administrative process, it could take a week, a month, a year, I don't know. I hope it wouldn't be a year but the time it would take is uncertain.⁶³

60. DTA § 1005 (b)(1).

61. *Deputy Sec'y Def. OSD Order*, *supra* note 54, at 5.

62. Brief to the United States Supreme Court on writ of certiorari at ii, n1, 15, *Al Odah v. United States*, No. 02-CV-828 (CKK) (D.D.C. Aug. 25, 2007); *see also* http://www.kuwaitifreedom.org/guantanamo_bay_prisoners/iraq_prisoners_abuse.php; <http://jurist.law.pitt.edu/paperchase/2006/09/two-more-kuwaitis-set-for-release-from.php>

63. Unclassified Summary of Administrative Review Board Proceedings for ISN 228, ARB Transcript Set 2, 585–768, 689 (Mar. 3, 2006), *available at* http://www.dod.mil/pubs/foi/detainees/csrt/ARB_Transcript_Set_2_585-768.pdf.

Thus, a civilian official, far from and perhaps long after the actual process, reads the record and the ARB's recommendation. Despite a recommendation for continued detention or release, the official has the authority, without ever having met the detainee, to determine whether the detainee was telling the truth or lying during the proceeding and can ignore the ARB recommendation. Other factors which might be irrelevant to whether the detainee poses a threat to the U.S.—such as an ongoing political negotiation between the U.S. and the detainee's home country—might motivate the official to ignore the recommendation. Thus, this “administrative” determination may subject the individual to continued detention in conditions the DoD has likened to U.S. maximum security prisons, for convicted felons, despite the fact that the individual has never been charged with any crime and was subject to an inadequate process that landed him there in the first place.

More significantly, the ARBs exemplify the Brzezinski phenomena—that is, the vagueness of the “war on terror” has created a fear allowing us to view an extremely broad scope of individuals as “the enemy.” These individuals are believed by default to be dangerous and, therefore, necessary to be detained in the “war on terror.” For example, in the case of Mesut Sen, ISN #296, the ARB found the following factors favored his continued detention:

- (1) The detainee is a Belgium [sic] citizen that admitted to traveling from Germany, through Holland, the United Arab Emirate, Pakistan, to Jalalabad, Afghanistan in September 2000;
- (2) The detainee traveled to Afghanistan with approximately 2000 to 2500 US dollars along with his Belgian passport;
- (3) The detainee's passport was taken for storage while at a Kandahar, Afghanistan guesthouse and he was given a new name;
- (4) The detainee was captured in a village near Peshar, Pakistan while trying to cross the border into Pakistan;
- (5) The detainee lived for nearly one year at a Taliban transit house in Jalalabad, Afghanistan;
- (6) The detainee had connections to Millis [sic] Gorous, as did his father;
- (7) The Belgium Government considers Milli Gorous to be an extremist group and it is therefore banned from having representatives on the official representative board for Muslims in Belgium;
- (8) The detainee was in possession of a Casio watch. The same model number of Casio watch found in the possession of the detainee has been frequently used in bombings that have been linked to al Qaida and other radical Islamic terrorist groups; and

(9) Emerging as a leader, the detainee has been leading the detainees around him in prayer. The detainees listen to him speak and follow his actions during prayer.⁶⁴

There is not a single allegation of a hostile act against the U.S. Yet factors such as traveling, having money, leading prayer, and having “connections” are considered to support the determination that this individual is dangerous and should continue to be detained. This is not an uncommon occurrence in ARB proceedings. For example, the following are factors taken from several different detainees’ ARBs that support continued detention:

The detainee traveled to Kabul, Afghanistan from Kazakhstan in September 2000.⁶⁵

The detainee’s travel route took him through Karachi, Islamabad, and Peshawar, Pakistan and through Kandahar, Afghanistan.⁶⁶

The detainee was in Afghanistan during the US bombing campaign.⁶⁷

The detainee stated he financed his own trip to Afghanistan.⁶⁸

The detainee seems to know another detainee well.⁶⁹

The detainee traveled to Afghanistan, via Iran, after September 11, 2001, with approximately 15,000 U.S. dollars.⁷⁰

While some ARB hearings do contain allegations of hostile acts and direct support of terrorism, a substantial number of the factors that allegedly support continued detention are merely activities thought to be suspicious, likely only so because the “perpetrator” is Muslim. Were we not so immersed in the “culture of

64. DEP’T OF DEFENSE, OFFICE FOR ADMIN. REVIEW OF THE DET. OF ENEMY COMBATANTS AT U.S. NAVAL BASE GUANTÁNAMO BAY, CUBA, UNCLASSIFIED SUMMARY OF EVIDENCE FOR ADMINISTRATIVE REVIEW BOARD IN THE CASE OF SEN. MESUT. 1046, 1046–47 (Jan. 25, 2005), *available at* http://www.dod.mil/pubs/foi/detainees/csrt/ARB_Factors_Set_2_1046-1160.pdf. Several detainees were accused of wearing a certain model of Casio watch as support for their terrorist activities.

65. DEP’T OF DEFENSE, OFFICE FOR ADMIN. REVIEW OF THE DET. OF ENEMY COMBATANTS AT U.S. NAVAL BASE GUANTÁNAMO BAY, CUBA, UNCLASSIFIED SUMMARY OF EVIDENCE FOR ADMINISTRATIVE REVIEW BOARD IN THE CASE OF KERIMBAKIEV, ABDULRAHIN 1046, 1088 (May 3, 2005), *available at* http://www.dod.mil/pubs/foi/detainees/csrt/ARB_Factors_Set_2_1046-1160.pdf.

66. *Id.*

67. *Id.* at 1125.

68. *Id.* at 1130.

69. *Id.* at 1134.

70. DEP’T OF DEFENSE, OFFICE FOR ADMIN. REVIEW OF THE DET. OF ENEMY COMBATANTS AT U.S. NAVAL BASE GUANTÁNAMO BAY, CUBA, UNCLASSIFIED SUMMARY OF EVIDENCE FOR ADMINISTRATIVE REVIEW BOARD IN THE CASE OF KAMEL, ABUDLLAH 1161, 1169 (Apr. 27, 2005), *available at* <http://wid.ap.org/documents/detainees/abdullahkamel.pdf>.

fear,” it would be outrageous to consider the indefinite detention of an individual because he traveled abroad and was wearing a certain type of watch. Or, as in the case of one of my former clients, because “[t]he detainee often complains about President Bush and the U.S. Government and stated that his ‘interrogator and her government are criminals.’”⁷¹ This man is still detained at Guantánamo. It would be laughable were it not so tragic.

V. CONCLUSION

The information I have just relayed is significant—not to merely suggest mischief by the Administration, the military, or Congress, though that has certainly occurred—but because we must look beyond the procedures themselves in order to assess the CSRTs and ARBs with a critical and clear view. As mentioned, these procedures, the actual proceedings, and resulting determinations, were approved by Congress *ex post facto*, particularly with respect to the CSRT status determinations. Given the circumstances surrounding how these individuals came to be at Guantánamo and the fact that the CSRTs and the ARBs potentially mean a lifelong sentence in extremely harsh conditions for many, shouldn’t these procedures and proceedings be of the highest standards? Shouldn’t they be chock full of due process guarantees to ensure that we have separated the real combatants from innocent civilians and that we are holding our real enemies? As Charlie Swift stated so compellingly in his keynote address, “[I]et us not just talk about what approach is allowed under law, but what approach America should take.”⁷²

Let us at least start by adhering to the Constitution our Founding Fathers created in a time of crisis and established as fundamental to our democracy. Let us live up to these standards and employ the principles that make this country our America.

71. DEP’T OF DEFENSE, OFFICE FOR ADMIN. REVIEW OF THE DET. OF ENEMY COMBATANTS AT U.S. NAVAL BASE GUANTÁNAMO BAY, CUBA, UNCLASSIFIED SUMMARY OF EVIDENCE FOR ADMINISTRATIVE REVIEW BOARD IN THE CASE OF AL KANDARI, FAIZ MUHAMMAD AHMED 1161, 1194 (Apr. 28, 2005), available at http://www.dod.mil/pubs/foi/detainees/csrt/ARB_Factors_Set_3_1161-1234_Revised.pdf#9.

72. Charles Swift, retired Lieutenant Commander, Keynote Address at the Texas International Law Journal Symposium: A Conference on the Military Commissions Act (Apr. 10, 2007).