

YOU HAVE THE BODIES¹

by Thomas P. Sullivan²

Introduction

Call him Rashid. In 2001, he was thirty-one years old, living in a major city in Saudi Arabia, with his wife and four children. He was a member of a local police department, with an unspotted seventeen-year work record. Before September 11, 2001, he was granted a two month leave of absence in order to travel to Afghanistan to assist in charitable work, in accordance with the teachings of his Muslim faith. A month later, in October 2001, while Rashid was working in a small Afghani town, our armed forces invaded. He and many other Arabs fled Afghanistan to Pakistan. He was taken into custody by Pakistan officials, and then turned over to United States armed forces.

As with the vast majority of the men held at Guantánamo Bay, Rashid was not captured on a battlefield, or with a weapon, or in a uniform, nor was he seized by U.S. forces, nor was there evidence that he had fought against our forces or the Northern Alliance, or had any connection to Al Qaeda or the September 11, 2001 attacks. He, as hundreds of other Arabs, was sold into captivity as an alleged terrorist in exchange for a cash bounty.

U.S. military regulations require that a hearing be held in the field close to the time and place of capture whenever doubt exists about a prisoner's

¹ In Latin, *habeas corpus* means "you have the body." The term has become shorthand for an order directing that a person in custody be brought before the court to determine the basis for the person's being held: "We command that *you have the body* of the prisoner brought before the court." Known as the "Great Writ," it may be traced to the 12th Century in England as a check on royal power, and was codified in English law in 1679. The original United States Constitution provides in an. I, §9, cl. 2: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

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status³ Military personnel wanted to hold these hearings for those who were taken into custody during the conflict in Afghanistan. Officials in the White House vetoed that standard practice; we do not know why, although some of us believe the reason was to avoid scrutiny of where the prisoners were captured and how they were treated during interrogations.

Together with hundreds of other Arab prisoners, Rashid was eventually transported to the military prison at Guantánamo Bay, Cuba. There are now two categories of prisoners: the handful who have been charged and are awaiting trial before military commissions, and the almost 400 others who have spent the last four or five years in virtual isolation in tiny cells, whom the government does not intend to charge or bring to trial. In this later category, *not a single one has had a hearing at which evidence has been presented to warrant his incarceration.* And given the current morass created by the Congress and courts, described below, it is unlikely that will occur within the foreseeable future.

Most of the prisoners at Guantánamo Bay are represented by American lawyers who have volunteered their services *pro bono publico*. The majority have obtained their clients through the Center for Constitutional Rights in New York City, a not for profit organization devoted to civil rights, who received written requests for legal representation of prisoners from family members, as "next friends" of their husbands, sons, siblings, etc. Several years ago, a few of my partners and I volunteered to assist, and we have come to represent eighteen men, from Iraq, Libya, Saudi Arabia and Yemen.

When reading this, imagine that you too had volunteered your services.

Your Bizarre Initiation

Having received the names and prisoner identification numbers of your new "clients"—you haven't yet met or spoken with them or anyone on their behalf—you contact the point person at the Department of Justice and identify your clients. You thereupon enter a bureaucratic maze. Before being permitted to write or visit your clients, you must first obtain a "secret" security clearance,

³ Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, U.S. Army Regulation 190-8 (1997).

a process which involves the FBI, and usually consumes months. When this is accomplished, you receive a telephonic briefing by a DOJ representative, during which you are cautioned not to discuss the case in a room unless the blinds are drawn (my office is on the forty-first floor with an unimpeded view of Lake Michigan), to move offices when discussing the case, and similar admonitions reminiscent of a John le Carré spy novel. You must sign a lengthy protective order acknowledging, among other things, that it is a serious criminal violation to reveal anything you are told by your client without having the information written and cleared through a screening procedure described below.

With that, you are qualified to visit the "secure facility" near Washington, D.C., to view classified material relating to your client. You nervously read the contents, then alternate between amazement and amusement as you realize that not only is there little or nothing very secret in the files, but that it's often only the statements the prisoner he himself made when questioned by U.S. personnel, with innocent explanations as to why, for example, he was present in Afghanistan or Pakistan, and what he was doing before being taken into custody.

To capture in a single word the process of obtaining permission to view the alleged classified evidence and visit a client - well, it's weird - and the most intriguing aspect is that the DOJ lawyers, although polite and usually accommodating, appear to take this maximum-security process seriously, as though the future of the free world hung in the balance. But on the other hand, we are taught in law school to represent our clients' attitudes and interests diligently, no matter how bizarre they may seem to us.

You're now ready to visit your client at the Cuban-based prison. But before you embark on that adventure, let me explain why your new clients have remained imprisoned at Guantánamo Bay, many for four or five years, without having had any evidence produced to explain why they were brought there in the first place, or why they are still being kept there at taxpayer expense. To follow this will require an investment of your time and attention. What follows is factually accurate, hence it may help if you repress your innate sense of incredulity while you struggle through this

tangled legal odyssey.

The Procedural Morass Created for Your Clients by the Courts and Congress

It is my opinion that most American lawyers would be appalled to learn how the prisoners were brought to Guantánamo and why they are still "detained" there without having had even the most rudimentary kind of hearing at which evidence was produced to justify their confinement. Those of us who have been raised in the United States and schooled in law assume that we do not indefinitely imprison citizens of countries with whom we are not at war, unless they have been indicted for or convicted of serious crimes, or at the least that evidence has been presented in open court to establish that they are dangerous, or that some other justification has been established in a judicial proceeding. The reality at Guantánamo is just the opposite.

In brief outline, here is what happened to each prisoner, and what has formed the basis for his incarceration for these five years:

Prior to the time you came to represent your prisoner-clients, other volunteer lawyers had filed petitions for writs of habeas corpus in the United States District Court for the District of Columbia on behalf of men held in the prison. The petitions were based on claims that the prisoners were being held in custody in violation of their rights. The various bases for these claims included:

(1) Provisions of the federal Constitution, including the so-called Suspension Clause (Art. I, § 9, cl. 2), which provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or Invasion the public Safety may require it," and the Due Process Clause of the Fifth Amendment;

(2) The federal habeas corpus statute, which grants federal district courts "within their respective jurisdictions" authority to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2241 (a) and (c)(3); and

(3) Other federal statutes and international conventions and treaties

to which the United States is a signatory.

The government moved to dismiss the petitions. After briefing, a District Court Judge granted the motions on the ground, *inter alia*, that "aliens detained outside the sovereign territory of the United States [may not] invoke[e] a petition for a writ of habeas corpus." *Rasul v. Bush*, 215 F. Supp. 2d 55, 68 (D.D.C. 2002). The Court of Appeals for the District of Columbia affirmed, on the same ground—"aliens in military custody who have no presence in 'any territory over which the United States is sovereign'" have no right to sue in United States courts. *Al Odah v. United States*, 321 F. 3d 1134, 1144 (D.C. Cir. 2003).

In June 2004, the Supreme Court reversed (six to three) in *Rasul v. Bush*, 542 U.S. 466 (2004). In the majority opinion, Justice Stevens observed that the lease between Cuba and the United States of the forty-five square miles that make up the Guantánamo Bay Naval Base provides it will continue so long as the United States shall not abandon the naval station, hence the base is "a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'" *Id.* at 475. "By the express terms of its agreements with Cuba, the United States exercises 'complete jurisdiction and control' over the Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses." *Id.* at 480. Justice Stevens continued:

Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. Section 2241, by its terms, requires nothing more. We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantánamo Bay Naval Base. *Id.* at 483-84 (citations and footnotes omitted).

The Court also ruled that the District Court had jurisdiction to hear the petitioners' non-habeas statutory claims. *Id.* at 484-85. The Court reversed and remanded "for the District Court to consider in the first instance the merits of petitioners' claims." *Id.* at 485.

The *Rasul* decision was announced on June 28, 2004. Nine days later, the Department of Defense put into place a new, unique administrative process, to be held before panels named "Combatant Status Review Tribunals" (CSRTs).⁴ It was later learned that, before the CSRTs were called into session, every prisoner—without his knowledge or participation—had already been determined in an *ex parte* proceeding to be an enemy combatant. We have yet to learn who was involved in making the findings, how the decisions were arrived at, whether any evidence was presented, and whether rules of evidence were used.⁵

The CSRT hearings were held between August 2004 and early 2005, for the purpose of determining whether the prisoners had been correctly classified as "enemy combatants" in the prior secret proceedings. Out of nearly 600

⁴ Memorandum for the Secretary of the Navy from Paul Wolfowitz, Deputy Sec'y of Defense, U.S. Dep't of Defense (July 7, 2004); Memorandum for Secretaries of the Military Departments from Gordon R. England, Sec'y of the Navy, U.S. Dep't of Defense regarding Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba (July 29, 2004). The CSRT Procedures have since been amended twice. *See* Memorandum for Secretaries of the Military Departments from Gordon R. England, Sec'y of the Navy, U.S. Dep't of Defense regarding Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba (July 14, 2006); DEPT OF DEFENSE OFFICE FOR THE ADMIN. REVIEW OF THE DETENTION OF ENEMY COMBATANTS (OARDEC), OARDEC INSTRUCTION 5421.1 ON PROCEDURE FOR REVIEW OF "NEW EVIDENCE" RELATING TO ENEMY COMBATANT (EC) STATUS (May 7, 2007).

⁵ The July 29, 2004 Memorandum referred to in the preceding footnote states: "Each detainee whose status will be reviewed by a Tribunal has previously been determined, since capture, to be an enemy combatant through multiple levels of review by military officers and officials of the Department of Defense." Memorandum for Secretaries of the Military Departments from Gordon R. England, Sec'y of the Navy, U.S. Dep't of Defense regarding Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba (July 29, 2004), Encl. 1. The memorandum defines an "enemy combatant" as "an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Id.*

prisoners, over ninety-three percent were found by the CSRTs to be properly classified as enemy combatants.⁶ I describe more fully below the manner in which the CSRTs were conducted. To use the vernacular, I believe they were kangaroo courts, a complete sham, with not even a tenuous relation to what lawyers trained in the United States regard as due process of law.

While the CSRTs were in progress, lawyers for the prisoners pursued efforts to arrange the habeas corpus hearings the Supreme Court authorized in *Rasul*. However, a number of obstacles impeded those efforts.

First obstacle: All of the habeas cases in the District Court were stayed pending cross appeals from conflicting rulings by District Court judges as to whether the prisoners had rights cognizable under the federal habeas corpus statute or treaties, and the other non-habeas claims asserted.⁷ The threshold question presented to the Court of Appeals was whether, although the prisoners had a right to file their petitions as the Supreme Court held in *Rasul*, there was any relief to which they were entitled. Briefs were filed and oral arguments held.

⁶ Mark Denbeaux, et al., *No-Hearing Hearings: CSRT: The Modern Habeas Corpus?* 39 (2006). In three cases in which a CSRT found the prisoner had not been or was no longer an enemy combatant, the CSRT Director ordered that the case be reheard before a new tribunal, conducted *ex parte*, without the knowledge or presence of the prisoner. In two of these "rehearings," the prisoner was found to be an enemy combatant. In the other rehearing, the second CSRT exonerated the prisoner, whereupon a third was ordered in which he was found to be an enemy combatant. *Id.* at 37-39.

⁷ Compare *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) with *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). In the *Detainee Cases*, Judge Joyce Helen Green concluded that the prisoners had stated claims for relief, and that the CSRT procedures "deprive the detainees of sufficient notice of the factual bases for their detention and deny them a fair opportunity to challenge their incarceration," 355 F. Supp. 2d at 472, and improperly allow for the use of statements obtained through torture and coercion, *id.* at 472-74. In the *Khalid* case, Judge Richard I. Leon ruled that the prisoners had no right to relief under any federal statute or treaty. 355 F. Supp. 2d at 323, 326-27. In the *Khalid* case, Judge Richard J. Leon ruled that the prisoners had no right to relief under any federal statute or treaty. 355 F. Supp. 2d at 323, 326-27.

Second obstacle: Before the Court of Appeals rendered its decision on the cross appeals, Congress enacted by a substantial majority vote in both branches—the Detainee Treatment Act of 2005 (DT A), which the President signed into law on December 30, 2005.⁸ The DTA—a congressional effort to reverse *Rasul* contained the following provisions:

(1) No federal court shall have jurisdiction to hear an application for writ of habeas corpus or any other action relating to any aspect of the detention of an alien at Guantánamo Bay, Cuba, DTA § 1005(e)(1);

(2) The Court of Appeals for the District of Columbia shall have "exclusive jurisdiction to determine the validity of any final decision of a [CSRT] that an alien is properly designated as an enemy combatant," DTA § 1005(e)(2)(A); and

(3) "The jurisdiction of the [Court of Appeals] ... shall be limited to the consideration of (i) whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States," DTA § 1005(e)(2)(C)(i)-(ii).

The Court of Appeals ordered further briefing and arguments with respect to the impact of the DT A on the pending cross appeals.

In the meantime, in another case pending before the Supreme Court involving a Guantánamo Bay prisoner, the government asserted that the DT A precluded the prisoner from proceeding with his challenge to the legality of a military commission before which he was charged. In June 2006, a majority of the Supreme Court held that the DTA was *not retroactive*. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2762-69 (2006) (5-3 decision) (Roberts, C.J., not

⁸ Pub. L. No. 109-148, 119 Stat. 2680 (2205).

participating). This ruling meant that the DT A did not affect the rights of the Guantánamo Bay habeas petitioners who had filed before December 30, 2005. The Court also ruled that the military commission before which Hamdan was to be tried did not comply with the Uniform Code of Military Justice and Geneva Conventions signed by the United States in 1949. *Hamdan*, 126 S. Ct. at 2786. This settled the DTA issues before the Court of Appeals, which refocused the issues on the original cross appeals, mentioned above.

Meanwhile, although the habeas cases pending in the District Court continued to be stayed pending a ruling by the Court of Appeals, the prisoners' lawyers were permitted to visit their clients at the Guantánamo Bay prison and file various motions relating to procedural matters.

Third obstacle: Before the Court of Appeals ruled, Congress acted again, this time through passage of the Military Commissions Act of 2006 (MCA), which the President signed into law on October 17, 2006.⁹ In response to the *Hamdan* ruling, the MCA established new military commissions to hear charges brought against the prisoners under the Code of Military Justice. MCA § 3(a)(1). As to the holding that the DTA was not retroactive and therefore did not affect the prisoners' filing of habeas petitions, the MCA explicitly provided that its terms "shall apply to all cases, without exception, pending on or after the date of the enactment of the Act." MCA, § 7(a). The MCA also provided that no judge "shall have jurisdiction to hear an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination," or "any other action ... relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement"; and that the provisions of the DT A regarding the scope of appeals from decisions of the CSRTs included appeals by all aliens detained by the United States.¹⁰

⁹ Pub. L. 109-366, 120 Stat. 2600 (2006).

¹⁰ MCA § 7(a). Thus, the MCA expanded the proscriptions on the use of habeas corpus, and appeals from *CSRT* determinations, beyond alien prisoners held at Guantánamo Bay to those held anywhere. An amendment introduced in the Senate to delete this "habeas stripping" provision failed by

After receiving further briefing and arguments relating to the effect of the MCA on the pending appeals, the Court of Appeals rendered its decision in February 2007. *Boumediene v. Bush*, 476 F. 3d 981 (D.C. Cir. 2007).¹¹ All three judges ruled that the MCA was retroactive and therefore applicable to the prisoners' habeas cases. The Court then turned to the question "whether the MCA, in depriving the courts of jurisdiction over the detainees' habeas petitions, violated the Suspension Clause of the Constitution." *Id.* at 988.

The two-judge majority held the controlling case to be *Johnson v. Eisentrager*, 339 U. S. 763 (1950),¹² from which the majority quoted:

We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy

a vote of 51 to 48. S. Arndt. 5087, 109th Congo (2006) (Sept. 28, 2006).

¹¹ The opinions are a legal historian's delight. In an attempt to trace the historical reach of the writ of habeas corpus, both the majority and the dissenter focused on two habeas corpus cases decided by British courts in the 18th century, one involving three Spanish seamen who sailed on a British vessel with a promise of wages on arrival in England, but who instead were turned over by the captain as prisoners of war, *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779) , and the other about a citizen of Sweden, a crew member on a British merchant ship, who was taken prisoner by a French privateer, then transferred to another French ship which was captured by a British ship, and then taken to Liverpool, where he was imprisoned, *Rex v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759); and an 1813 decision of the Supreme Court of Pennsylvania involving a British resident of Philadelphia, declared an "enemy alien" during the War of 1812, and imprisoned after failing to comply with a federal marshal's order to relocate, *Lockington's Case*, Bright. (N.P.) 269 (Pa. 1813). Also discussed are Blackstone, Robert Chambers, Samuel Johnson, Lord Mansfield, and other legal notables of yore. *Boumediene*, 476 F.3d at 988-91; *id.* at 1000-04 (Rogers, J., dissenting).

¹² In *Eisentrager*, the petitioners, who filed petitions for writs of habeas corpus in the District of Columbia District Court, were German nationals who had been tried before a United States Military Commission held in Nanking, China after the end of World War II. They were convicted of ordering or permitting military activities against the United States by lending intelligence assistance to Japanese military forces after Germany's surrender but before Japan's surrender. They then were sent to Germany where they were imprisoned in a facility operated by the United States government.

who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. *Id.* at 990.

The majority held that under the terms of the 1903 lease, Cuba retained sovereignty over the leased land, hence Guantánamo Bay is not United States territory. *Id.* at 991-92. The Court concluded, "The law of this circuit is that a 'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.'" *Id.* at 992. The Court affirmed dismissal of the prisoners' District Court actions.

The dissenting judge argued that the Supreme Court's ruling in *Rasul* was controlling:

Prior to the enactment of the MCA, the Supreme Court acknowledged that the detainees held at Guantánamo had a statutory right to habeas corpus. *Rasul v. Bush*, 542 U.S. 466, 483-84 (2004). The MCA purports to withdraw that right but does so in a manner that offends the constitutional constraint on suspension. The Suspension Clause limits the removal of habeas corpus, at least as the writ was understood at common law, to times of rebellion or invasion unless Congress provides an adequate alternative remedy. The writ would have reached the detainees at common law, and Congress has neither provided an adequate alternative remedy, through the [DTA], nor invoked the exception to the Clause by making the required findings to suspend the writ. The MCA is therefore void and does not deprive this court or the district courts of jurisdiction. *Id.* at 995 (Rogers, J., dissenting).

Regarding the CSRT process for reviewing the determinations that the prisoners were "enemy combatants," she wrote, "An examination of the CSRT procedure and this court's CSRT review powers reveals that these alternatives are neither adequate to test whether detention is unlawful nor directed toward releasing those who are unlawfully held." *Id.* at 1005.¹³ She concluded that the court should remand the cases to the District Court with

¹³ The dissenting judge identified the many deficiencies in the CSRT procedures. *Boumediene*. 476 F. 3d at 1004-07; see also *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 468-78 (D.D.C. 2005); discussion *infra* pp. 9-12.

orders to follow the procedures outlined in the habeas corpus statute. *Id.* at 1011.

In April 2007, by a vote of six to three, the Supreme Court denied the prisoners' petitions for writs of certiorari. *Boumediene v. Bush*, 127 S. Ct. 1478 (2007). Justices Stevens and Kennedy explained that their votes to deny certiorari were based on "traditional rules governing our decision of constitutional questions, and our practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus." *Id.* at 1478 (citations omitted). They were apparently referring to the appeal procedures from the CSRTs to the Court of Appeals provided for in the DTA, made retroactive to pending cases by the MCA. The two Justices cautioned, "Were the Government to take additional steps to prejudice the position of petitioners in seeking review in this court, 'courts of competent jurisdiction,' including this Court, 'should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised. ", *Id.* (citations omitted).

A glimmer of hope finally appeared on June 29, when the Supreme Court granted the petition for rehearing and agreed to review the Court of Appeals; decision in *Boumediene*

Justices Breyer, Souter and Ginsburg dissented from the denial of certiorari, pointing out, among other reasons, that immediate review of the prisoners' claims "may avoid an additional year or more of imprisonment"; that if the prisoners have the right of access to habeas corpus in the federal courts, the Supreme Court "would then have to consider whether Congress' provision in the [DTA], providing for review in the Court of Appeals for the D. C. Circuit of those proceedings, is a constitutionally adequate substitute for habeas corpus"; and that in light of the Court of Appeals' ruling that the prisoners had no constitutional right to habeas corpus, "further percolation of the question presented [will not] offer elucidation as to either the threshold question whether petitioners have a right to habeas, or the question whether the DTA

provides a constitutionally adequate substitute." *Id.* at 1479-80 (Breyer, Souter, & Ginsburg, JJ., dissenting).

The effect of the Court of Appeals ruling, which is controlling at present, apparently restricts the rights of the prisoners to appeal to the Court of Appeals pursuant to the procedures specified in the DTA, in which the Court of Appeals will be limited to determining whether the CSRTs followed their own standards and procedures, with "a rebuttable presumption in favor of the Government's evidence," and whether the standards and procedures were consistent with applicable provisions of the Constitution and laws of the United States.¹⁴

A Brief Explanation of Your Clients' Combatant Status Review Tribunal and Administrative Review Board Hearings

The CSRTs consisted of a Tribunal President and three officers, the senior being denominated Tribunal President, none of whom was identified by name, rank, serial number or otherwise. The prisoners did not have their own lawyers. A "Personal Representative," also not identified except by that title, participated in the hearings. It was their function to advise and assist the prisoners in responding to the tribunals' inquiries. The Personal Representatives were functionaries of the tribunals. They were not lawyers, and did not act as the prisoners' advocates; they made no arguments on the prisoners' behalf, and sometimes made statements contrary to their interests. The CSRT regulations expressly provide that "no confidential relationship exists between the detainee and the Personal Representative."

Also present was a Recorder, whose identity was not disclosed. The regulations provide that the Recorder "has a duty to present to the CSRT such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into custody of U. S. or allied

¹⁴ Should the Court of Appeals rule that the CSRTs' status determinations were inconsistent with its specified standards and procedures, or with United States laws or the Constitution, a potential result is that the case will be remanded to the CSRTs for new hearings, resulting in further delay, and perhaps additional appeals to the Court of Appeals, before Supreme Court review may again be sought under customary rules of finality.

forces," and "[i]n the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also provide such evidence to the Tribunal." However, whatever evidence the Recorders accumulated about the prisoners was not revealed during the portions of the CSRT hearings which the prisoners were permitted to attend. Our clients' CSRT summaries and classified files contain no information about how the prisoners were taken into custody, or evidence to show whether they were or were not enemy combatants. These portions of the Recorders' presentations, if they exist, were not made available either to our clients or to us.

During the first portion of the CSRT hearings, which the prisoners were allowed to attend, interpreters were present, who were required because most prisoners neither spoke nor understood English, the language in which the proceedings were conducted. The provision in the regulations, "The Tribunal is not bound by the rules of evidence such as would apply in a court of law," was superfluous, because no evidence was presented to the tribunal during the portion of the hearing attended by the prisoner, save only for the prisoners' own statements, as described below. The "allegations" (sometimes referred to as "accusations") were read—a few terse declarative sentences—and the prisoners were asked to respond. No evidence or witnesses were presented in support of the charges, hence the prisoners had no opportunity to confront witnesses or view documentary evidence. The tribunals were permitted to consider evidence obtained through torture¹⁵ and classified evidence to which the prisoners had no access.¹⁶ With rare exceptions, the

¹⁵ See *Boumediene v. Bush*, 476 F.3d at 1006 (Rogers, J., dissenting); *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 472-74; see also DTA, § 1005(b)(1)(A)(B) (authorizing CSRTs and ARBs to "assess- (A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and (B) the probative value (if any) of such statement").

¹⁶ "The CSRT reviewed classified information when considering whether each detainee presently before this Court should be considered an 'enemy combatant,' and it appears that all of the CSRT's decisions substantially relied upon classified evidence. No detainee, however, was ever permitted access to any classified information nor was any detainee permitted to have an advocate review and challenge the classified evidence on his behalf." *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 468. The rules implementing the

prisoners were not afforded an opportunity to call witnesses, and in the few instances in which that was permitted, the witnesses were fellow inmates.

As illustrated by the examples given below, if the prisoners asked the tribunal for details of the charges which were stated in short, conclusory form—the President responded that he/she neither prepared nor had information about them. The following examples are taken verbatim from four CSRT transcripts, produced in the habeas cases or under the Freedom of Information Act:¹⁷

Recorder [reading the allegation]: While living in Bosnia, the Detainee associated with a known Al Qaida operative.

Detainee: Give me his name.

Tribunal President: I do not know.

Detainee: How can I respond to this?

Recorder [reading the allegation]: Detainee is a close association (sic) with, and planned to travel to Pakistan with, an individual who later engaged in a suicide bombing. [Name] possibly is the Elalanutus suicide bomber.

CSRTs, enacted by the Secretary of the Navy, provide that detainees may view only the unclassified information relevant to their cases, and that detainees shall not be allowed to attend proceedings involving "testimony or other matters that would compromise national security if held in the presence of the detainee." Memorandum for Secretaries of the Military Departments from Gordon R. England, Sec'y of the Navy, U.S. Dep't of Defense regarding Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba (July 29, 2004). Encl. 1, at 4; *see also* Memorandum for Secretaries of

¹⁷the Military Departments from Gordon R. England, Sec'y of the Navy, U.S. Dep't of Defense regarding Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba (July 14, 2006), Encl. 1, at 4.

Other examples may be found in Judge Green's opinion in *In re Guantánamo Detainee Cases*. 355 F. Supp. 2d 443.468-71 (D.D.C. 2005).

Detainee: Where are the explosives? What bombs?

Recorder to Tribunal President: Sir, I don't believe I can answer in this session.

Tribunal President: I certainly cannot answer because this is the first time I have seen this evidence. It is my understanding that anything remaining concerning this individual [name] is in the classified session.

When the Tribunal President explained Exhibit R-2 [the FBI redaction letter], the Detainee stated if they are classified, what if they are incorrect? The Detainee was concerned over his fate if the documents presented were not correct. He wanted to see the classified documents.

Tribunal President: The classified information cannot be shown to you due to national security reasons. By you participating today, we want to hear your story as well (sic). We haven't seen any information prior to this. We will take everything into consideration.

Tribunal President: As to the second request, you asked us to check with the Saudi police in [city]. It could prove you were on a humanitarian mission while on leave.

Detainee: Yes.

Tribunal President: I denied that request as well, because an employer has no knowledge of what their (sic) employees do when they are on leave.¹⁸

¹⁸ This is an excerpt from the transcript of the hearing involving my client, whom I've named Rashid.

The prisoners were often asked for answers to the allegations, but it was a "one way street," because no information or evidence was adduced by the tribunal to support or explain the allegations. In short, the proceedings involved nothing more than the Recorders reading terse, unsupported accusations, followed by requests to the prisoners to respond if they chose, and examinations by tribunal members about the prisoners' explanations. When these exchanges ended, the open sessions were closed, the prisoners removed, and the CSRTs went into closed hearings. We have seen no transcripts or records of those sessions.

Each year since the CSRTs were concluded, hearings as to each prisoner have been held by an Administrative Review Board, known as ARBs.¹⁹ The prisoners were allowed to attend, with an assigned Assisting Military Officer—Board functionaries, not advocates for the prisoners—but without personal lawyers. As in the CSRT hearings, the prisoners were permitted to make any statement they wished. As in the CSRTs, no evidence was produced by the Board, and after the prisoners were removed, the Board went into a secret closed session. The ARBs do not have authority to change CSRT determinations, but may recommend whether an enemy combatant should be further detained, transferred or released. Designated Civilian Officers, appointed by the Secretary of Defense, review ARB recommendations and decide whether to release, transfer or continue to detain the prisoners.²⁰

¹⁹ Memorandum from Gordon R. England, Sec'y of the Navy, U.S. Dep't of Defense regarding Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba (September 14,2004). The ARB procedures have since been revised. *See* Memorandum for Secretaries of the Military Departments from Gordon R. England,

²⁰Sec'y of the Navy, U.S. Dep't of Defense regarding Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (July 14,2006).

Memorandum from Gordon R. England, Sec'y of the Navy, U.S. Dep't of Defense regarding Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba (September 14,2004), Encl. 3 (3)(g)-(h); *see also* Memorandum for Secretaries of the Military Departments from Gordon R. England, Sec'y of the Navy, U.S. Dep't of Defense regarding Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo

To summarize: In both the CSRT and ARB proceedings, unrepresented prisoners had the burden of refuting unsupported, hearsay allegations from undisclosed sources, including evidence obtained through coercion, and classified evidence, which the prisoners did not hear or see, which the tribunals presumed to be true.

Some may believe that these glaring deficiencies in due process will be corrected when the prisoners are brought before the military commissions established in the MCA, which provides many of the protections embodied in the Federal Rules of Criminal Procedure. But here's the hitch, and it's fraught with irony: the government has announced that only a tiny fraction of the prisoners (so far ten) will be charged and tried before the commissions, namely those who have been publicly described by our government officials as "the worst of the worst."²¹ The vast majority of the prisoners now being held at Guantánamo Bay, numbering in the hundreds, will not be charged and brought to trial before the commissions, but instead will continue to languish in their cells without hope of release except through the grace of their jailers.²²

Your Visit to the Prison

Let us return now to your representation of prisoners at the Guantánamo Bay Naval Base prisons.²³ I've been there four times in the past fifteen Bay, Cuba (July 14,2006), Encl. 3 (3)(g)-(h).

²¹ Consider, however, what happened to the first commission case involving David Hicks. He pled guilty, was sentenced to seven years, and was then returned to his native Australia, and is expected to serve only nine months before being released. Josh White, *Australian's Guilty Plea Is First at Guantánamo*, WASH. POST, Mar. 27, 2007, at A01.

²² To make matters worse, prisoners acquitted by the military commissions may be held thereafter as "enemy combatants." Manual for Military Commissions, Jan. 18, 2007, Chapter XI, Rule 1 101 (b)-(c) (implementing the Military Commissions Act of 2006).

²³ The denial of certiorari in *Boumediene*, discussed above, which requires the MCA procedures to control for the present, has triggered another problem for the prisoners and their lawyers: the government has moved to dismiss all of

months. To get there, you fly to Ft. Lauderdale, and then continue on to the base on one of two small prop plane carriers, Air Sunshine or Lynx Air. The planes have a dozen or so seats, but no toilet on board. When you check in for the three and one-half hour flight, you're weighed along with your luggage to determine if the plane will be too heavy to fly all the way to the base without a stop to refuel at Exuma in the Bahamas. The plane may not enter Cuban air space, so you fly to the easternmost end of the island, make a right turn and descend to the airport on the leeward side of the base. There is no prison on that side of the bay, and unsupervised movements are permitted, but amenities such as a restaurant or grocery store are scarce. You stay at the former CBQ - combined bachelors' quarters - at an attractive government room rate of \$20 per night. A kitchenette and four twin beds furnish each two room "suite." There are so few visitors that each lawyer is usually housed alone, although recent construction on the CBQ has required some doubling up.

The following morning, a bus takes you and your interpreter (the usual fee is \$1,000 per day plus expenses) to the landing at the bay, where a ferry loaded with cars and trucks waits to make the twenty-minute crossing to the windward side. Your fellow travelers are chiefly workers from the Philippines and Jamaica, and military personnel. In most places on this side you may move about only by bus or van, accompanied by members of the military Joint Task Force, which includes personnel from the Army, Navy and Marine Corps. No electronic devices are allowed, including Blackberries, cell phones and cameras. Women are advised in advance to wear long, loose fitting clothing.

On the first day of your visit, you are taken to an office to be photographed and given a clip-on badge, which you wear in the bus and at the prison but not in public places, and which you must return before you leave the windward side. You are driven to McDonald's to purchase food and drink for yourself, your interpreter and your clients (no meat). You may also have brought baklava, a popular mid-eastern sweet, best purchased from a

the pending habeas cases in the District Court, and is insisting that the prisoners' lawyers sign a new form of Protective Order, to be approved by the Court of Appeals, which imposes far greater restrictions upon the lawyers' ability to communicate with and visit their clients.

specialty vendor in Detroit. Your driver then takes you to the camp where your client is awaiting the meeting.

The prison is divided into a number of "camps," each of which is enclosed by wire fencing topped with razor sharp coils, and everything is double gated and securely locked. Soldiers proliferate, mainly young American men and women, looking serious and dressed in camouflage-patterned uniforms and combat boots, most carrying side arms or rifles.

You wait patiently outside the gate. The female lawyers don head scarves. The soldiers who police the entrance are polite and businesslike. One of them opens the gate and motions you and your interpreter in. Inside the compound, you observe that the soldiers' name tags are covered. A soldier runs a scanner over you, front and back with arms extended, looks through your wallet, reviews your papers, and confiscates items deemed inappropriate for lawyer visits such as news articles, books and magazines. He or she also takes anything that is considered usable as a weapon, for example, paper clips, staples, straws, combs. You are then escorted by armed personnel to a small, rectangular building that resembles the van of a semi-trailer. The soldier opens the door, you and your interpreter enter, and the door is shut and locked.

You see your client seated behind a table, one leg shackled to the floor. He is young, bearded, swarthy, and does not speak or understand more than a few words of English. If you haven't met before - and often even if you have - he suspects that you and your interpreter are secret agents for the U. S. government who have come to pry information from him. After traditional amenities, and repeated assurances that you are there to help him, you discuss the state of the legal and political efforts underway to have him and the others prisoners returned home. There is a problem here: there is no real news to report, at least no good news. The conversation consists chiefly of you trying to explain why no progress has been made to get a hearing before a tribunal that will require the government to explain why he and his fellow prisoners have been held in jail for five years.

You try to curry favor by offering McDonald's and baklava; both often go untouched. Your self-serving protestations of loyalty to him ring hollow. You

find it difficult if not impossible to respond to questions about why, when your government preaches liberty and fair dealing for all, it confines citizens of other countries, mostly Islamic, for years without hearings, and why your Congress and courts not only fail to afford relief, they affirmatively take steps to bar it.

At the end of the visit, your client expresses his sincere appreciation for your having come, and assures you he knows that not all Americans support the administration's repressive treatment of the men imprisoned at Guantánamo Bay. You are taken aback and embarrassed at being met with kindness and solicitude by a man whom your government has caged for years for no discernable reason. You promise to write and keep your client informed, and to continue working on his behalf to correct the injustices visited on him and his fellows. He responds with polite but understandable skepticism. The interview closes on this ambiguous note.

You are escorted back to the outside gates, where a soldier runs the scanner over you again and confiscates the notes you have taken. For you to have access to them later, and to use the information in court papers or share with your partners, a security officer must first read and approve them, a time-consuming process which, according to DOJ security personnel, results in the loss of the attorney-client privilege.

When you have finished with your interviews, you and your traveling companions return to Ft. Lauderdale via the prop planes that brought you to the base, with time to reflect on the contradiction between the prisoners' plight and the Joint Task Force motto, prominently displayed throughout the base, "Honor Bound to Defend Freedom." You are a few days older, but without any greater understanding than when you came as to why our government is spending our money and using our armed forces to imprison your clients.

The Physical Conditions at Guantánamo Bay

Those who are inclined to belittle the descriptions of do-good lawyers who represent the prisoners would do well to visit the prison and see first hand

the conditions under which these men are held. Most are kept in 24/7 isolation, without proper medical attention, or decent food, or diversions such as radio, television, books, newspapers, magazines, or reading material other than the Quran. By design, most have no contact with fellow prisoners, and opportunities for exercise are limited. Most prisoners are housed in rectangular cubicles, actually small cages, measuring from six by eight to seven by ten feet, with a raised concrete slab and mattress for a bed, a wash basin and a toilet.²⁴ The walls are made of fine wire mesh which I am told impairs vision if looked through for extended periods. In most of the camps, physical contact among prisoners is prohibited, and oral communication is restricted to shouting to those celled nearby. In Camp Six the walls are not porous, resulting in total isolation. All movements of prisoners require two armed guards, with the prisoners chained hand and foot. Mail from home is spasmodic, often delayed for many, many months while being translated and censored for unauthorized content, and heavily redacted.

The Lawyers' Efforts to Right These Wrongs

The prisoners' lawyers have been working for years, so far without success, to obtain a minimum measure of due process of law for the men held at Guantánamo Bay. Their efforts are now concentrated chiefly in five areas:

First, the court battles continue, but how slowly and circuitously! To put it in mild terms, the four years of litigation involving the Guantánamo Bay prisoners has been frustrating in the extreme. It has been three years since the Supreme Court affirmed the prisoners' right to habeas corpus. But owing to the intervening congressional enactments of the DTA and the MCA, and court rulings, not a single habeas hearing has been held. Instead, we are

²⁴ During the 1950's, when I was a young lawyer representing indigent defendants in the Criminal Court of Cook County, an Assistant State's Attorney demanded a long sentence for a forlorn convicted defendant, whereupon the veteran judge asked rhetorically, "Mister prosecutor, have you ever done 30 days?" How would we react if we were compelled to sit for five hours (instead of five years) in a small bathroom with no one to talk with, no radio or TV, and nothing to read?

now forced to engage in a new round of appeals, this time from the obviously inadequate CSRT proceedings, even though we know in advance the odds are that our positions will again be rejected by the District of Columbia Court of Appeals.²⁵ Perhaps in a year or so we will be able to request the Supreme Court for review.²⁶

The men held at Guantánamo are entitled to a ruling by the Supreme Court on the fundamental questions of whether the Suspension Clause and other constitutional provisions, statutes and treaties apply to them, and if so whether the remedies provided by the CSRTs provide an adequate substitute. In my opinion, the long delay in resolving these issues has brought deserved discredit upon our judicial system.

Second, we are working to persuade members of Congress to enact legislation to restore the statutory right of habeas corpus to the prisoners, by repealing the habeas stripping provision of the MCA. These efforts have been supported in letters signed by more than forty former senior officials of the Department of Justice and former United States Attorneys. over twenty-five former ambassadors, a former National Security Advisor, and retired Navy Rear Admirals and Army and Marine Corps Generals. Several bills have been introduced in both houses of Congress to restore habeas corpus, and we hope hearings will be held, but none has yet been scheduled. However, even if a habeas restoration bill is passed, there remains the problem of amassing the necessary votes to override a likely presidential veto.

Third, many of us are pursuing diplomatic channels, attempting through the embassies of the prisoners' countries of origin to bring pressure to bear on our administration to release the prisoners who will not be charged before the military commissions, and who have not been proven to pose a demonstrable threat to our national security. In this connection, it is

²⁵ As noted above, on two prior occasions the Supreme Court has reversed rulings of the District of Columbia Court of Appeals after that court ruled against the Guantánamo Bay prisoners. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Rasul v. Bush*; 542 U.S. 466 (2004).

²⁶ *But see supra*, note 14, at 9.

significant that all prisoners of European origin were long since repatriated to their respective countries, as well as various others whom the administration believed it was prudent to release, regardless of their past connections and activities.

Fourth, we continue to write articles in newspapers, magazines, law reviews and letters to editors, and to speak out publicly on radio, television and in gatherings, about how, as to the men held at Guantánamo Bay, we have lost sight of the values that have made us all so proud to be citizens of this country.

Fifth, we have kept in communication with the prisoners by visiting them at the base and writing them letters. Many of us have also attempted to communicate with their families by mail and telephone, although this is difficult because many of the prisoners' wives, children, parents and siblings are suspicious of our identities and motives, and communication by telephone through interpreters is often difficult.

My Personal Conclusion and Opinions

In times of real or perceived national crises, many American citizens lose confidence in the ability of our democratic institutions to protect the nation, and that loss of confidence is transmitted to and reflected by the actions of those in government who make policy decisions. Frightening times present a test of our commitment to the principles that we teach in our schools, announce in the Declaration of Independence, in our federal and state constitutions, and parade on the Fourth of July. Sad to say, as a nation we often slip our moorings, as we did by incarcerating Japanese-Americans citizens during World War II, and by spreading the fear of Communist infiltration during the McCarthy-House Committee on Un-American Activities era. It is happening again as a result of the September 11, 2001 terrorist attacks.

My impression of the prisoners I've encountered is shared by my partners

who have visited our clients at the prison, as well as the other fine lawyers for prisoners with whom we've spoken. We believe most of these men are not and never were criminals or terrorists, were not connected with Al Qaeda, should not have been imprisoned in the first place, and if sent home would resume peaceful, productive lives, albeit damaged by the awful experiences they have endured during the past half decade. *But be they good or evil, these men are entitled to have their captor—the United States government—establish before a fair tribunal a valid reason why they are imprisoned.* None has received that kind of hearing, and it appears none will in the foreseeable future.

"Detainee" is a euphemism used by the government that suggests temporary confinement; it is an inappropriate description of the status of these men. They have been inmates of a prison for from four to five years. Their "housing" resembles the cellblocks reserved for the most unruly felons in our state and federal prisons, and their isolation is patterned on how we isolate convicted murderers on death row. The way we are treating them, and the conditions of their confinement, are demeaning, cruel, and unnecessary.²⁷

So far as I am able to discern, what keeps these men from sinking into madness is a deep-seated faith and a passionate belief in their religion: Allah has willed their imprisonment, and when He wills otherwise, pursuant to His divine purposes, He will set them free. In the meantime, they take it day by day.²⁸

²⁷ This is not the first time citizens of other countries have been held at the Naval Base. A recent article recounts a poignant historical analogy, involving the Haitian "boat people" who, following the 1991 military overthrow of Jean-Bertrand Aristide, sought asylum in the United States under a 1951 Convention Relating to the Status of Refugees on the ground that their lives and safety were threatened. They were picked up on the seas by the Coast Guard cutters, taken to Guantánamo Bay, and held there "in squalid camps surrounded by barbed wire and informed that their detention would be indefinite. They were denied access to counsel and

²⁸ simply left waiting in what were effectively prisons." The author concludes: In an eerie repetition of history, the "enemy combatant" detainees shipped to Guantánamo were, like the Haitian detainees before them, denied the protections of U.S. laws, even though their very presence in Guantánamo was a direct consequence of the exercise of U.S. law.

There is ominous potential for future danger flowing from our conduct. Bear in mind one of President Bush's justifications for invading Afghanistan in 2001: that Taliban leaders had not submitted to his demand that they "return all foreign nationals, including American citizens, unjustly detained in your country." If dedication to the rule of law and fair play does not motivate our leaders, they ought to consider the standard we have established for redressing unjust imprisonment of other nation's citizens.

In the past, I have described this state of affairs as a national disgrace, but those words grossly understate my feelings and concerns. The prison at Guantánamo Bay is perceived throughout the globe to be an example of the wretched way Americans treat those of the Islamic faith, As a result we have brought ourselves into disrepute in many parts of the world. We have become an international bully, treating international rules and our treaty obligations as one-sided, applicable to other countries but not to ours. We are committed as a nation to affording all persons fair hearings and due process of law, regardless of religious belief, skin color or national origin, and without regard to the nature or seriousness of the crimes with which they are accused. Our actions with regard to the men at Guantánamo Bay have violated and continue to this day to violate these basic American principles.

Thomas P. Sullivan

May 15, 2007

Then, as now, although the U.S. exercises sovereign power in its arrest and detainment of alleged enemy combatants, it simultaneously disclaims the power (and obligation) to protect the basic rights of human beings under its jurisdiction. Mary Anne Franks, *Guantánamo Forever: United States Sovereignty and the Unending State of Exception*, 1 HARV. L. & POL'Y REV. 260,262 (2007).

A similar sentiment was expressed by Prince Hamlet:
There's a divinity that shapes our ends,
Rough-hew them how we will.
WILLIAM SHAKESPEARE, HAMLET act 5, sc, 2.