Combatant Status Review Tribunal (CSRT) Process at Guantanamo

Article 5 of the Third Geneva Convention requires a tribunal to determine whether a belligerent, or combatant, is entitled to prisoner of war (POW) status under the Convention only if there is doubt as to whether the combatant is entitled to such status. The President has determined that those combatants who are a part of al-Qaeda, the Taliban or their affiliates and supporters, or who support such forces do not meet the Geneva Convention's criteria for POW status.[1] Because there is no doubt under international law about whether al-Qaida, the Taliban, their affiliates and supporters, are entitled to POW status (they are not), there is no need or requirement to convene tribunals under Article 5 of the Third Geneva Convention in order to review individually whether each enemy combatant detained at Guantanamo is entitled to POW status.

In evaluating the entitlements of a U.S. citizen designated as an enemy combatant, a plurality of the U.S. Supreme Court in *Hamdi* held that the Due Process Clause of the U.S. Constitution requires "notice of the factual basis for [the citizen-detainee's] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." A plurality of the Court further observed: "There remains the possibility that the [due process] standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal," and proffered as a benchmark for comparison the procedures found in Army Regulation (AR) 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, October 1, 1997. In a conflict in which the Third Geneva Convention applies, U.S. forces use the procedures found in AR 190-8 to conduct Article 5 tribunals when such tribunals are required.

As a result of Supreme Court decisions in June 2004 (*Rasul*, *Hamdi*), the U.S. Government on July 7, 2004, established the Combatant Status Review Tribunal (CSRT) process at U.S. Naval Base Guantanamo Bay, Cuba. The CSRT process supplements DoD's already existing screening procedures and provides an opportunity for detainees to contest their designation as enemy combatants, and thereby the basis for their detention. Consistent with the Supreme Court guidance applicable to situations involving U.S. citizens, the tribunals draw upon procedures found in AR 190-8.

[1] In February 2002, the President determined that neither the Taliban nor the al-Qaida detainees are entitled to Prisoner of War (POW) status under the Geneva Convention. Although the United States never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Geneva Convention, and the President determined that the Taliban are covered by the Convention. They did not qualify as POWs, however, because they did not satisfy the Convention's four conditions for such status: they were not part of a military hierarchy; they did not wear uniforms or other distinctive signs visible at a distance; they did not carry arms openly; and they did not conduct their military operations in accordance with the laws and customs of war. Al-Qaida is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status. See http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html and http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

The below chart compares the CSRT procedures with the procedures found in AR 190-8:

Characteristic	Army Regulation 190-8	CSRT
Applicability of tribunal proceeding	Person who has committed a belligerent act and is in the custody of the U.S. Armed Forces and for whom there is doubt as to status.	All detainees at GTMO. The President has previously determined that al Qaeda and Taliban detainees are not entitled to POW status.
Frequency of review	No provision for more than one review.	One-time. Can be reconvened to reevaluate a detainee's status in light of new information.
Notice provided to detainee	Advised of rights at the beginning of the hearing.	Advised of rights in advance of and at beginning of the hearing. The detainee is provided with an unclassified summary of the evidence in advance of the hearing.
Tribunal composition	The Tribunal is composed of 3 commissioned officers including at least one field grade officer. Recorder: Non-voting officer, preferably a member of the Judge Advocate General's Corps (JAG). The Recorder prepares the record of the Tribunal and forwards it to the first Staff Judge Advocate (SJA) in the internment facility's chain of command. Legal adviser: None for the Tribunal. The record of every Tribunal proceeding resulting in the denial of POW status is reviewed for legal sufficiency when the record is received at the office of the SJA for the convening authority.	The Tribunal is composed of 3 neutral commissioned officers not involved in the capture, detention or interrogation of the detainee. All are field grade officers, and the senior member is an 0-6 (Colonel/Navy Captain). Recorder: Non-voting officer serving in the grade of 0-3 (Captain/Navy Lieutenant) or above. The Recorder obtains and presents all relevant evidence to the Tribunal. The Recorder also prepares the record of the Tribunal and forwards it for a legal review to the legal adviser. Legal Adviser: A JAG is available to advise the Tribunal on legal and procedural matters. The record of every Tribunal is reviewed for legal sufficiency by a JAG.

Characteristic	Army Regulation 190-8	CSRT
	Person to provide assistance to the detainee: None.	Personal Representative: Each detainee has the assistance of a Personal Representative (PR). The PR meets with the detainee to explain the CSRT process and assists the detainee in reviewing relevant unclassified information, preparing and presenting information, and questioning witnesses at the CSRT hearing. The personal representative is an officer serving in the grade of 0-4 (Major/Navy Lieutenant Commander) or above.
Participation by military judges	None. However, preference is to have a JAG serve as the non-voting recorder.	None. However, one of the voting officers must be a JAG.
Attendance by detainee	The detainee is allowed to attend all open sessions, which includes all proceedings except those involving deliberation and voting by members, and testimony or other matters that would compromise national security if held in the open.	Same as under AR 190-8.
Witnesses	Detainee may call witnesses if they are reasonably available and can question the witnesses called by the Tribunal. If requested witnesses are not reasonably available, written statements are permitted. The commanders of military witnesses determine whether they are reasonably available.	Detainee may call witnesses if they are relevant and reasonably available, and can question the witnesses called by the Tribunal. If requested witnesses are not reasonably available, written statements are permitted. Telephonic or videoconference testimony is also permitted. The President of the Tribunal determines whether witnesses are relevant and reasonably available.
Detainee testimony	Detainee may testify or otherwise address the Tribunal, but cannot be compelled to testify.	Same at AR 190-8.
Standard of proof	Preponderance of evidence. Majority vote.	Preponderance of evidence Majority vote.

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		There is a rebuttable presumption that the government evidence submitted by the Recorder is genuine and accurate.
Presumption of status	A person shall enjoy the protection of the Third Geneva Convention until such time as his or her status has been determined by a competent tribunal.	Protected (POW) status not applicable. As to enemy combatant status, prior to the CSRT, battlefield and subsequent determinations of each Guantanamo detainee who was initially detained by DoD have found the detainee to be an enemy combatant. The CSRT process is a fact-based proceeding to determine whether each detainee is still properly classified as an enemy combatant, and to permit each detainee the opportunity to contest such designation.
Type of evidence considered. Is coercion evaluated?	Testimonial and written evidence is permitted. AR 190-8 contains no requirement to evaluate whether statements were the result of coercion.	Testimonial and written evidence is permitted. The Detainee Treatment Act (DTA) requires the CSRT to assess whether any statement being considered by the CSRT was obtained as a result of coercion, and the probative value, if any, of such statement.
Access to evidence by detainee	None.	The detainee may review unclassified information relating to the basis for his or her detention. The detainee also has the opportunity to present reasonably available information relevant to why the detainee should not be classified as an enemy combatant. Evidence on the detainee's behalf may be presented in documentary form and through written statements, preferably sworn. The detainee's Personal Representative (PR) shall have the opportunity to review the government information relevant to the detainee and to consult with the detainee concerning his (or her) status as an

Characteristic	Army Regulation 190-8	CSRT
		enemy combatant and any challenge thereto; the PR may only share unclassified portions of the government information with the detainee. The President of the Tribunal is the decision authority on the relevance and reasonable availability of evidence.
Assistance provided to detainee	Interpreter provided if necessary.	Interpreter provided if necessary. A Personal Representative (PR) is provided to every detainee. The PR meets with the detainee to explain the CSRT process, assist the detainee in participating in the process, and assist the detainee in collecting relevant and reasonably available information in preparation for the CSRT.
Further review of decision outside of the Department of Defense	None.	Under the Detainee Treatment Act and the Military Commissions Act, the Court of Appeals for the District of Columbia has the authority to determine if the detainee's CSRT was conducted consistent with the standards and procedures for CSRTs. The Court of Appeals also has the authority to determine whether those standards and procedures are consistent with the Constitution and laws of the United States, to the extent they are applicable at Guantanamo.

As noted above, the Detainee Treatment Act (DTA) and the Military Commissions Act (MCA) permit the Court of Appeals for the District of Columbia Circuit to review CSRT determinations of detainees at Guantanamo. Below is an excerpt from a recent Federal court filing by the U.S. Government describing how this review compares to various types of habeas corpus review in federal courts:

> … The availability of such review negates any argument under the Suspension Clause. First, the MCA and DTA provide alien detainees with greater rights than that traditionally available in the military tribunal context. The Supreme Court has held that the habeas review traditionally afforded in the context of military

tribunals does not examine the guilt or innocence of the defendant, nor does it examine the sufficiency of the evidence. Rather, it is limited to the question of whether the military tribunal had jurisdiction over the charged offender and offense. *See Yamashita v. Styer*, 327 U.S. 1, 8 (1946) ('If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decision'); *id.* at 17 ('We do not here appraise the evidence on which petitioner was convicted' because such a question is 'within the peculiar competence of the military officers composing the commission and were for it to decide'); *Ex parte Quirin*, 317 U.S. 1, 25 (1942) ('We are not here concerned with any question of the guilt or innocence of petitioners'). *See also Eisentrager*, 339 U.S. at 786. By providing for constitutional and other legal claims, including issues of compliance with the military's own procedures and evidentiary sufficiency, the DTA and MCA actually provide petitioners with greater rights of judicial review than that traditionally afforded to those convicted of war crimes by a military commission.

Second, traditional *habeas* review in alien-specific contexts involved, in general, review of questions of law, but 'other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive.' *INS v. St. Cyr*, 533 U.S. 289, 306 (2001) (noting with respect to deportation orders under historical immigration laws that 'the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court. In such cases, other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive.'). Similarly, under the DTA, to the extent an alien-petitioner has concerns about the legal adequacy of the CSRT standards and procedures used to make an 'enemy combatant' determination, he may squarely raise those claims and have them adjudicated in the Court of Appeals. *See* DTA § 1005(e)(2)(C). Further, the Court of Appeals' review involves an assessment by that Court of whether the CSRT, in reaching its decision, complied with 'the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence.' *See id.* § 1005(e)(2)(C)(i).

Furthermore, it cannot be that to be constitutionally adequate, a substitute for *habeas* must entitle a petitioner to full *de novo* review by a court. Any such assertion would not only be inconsistent with traditional *habeas* practice, *see supra*, it could not be reconciled with *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633 (2004), in which the controlling opinion made clear that constitutional requirements for detaining even citizens in this country as enemy combatants 'could be met by an appropriately authorized and properly constituted military tribunal' modeled upon military procedures implementing the Geneva Conventions for determining the status of detainees potentially entitled to prisoner-of-war status. *See id.* at 2651 (plurality opinion). Acknowledging 'the weighty and sensitive governmental interests in ensuring that those who have in

fact fought with the enemy during a war do not return to battle against the United States,' *id.* at 2647, as well as the need to 'tailor[] [enemy combatant proceedings] to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict,' *id.* at 2649, the Plurality noted that proceedings by which the military determined enemy combatant status legitimately could be severely limited in scope, in ways that are not characteristic of traditional judicial proceedings, including permitting hearsay from the Government, establishing a presumption in favor of the Government, and limiting factual disputes to the alleged combatant's acts. *Id*. Such an approach, now affirmed by Congress through its approval of the CSRT process used for enemy combatant status determinations, *see* DTA § 1005(e)(2), simply cannot be reconciled with an argument that wide-ranging, *de novo* court review of the outcome of those proceedings is necessary to avoid Suspension Clause concerns.

For these reasons, the exclusive-review scheme afforded by the DTA is more than adequate for Suspension Clause purposes, even if petitioners could avail themselves of the Constitution, which they cannot.