

Six Years without Judicial Review: CSRTs Not an Adequate Substitute for Habeas Review

*[T]he CSRT process was not structured to yield reliable determinations as to whether the detainees held in Guantanamo were properly detained as enemy combatants. Rather, the Executive put in place a process to legitimize, without substantial corroborated evidence or any meaningful independent review, earlier determinations that were not the product of a thoughtful, deliberative process directed to the ascertainment of truth. The process ensured that panels would rubber-stamp decisions already made rather than applying independent judgment as to whether those decisions were correct. Under the guise of implementing the Supreme Court's decision in *Rasul*, the CSRT process completely frustrated it. In my opinion, it is time for Congress to restore the judicial mechanism — habeas corpus — that will both honor our commitment to justice and keep America secure.*

— Written statement of Lt. Col. Stephen Abrahams, who served on a CSRT panel in the Office for the Administrative Review of the Detention of Enemy Combatants, before the House Armed Services Committee, July 26, 2007.

On December 5, 2007, the United States Supreme Court will hear oral arguments on the rights of detainees held at Guantánamo Bay, Cuba. At issue in the consolidated cases of *Boumediene v. Bush* and *Al-Odah v. USA* (collectively “*Boumediene*”) is whether Congress in the Detainee Treatment Act of 2005 (DTA) and the Military Commissions Act of 2006 (MCA) did— or even may— constitutionally strip the federal courts of jurisdiction to consider *habeas corpus* petitions from Guantánamo detainees. Critical to this controversy is whether the Combatant Status Review Tribunals (CSRTs), established in July 2004, allow detainees meaningful opportunity to contest allegations against them in lieu of *habeas corpus* review. *Habeas corpus* proceedings ensure the right to a fair hearing by an independent tribunal and protect against government engagement in arbitrary and secret detention, enforced disappearances, unlawful transfer, torture, and cruel, inhuman and degrading treatment.

The government in its brief to the Supreme Court in *Boumediene* asserts that the CSRT scheme, plus the review provided for under the DTA, is a “constitutionally adequate substitute” for detainees to challenge their detention.¹ Under the DTA, a detainee may challenge a CSRT determination only to the D.C. Circuit Court of Appeals and only on the limited issue of whether the government adhered to Department of Defense procedures and whether the procedures to make the determination is consistent with the Constitution and U.S. law.² Circuit Court review of constitutional arguments, however, is meaningless because the government argues that Guantánamo detainees have no constitutional rights.

Habeas corpus review and international law, however, require that detainees be able to access a competent, independent, and impartial court which examines the factual and legal basis for detention and not simply review whether the determination was consistent with CSRT rules, no matter how unfair those rules are.

¹ *Boumediene v. Bush*, No. 06-1195, Brief for the Respondents, at 10 (S.Ct. October 2007).

² Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat 2739 (2005), § 1005(e)(2)(C)(ii).

The CSRTs fail to meet fair hearing standards in several ways:

- There is no meaningful way for a detainee to challenge a CSRT's determination as he has little or no access to witnesses or classified information on which the determination to detain is based.
- The CSRT can rely on information obtained through unlawful methods, including information coerced from detainees who were subjected to torture or cruel, inhuman degrading treatment. Because CSRTs can also rely on secret evidence, the fact that evidence is obtained illegally, including through torture, might never be known.
- The CSRTs lack an effective remedy as they are not mandated to release a detainee who is not designated as an enemy combatant.

CSRTs fail to measure up to protections afforded by federal court *habeas* review and international fair hearing standards. *Habeas corpus* will ensure that detainees have a meaningful chance to test the legality of their detention in an independent court.

Human Rights First urges Congress to restore the statutory writ of *habeas corpus* for detainees.

1. The Invention of Combatant Status Review Tribunals

This is not a legal proceeding. This is an administrative proceeding . . . This is fact-based determination of [whether] you're an enemy combatant. Separate from that is habeas corpus review.

—Gordon England, Secretary of the Navy, on Combatant Status Review Tribunals, July 30, 2004.

On July 30, 2004, the Department of Defense (DOD) began conducting Combatant Status Review Tribunals for noncitizens held at Guantánamo. The hearings were authorized by then Deputy Defense Secretary Paul Wolfowitz in a July 7, 2004 Order and procedural rules were issued three weeks later. Along with CSRTs the government set up Administrative Review Boards (ARBs) as a second administrative body that annually reviews each detainee's CSRT-designated status as an "enemy combatant."³ Administration officials assert that the status hearings under which Guantánamo detainees may challenge their designation as "enemy combatants" reflect the Supreme Court's instructions in *Rasul v. Bush*, 542 U.S. 466 (2004) and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which affirmed detainees' rights to challenge their detentions in U.S. courts. But in fact the hearings fall far short of satisfying the Supreme Court's rulings and are woefully inadequate to meet basic fair hearing standards under common law habeas review and international law.

³ The ARB only compounds the defects of the CSRTs. Based on classified evidence, including evidence that might have been extracted under coercion, the ARB determines whether a detainee continues to be detained or whether he can be transferred to the custody of another government or released. The ARB was instituted "as a matter of discretion" by the Secretary of Defense who "may suspend or amend" its procedures thereby indicating that they are not independent. The ARB scheme is not subject to judicial review under the DTA or the MCA, does not have the authority to change the "enemy combatant" classification, and cannot require the release of a detainee.

The government in its brief argues that CSRT procedures provide a process “similar” to that under Article 5 of the Geneva Convention, as implemented by Army Regulations § 190-8.⁴ The CSRT and Article 5 hearings serve entirely different purposes and operate under distinct circumstances. Article 5 hearings take place on or near the zone of combat, immediately after capture, thereby maximizing availability of witnesses and evidence. They are designed to swiftly determine a prisoner’s legal status: detention under the Geneva Convention as a POW, referral for prosecution for war crimes or violation of civilian law. If found innocent, the detainee is returned to the place of capture and released. In contrast, as noted below, CSRTs were conducted months and years after initial capture, thousands of miles away from the combat zone, and after repeated interrogation under questionable circumstances. Unlike CSRTs, Army Reg. 190-8 ¶2-1.a(1)(d) prohibits the use of torture and coercion.⁵

a. *Without Independence or Impartiality: The Government Announces the Result and then Convenes a Hearing to Confirm It*

What I expected to see was a fundamentally fair process in which we were charged to seek the truth, free from command influence. In reality, command influence determined not only the lightning fast pace of the 500-plus proceedings, but in large part, the outcome – little more than a validation of prior determinations that the detainees at Guantánamo were enemy combatants, and . . . presumed to be terrorists who could be detained indefinitely.

—*Testimony of Stephen E. Abraham, Lieutenant Colonel, U.S. Army Reserve, before the Armed Services Committee, U.S. House of Representatives, July 26, 2007.*

At common law, habeas requires that a detainee’s custodian be a neutral, independent judge who can assess the legal and factual basis for detention.⁶ Under international law, review of the lawfulness of detention must be by a court that is independent and impartial. Article 14(1) of the International Covenant of Civil and Political Rights (ICCPR), ratified by the U.S., states, “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” The Human Rights Committee, the authoritative body established to monitor implementation and compliance with the ICCPR, has stated that the requirements of article 14(1) “is an absolute right that is not subject to any exception,” and refers to “actual independence of the judiciary from political interference by the executive branch and legislature.”⁷ Moreover, article 9(4) of the ICCPR mandates that the legality of detention must be determined by a court. The Human Rights Committee has explained that this is “to ensure a higher degree of objectivity and independence.”⁸ Thus, a court must function independently of the executive branch which has carried out the detentions in the first instance.

The CSRT is not an independent body. It consists of three so-called “neutral” members of the U.S. armed forces— the concept of neutrality here meaning apparently nothing more than the members having no prior involvement in the detainees’ cases— who merely review existing “enemy combatant” determinations. The DOD Order establishing the CSRT expressly states that every detainee subject to it has *already* been “determined to be an enemy combatant through multiple levels of review by officers of

⁴ *Boumediene*, Brief for the Respondents, at 50.

⁵ The government’s definition of “enemy combatant” enables military detention of persons who have committed no hostile acts and indeed, have no connection to any armed conflict. In addition, CSRTs are not even capable of according either prisoner of war (POW) status or civilian protected status to detainees, as required by the Geneva Conventions for cases of international armed conflict.

⁶ 1 William Blackstone, *Commentaries on the Laws of England*, 132-33 (1765).

⁷ General Comment 32, Article 14: Right to equality before courts and tribunals and to a fair trial. U.N. Doc.: CCPR/C/GC/32 (2007), para. 19.

⁸ *Torres v. Finland*, No. 291/1988, U.N. Human Rights Committee, CCPR/C/28/D/1291/1988, April 2, 1990, para. 7.2.

the Department of Defense.”⁹ Secretary of the Navy Gordon England, who is responsible for overseeing the CSRTs, emphasized that the CSRT system “is only to determine, *again*, if you’re an enemy combatant. And there’s already been prior determinations. This is a much more formal process, but there’s been a number of determinations in the past, so I would expect that most would indeed be enemy combatants, just because of prior reviews.”¹⁰

Moreover, members of CSRTs have no protection against command influence. Senior administration officials, including the Secretary and Deputy Secretary of Defense, Secretary of Navy, and the Commander-in-Chief of the Armed Forces (the President) in their public comments have presumed the guilt of the detainees.¹¹

- *These are among the most dangerous, best-trained, vicious killers on the face of the earth.*— Secretary of Defense Donald Rumsfeld, January 27, 2002.
- *[T]he ones in Guantánamo Bay are killers. They don’t share the same values we share.* — President George W. Bush, March 20, 2002.
- *So they’re dangerous people, whether or not they go before a military commission . . . We’re dealing with a special breed of person here.* — Deputy Secretary of Defense Paul Wolfowitz, March 21, 2002.

Many of the detainees were not captured in armed combat but were handed to the U.S. by Pakistanis and Afghans in exchange for bounties. In November 2001, a month after the invasion of Afghanistan then Secretary of Defense Donald Rumsfeld announced that leaflets were dropped over Afghanistan advertising “substantial monetary rewards . . . [to] incentivize . . . a large number of people to begin . . . looking for the bad folks.”¹²

Giving the government a greater advantage, CSRT procedures create a presumption that the government’s information presented in support of its classification of the detainee as an “enemy combatant” is “genuine and accurate.”¹³

⁹ Memorandum from Deputy Secretary of Defense to the Secretary of Navy, “Order Establishing Combatant Status Review Tribunal,” July 7, 2004, § a.

¹⁰ Special Defense Department Briefing, October 1, 2004, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2242> (emphasis added).

¹¹ See also Statement of John D. Hutson, RADM JAGC USN (ret) Dean and President, Franklin Pierce Law Center Before the Senate Armed Services Committee, April 26, 2007.

¹² Department of Defense news briefing – Secretary Rumsfeld, November 19, 2001, transcript at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2444>. Examples of leaflets available at <http://www.psywarrior.com/afghanleaf40.html> (e.g. “Get wealth and power beyond your dreams. Help the Anti-Taliban forces rid Afghanistan of murderers and terrorists”).

¹³ Combatant Status Review Status Tribunal Process (hereinafter “CSRT Procedures”), § G(11), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>

After the hearing, the panel's decision and supporting documents are provided to the CSRT legal advisor, a military lawyer, who conducts a "legal sufficiency review." The legal advisor forwards the record to the CSRT Director who can either approve the decision of the tribunal or send the case back for further proceedings.¹⁴ This opens the door to repeat bites at the apple should a CSRT panel fail to confirm the enemy combatant designation the government wants. A U.S. Army Major who sat on 49 CSRT panels indicated in an affidavit that in six of those hearings, "there was a *unanimous* decision that the detainee was a *Non-Enemy Combatant* (NEC). In all of those NEC cases, the Command directed that a new CSRT be held or the original CSRT was ordered reopened. In each of those cases, the 'new evidence' that was presented was in fact a different conclusory intelligence finding, which was not justified by the underlying evidence."¹⁵

The CSRT is not a court or a body that meaningfully reviews the lawfulness of detention but instead merely reviews the existing classification of enemy combatants. The CSRT panel consists of military personnel whom the executive branch controls. In sum, the CSRT structure and their composition of military officers makes them partial and not independent.

b. *No Meaningful Way to Confront Evidence*

Detainees are unable to examine the extent of evidence relied upon by the government in support of the detention. A Seton Hall law school study of publicly available CSRT records found that the government relied exclusively on classified evidence in a majority of the cases.¹⁶ The government in its brief in the *Boumediene* case admits that "in most cases" classified information "formed part of the basis for the government's determination that they were enemy combatants," and rejected the notion that a detainee should or needs to know what that information was.¹⁷

The Seton Hall study found that at least 55 percent of the detainees asked to see classified evidence used against them or to present exculpatory evidence in the form of witnesses and/or documents.¹⁸ *Every* request to review classified evidence was denied. Where a witness requested by a detainee was another detainee *right there at Guantánamo*, the CSRTs denied three quarters of such requests. And *every* request for witnesses not at Guantánamo was denied.¹⁹

Abdul al Hilal, during his CSRT hearing, said, "It's not fair for me that you may mask some of the secret information. How can I defend myself . . . It is unfair that the government is going to be talking about me, and I don't have an attorney."²⁰

¹⁴ CSRT Procedures, § I(8).

¹⁵ Affidavit filed in *Hamad v. Gates*, No. 07-1098 (D.C. Cir. October 4, 2007); *see also* <http://www.huffingtonpost.com/andy-worthington/a-new-guantanamo-whistle-b-67695.html> (emphases added).

¹⁶ Mark Denbeaux & Joshua Debeaux, *No Hearing Hearings: CSRT the Modern Habeas Corpus* (2006), at 2-3 (hereinafter "No Hearing Hearings").

¹⁷ *Boumediene*, Brief for the Respondents, at 55.

¹⁸ *No Hearing Hearings*, at 26-28.

¹⁹ *Ibid.*

²⁰ Unclassified CSRT transcript of Abdul al Hilal, ISN # 177, available at http://www.dod.mil/pubs/foi/detainees/csrt/Set_43_2811-2921.pdf#19

Mustafa Ait Idr, during his CSRT hearing, was told that he associated with an al-Qaeda operative. The following colloquy took place between the detainee and CSRT president:

Detainee: Give me his name.

Tribunal President: I do not know.

Detainee: How can I respond to this?

Tribunal President: Did you know of anybody that was a member of Al Qaida?

Detainee: No, no.

Tribunal President: I'm sorry, what was your response?

Detainee: No.

Tribunal President: No?

Detainee: No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.

Tribunal President: We are asking you the questions and we need you to respond to what is on the unclassified summary.²¹

Under CSRT procedures a “Recorder” is supposed to find all “reasonably available” information in the government’s possession that bears on a detainee’s status and then present that information to the CSRT.²² The term “recorder” may appear to insinuate neutrality, but in military administrative proceedings convened for purposes of disciplining soldiers, the “recorder” serves a clearly prosecutorial function. It is the same with CSRTs. Thus it is the executive branch that unilaterally determines what information is or is not “reasonably available” at the CSRT. Consequently, detainees rarely see more than a handful of unsupported allegations summarized from a classified file.

What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence. Statements allegedly made by percipient witnesses lacked detail. Reports presented generalized, indirect statements in the passive voice forms without stating the source of the information or providing a basis for establishing the reliability or credibility of the source. Statements of interrogators presented to the panel offered surmises from which we were expected to draw conclusions favoring a finding of “enemy combatant.”

— Written statement of Lt. Col. Stephen Abrahams, before the House Armed Services Committee, July 26, 2007.

c. *Use of Evidence Obtained Through Unlawful Means*

The CSRT procedures implemented in July 2004 allow for the admission of coerced evidence. The CSRT is “free to consider *any* information it deems relevant and helpful to a resolution of the issues

²¹ CSRT Transcript cited in *In re Guantánamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005).

²² CSRT Procedures §§ E(3), H(4).

before it.”²³ The CSRT procedures were amended in July 2006—after more than 550 CSRTs already had been conducted—to take account of the passage of the Detainee Treatment Act in December 2005. The DTA prohibits cruel, inhuman or degrading treatment (as defined by U.S. rather than international law)²⁴ by U.S. officials. Under the 2006 procedures, “[i]n making a determination regarding the status of any detainee, the CSRT shall assess, to the extent practicable, whether any statement derived from or relating to such detainee was obtained as a result of coercion and the probative value, if any, of any such statement.”²⁵ CSRTs thus can continue to accept and rely on information obtained by torture or ill-treatment.

Under U.S. constitutional law, the government is barred from relying on statements obtained through torture.²⁶ The Bush Administration, however, has consistently argued that the Constitution is inapplicable to Guantánamo detainees. International law similarly prohibits the admission of evidence in any proceedings if there is knowledge or belief that the statement has been obtained as a result of torture or other cruel, inhuman or degrading treatment or punishment. The Human Rights Committee has stressed that “the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.”²⁷ In its conclusions on the United States’ compliance with its obligations under the ICCPR, the Human Rights Committee expressed particular concern that under the DTA, the CSRTs, and the follow-up ARBs were allowed to “weigh evidence obtained by coercion for its probative value” rather than finding such evidence altogether inadmissible.²⁸

Article 15 of the Convention against Torture, ratified by the U.S., prohibits statements obtained as a result of torture being used as evidence in any proceedings, except when used as evidence against the person accused of torture. The Committee against Torture in its concluding observations on the United States expressed its concern about the CSRTs’ use of coerced evidence and called upon the U.S. to ensure that its obligations under articles 13 (which allows for prompt review of allegations of torture or cruel inhuman and degrading treatment) and 15 are “fulfilled in all circumstances.”²⁹

However, studies of publicly available CSRT transcripts found that 18 percent of the detainees alleged torture, but records do not reveal whether the CSRT panels made efforts to assess the allegations and the impact of any mistreatment on the reliability of evidence before upholding the detention of such persons.³⁰

²³ CSRT Procedures, §I(7) (emphasis added).

²⁴ U.S. law interprets conduct that is cruel, inhuman or degrading if it “shocks the conscience.” Public statements of Bush Administration officials interpret whether conduct “shocks the conscience” on a sliding scale, allowing for increasingly aggressive interrogation techniques as the government’s interest in a particular interrogation increases. Thus, it explicitly leaves open the possibility of using cruel, inhuman or degrading interrogation methods on a detainee believed to have crucial intelligence information.

²⁵ Memorandum from Secretary of Navy Gordon England, *Implementation of the Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba*, “Implementation of the Detainee Treatment Act of 2005,” July 14, 2006.

²⁶ *Rogers v. Richmond*, 365 U.S. 534, 540-45 (1961); *Rochin v. California*, 342 U.S. 165, 172-74 (1952).

²⁷ U.N. Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of torture or other cruel, inhuman or degrading treatment or punishment), 1992, para. 12, U.N. Doc. HRI/Gen/Rev.7.

²⁸ Concluding Observations of the Human Rights Committee on the United States of America, CCPR/C/USA/CO/3/Rev.1 (2006), paras. 14 and 18.

²⁹ Conclusions and Recommendations of the Committee against Torture on the United States of America, U.N. Doc. CAT/C/USA/CO/2 (2006), para. 30.

³⁰ *No Hearing Hearings*, at 36.

- The unclassified evidence transcript of Mamdouh Habib consists entirely of alleged admissions by the detainee.³¹ But Habib’s government-appointed personal representative explained to the CSRT panel that “all of the information” Habib provided “was given under duress and torture” in Pakistan and Egypt prior to his arrival in Guantánamo.³² Habib’s detention was nevertheless upheld even though the CSRT panel determined that these allegations of abuse were credible enough to warrant investigation.³³
- In his CSRT hearing, Khalid Sheikh Mohammed said he was subjected to torture and abuse and therefore made false statements about other detainees.³⁴ Mohammed was held for more than three years in incommunicado detention by the CIA, reportedly subjected to waterboarding, kept naked in a cell for several days, and suspended from the ceiling by his arms with his toes. Wholly aside from the issue of Mohammed’s own status, Mohammed warned the CSRT panel to be careful in its review of *other* peoples’ status as “enemy combatants” based on information from his interrogations, because he had provided false information about people. The CSRT president said the panel would consider Mohammed’s allegations in making its enemy combatant status determination.³⁵ The DOD redacted most of Mohammed’s statements concerning his treatment during interrogation from the unclassified transcript as “classified.” Mohammed submitted to the CSRT a written account, which remains classified, describing his treatment in U.S. custody from his capture in March 2003 to his transfer to Guantánamo in September 2006.³⁶
- During his CSRT hearing conducted in 2007, the President of the CSRT referred to Abu Zubaydah’s allegations of “months of torture.”³⁷ Zubaydah alleged that during the months in which he was subjected to the CIA’s coercive methods, he provided false information simply to satisfy his interrogators.³⁸
- Similarly statements from Mohammed al-Qahtani, who was subjected to isolation, sleep and sensory deprivation and other abuse,³⁹ may have been introduced in the CSRTs of at least 30 other detainees, whom al-Qahtani identified as bodyguards for Osama bin Laden.⁴⁰ Under CSRT procedures, these 30

³¹ Unclassified Summary of Basis for Tribunal Decision, Tribunal Panel # 6, *Habib v. Bush*, No. 1:02-cv-01130-CKK, (D.D.C. October 6, 2004) (hereinafter Habib CSRT), available at <http://guantanamo.org/pdf/mamdouhhabib.pdf>; see also Written Testimony of Joseph Margulies before the U.S. Senate Committee on the Judiciary September 25, 2006, available at http://www.law.northwestern.edu/macarthur/documents/guantanamo/written_testimony_of_J_margulies.pdf

³² Habib CSRT, *supra*.

³³ *Ibid.* Habib has since been released and is living in Australia.

³⁴ Unclassified CSRT Transcript of Khalid Sheikh Mohammed, ISN # 10024, March 10, 16, 2007, available at http://www.defenselink.mil/news/Combatant_Tribunals.html

³⁵ *Ibid.*

³⁶ Dafna Linzer and Josh White, “Probe of al-Qaeda Leader’s Handling Sought,” *Washington Post*, March 17, 2007.

³⁷ Unclassified CSRT Transcript of Abu Zubaydah, ISN # 10016, March 23, 27, 2007, available at http://www.defenselink.mil/news/Combatant_Tribunals.html

³⁸ *Ibid.*

³⁹ Department of Defense, *Interrogation Log, Detainee 063* (November 23, 2002 to January 11, 2004), available at www.time.com/time/2006/log/log/pdf

⁴⁰ Guantánamo Provides Valuable Intelligence Information, Department of Defense News Release, June 12, 2005, available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=8583>

men would be never be told of the source of the information that they were Osama bin Laden's bodyguards and al-Qahtani's statements would be presumed genuine and accurate.

- On March 6, 2007, the government announced the commencement of CSRT hearings for 14 detainees transferred to Guantánamo in September 2006 from secret CIA detention. Details of allegations of torture made at the CSRTs were redacted from the subsequent unclassified transcripts of their CSRT proceedings. Unsurprisingly, the DOD announced in August 2007 that the CSRTs had determined that all 14 detainees transferred from CIA custody to Guantánamo in September 2006 met the criteria for designation as “enemy combatants.” The announcement did not mention any investigation, if any, had been ordered or carried out into the torture allegations, or whether the CSRT had relied upon allegedly coerced testimony in making its determinations.

d. *Absence of Remedy*

At common law, a habeas court is empowered to determine whether a detention is unlawful and thereby order release or continued detention.⁴¹ Under Article 2(3) of the ICCPR, a state must ensure that any person whose rights under the treaty are violated “shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” The CSRT, however, reviews only a detainee's “enemy combatant” status. It cannot order the release even if it finds that the detainee is not “properly” classified. This is incompatible with the requirements of articles 9(4) and 2(3) of the ICCPR, which respectively require that a court be empowered to order the release of a detainee and provide a remedy.

The Human Rights Committee has affirmed that “what is decisive for the purposes of [art. 9(4)] is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release ‘if the detention is not lawful’, article 9, paragraph 4, requires that the court be empowered to order release.”⁴² Judicial review of CSRT decisions under the Detainee Treatment Act fails to resolve this limitation as it can only require reconsideration of “enemy combatant” classification decision.

A detainee's indefinite detention may continue even after a CSRT determination of “No Longer an Enemy Combatant” (NLEC). In fact, a detainee may not even be told that he has been cleared until “finalization of transportation arrangements or at such earlier time as deemed appropriate by the Commander, JTF-GTMO.”⁴³ These delays can last years. For example, three of the 38 detainees—Zakirjan Asam (Uzbekistan national), Allah Muhammed Saleem (Egyptian) and Fethi Boucetta (Algerian)—who received NLEC status under the CSRT scheme between December 20, 2004 and March 29, 2005, were eventually sent to Albania on or around November 16, 2006.

The lack of independent judicial review of transfers also raises concerns about whether the detainees will be transferred to a country where they could be subjected to ill-treatment. The administration employs a practice of routinely transferring detainees to states where there is substantial risk that the detainee will be subjected to torture or other ill-treatment, under the fig leaf of receiving nominal “diplomatic assurances” that the detainees will not be mistreated. There is no guarantee, or even

⁴¹ *Ex Parte Bowlman*, 8 U.S. (4 Cranch) 75, 136 (1807).

⁴² *A. v. Australia*, U.N. GAOR, 59th Session, U.N. Doc. CCPR/2/59/D/560/1993 (1997).

⁴³ CSRT procedures, § I(10).

substantial reason to believe, that these assurances work. For example, after five years of detention in Guantánamo, in June 2007 Abdellah al Hajji and Lutfi Lagha were transferred to the custody of the Tunisian authorities—a country which the State Department lists “torture and abuse” as among the “significant human rights problems”—and were subjected to ill-treatment after their arrival in Tunisia.⁴⁴

The CSRT scheme thus provides no remedies whatsoever to release detainees, to prevent transfers of detainees to known human rights violators, to ensure legal representation for the detainee, or to order investigations into a detainee’s allegations of torture or ill-treatment.

Conclusion

The denial of *habeas corpus* to detainees and the removal of meaningful judicial scrutiny of executive action have led to human rights abuses including enforced disappearances, secret detentions, torture and ill-treatment and transfers to countries that persistently torture, and arbitrary detention. It is time to remedy the wrongs of the past six years and to reinstate *habeas* review.

⁴⁴ Human Rights Watch, *Ill-Fated Homecomings: A Tunisian Case Study of Guantánamo Repatriations*, September 2007.