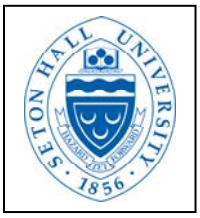

NO-HEARING HEARINGS
CRST: THE MODERN HABEAS CORPUS?

Mark Denbeaux and Joshua W. Denbeaux

NO-HEARING HEARINGS

CSRT: THE MODERN HABEAS CORPUS?

AN ANALYSIS OF THE PROCEEDINGS OF THE GOVERNMENT'S COMBATANT STATUS REVIEW TRIBUNALS AT GUANTÁNAMO

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NO-HEARING HEARINGS

AN ANALYSIS OF THE PROCEEDINGS OF THE GOVERNMENT'S COMBATANT STATUS REVIEW TRIBUNALS AT GUANTÁNAMO

EXECUTIVE SUMMARY

In the wake of the Supreme Court's decision that the United States Government must provide adequate procedures to assess the appropriateness of continued detention of individuals held by the Government at Guantánamo Bay, Cuba, the Department of Defense established the Combatant Status Review Tribunals ("CSRT") to perform this mission. This Report is the first comprehensive analysis of the CRST proceedings. Like prior reports, it is based exclusively upon Defense Department documents. Most of these documents were released as a result of legal compulsion, either because of an Associated Press Freedom of Information request or in compliance with orders issued by the United States District Court in habeas corpus proceedings brought on behalf of detainees. Like prior reports, "No Hearing Hearings" is limited by the information available.

The Report documents the following:

1. The Government did not produce any witnesses in any hearing and did not present any documentary evidence to the detainee prior to the hearing in 96% of the cases.
2. The only document that the detainee is always presented with is the summary of classified evidence, but the Tribunal characterized this summary before it as "conclusory" and not persuasive.
3. The detainee's only knowledge of the reasons the Government considered him to be an enemy combatant was the summary of the evidence.
4. The Government's classified evidence was always presumed to be reliable and valid.
5. In 48% of the cases, the Government also relied on unclassified evidence, but, like the classified evidence, this unclassified evidence was almost always withheld from the detainee.
6. At least 55% of the detainees sought either to inspect the classified evidence or to present exculpatory evidence in the form of witnesses and/or documents.
    a. All requests by detainees to inspect the classified evidence were denied.
    b. All requests by detainees for witnesses not already detained in Guantánamo were denied.

c. Requests by detainees for witnesses detained in Guantánamo were denied in 74% of the cases. In the remaining 26% of the cases, 22% of the detainees were permitted to call some detainee-witnesses and 4% were permitted to call all of the detainee-witnesses that they requested.
d. Among detainees that participated, requests by detainees to produce documentary evidence were denied in 60% of the cases. In 25% of the hearings, the detainees were permitted to produce all of their requested documentary evidence; and in 15% of the hearings, the detainees were permitted to produce some of their documentary evidence.

7. The only documentary evidence that the detainees were allowed to produce was from family and friends.
8. Detainees did not always participate in their hearings. When considering all the hearings, 89% of the time no evidence was presented on behalf of the detainee.
9. The Tribunal's decision was made on the same day as the hearing in 81% of the cases.
10. The CSRT procedures recommended that the Government have an attorney present at the hearing; the same procedures deny the detainees any right to a lawyer.
11. Instead of a lawyer, the detainee was assigned a "personal representative," whose role, both in theory and practice, was minimal.
12. With respect to preparation for the hearing, in most cases, the personal representative met with the detainee only once (78%) for no more than 90 minutes (80%) only a week before the hearing (79%).
13. At the end of the hearing, the personal representative failed to exercise his right to comment on the decision in 98% of the cases,
    a. During the hearing; the personal representative said nothing 12% of the time.
    b. During the hearing; the personal representative did not make any substantive statements in 36% of the cases; and
    c. In the 52% of the cases where the personal representative did make substantive comments, those comments sometimes advocated for the Government.
14. In three of the 102 CSRT returns reviewed, the Tribunal found the detainee to be not/no-longer an enemy combatant. In each case, the Defense Department ordered a new Tribunal convened, and the detainee was then found to be an enemy combatant. In one instance, a detainee was found to no longer be an enemy combatant by two Tribunals, before a third Tribunal was convened which then found the detainee to be an enemy combatant.
15. When a detainee was initially found not/no-longer to be an enemy combatant:
    a. The detainee was not told of his favorable decision;
    b. There is no indication that the detainee was informed of or participated in the second (or third) hearings;
    c. The record of the decision finding the detainee not/no-longer to be an enemy combatant is incomplete.

INTRODUCTION:

After the Supreme Court ruled on June 28, 2004 in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that the Guantánamo detainees were entitled to access to federal court through the writ of habeas corpus, the Defense Department established processes to review the status of all detainees, many of whom had been held without any proceeding for two and a half years. Within one month of *Rasul,* the Defense Department created the "Combat Status Review Tribunal" ("CSRT") and established a process for hearings before the CSRT. Each CSRT was composed of three unidentified members of the military who presided over the hearings.

As soon as most of the CSRT hearings were completed, the Government informed the District Court in which the habeas proceedings were pending that, despite the Supreme Court's ruling, no further judicial action was necessary because the detainees had been given CSRT review.

This Report analyzes the CSRT proceedings, comparing the hearing process that the detainees were promised with the process actually provided. The Report is based on the records that the United States Government has produced for 393 of the 558 detainees who had CSRT hearings.

The most important documents in this record were produced by the Government in response to orders by United States District Judges that the Department of Defense provide the entire record of the Combat Status Review Tribunal for review by counsel for at least 102 detainees. These are described as habeas-compelled "full CSRT returns." Without these documents, it would only be possible to review the process promised. With the 102 "full CSRT returns," this Report can also compare the process promised with the process provided.

The results of this review are startling. The process that was promised was modest at best. The process that was actually provided was far less than the written procedures appear to require.

The detainees were denied any right to counsel. Instead, they were assigned a "personal representative" who advised each detainee that the personal representative was neither his lawyer nor his advocate, and that anything that the detainee said could be used against him. In contrast to the absence of any legal representative for the detainee, the Tribunal was required to have at least one lawyer and the Recorder (Prosecutor) was recommended to be a lawyer.

The assigned role of the personal representative was to assist the detainee to present his case. In practice, any assistance was extraordinarily limited. The records of meetings between detainees and their personal representatives indicate that in 78% of the cases, the personal representative met with the detainee only once. The meetings were as short as 10 minutes, and this includes time for translation. Some 13% of the meetings were 20 minutes or less, and more than half of the meetings lasted no more than an hour.

During this meeting, the detainee was told the following:

- The CSRT proceeding was his opportunity to contest the Government's finding that he was an enemy combatant;

- The Government had already found the detainee to be an enemy combatant at multiple levels of review;

- The Government's finding rested upon classified evidence that the detainee would not see; and

- The Tribunal must presume that the secret classified evidence was reliable and valid.

In the majority of the CSRT hearings, the Government rested on the presumption that the classified evidence was sufficient to establish that the detainee was an enemy combatant. The Government never called any witnesses and rarely adduced unclassified evidence. In the majority of cases, the Government provided the detainee with no evidence, declassified or classified, which established that the detainee was an enemy combatant. Instead, the Government provided the detainee merely with what purported to be a summary of the classified evidence. This summary was so conclusory that it precluded a meaningful response. The Government then relied on the presumption that the secret evidence was reliable and accurate.

In the minority of cases, the Government produced declassified evidence to the Tribunal. Such declassified evidence did not bear directly on the question at issue. It consisted of letters from the detainee's family and friends asking for his release, portions of habeas corpus petitions submitted by the detainee's own lawyers on his behalf in United States District Court, and publicly available records that did not mention the detainee by name. None of the declassified evidence introduced against any detainee contained any specific information about the Government's basis for the detainee's detention as an enemy combatant.

Detainees who participated in CSRT proceedings rarely were able to confront the Government evidence. The Government never called witnesses and did not typically produce any unclassified evidence. When such evidence was presented to the Tribunal, it was not shown to the detainee 93% of the time. As for the ability of the detainees to produce evidence, only 11% of the detainees were allowed to introduce any evidence. The promised CSRT process provided that detainees could call witnesses, but no witness from outside Guantánamo ever appeared. The only witnesses the Government allowed detainees to call were other detainees. Therefore, the only witnesses that were allowed under the CSRT process were presumed enemy combatants testifying in favor of other presumed enemy combatants.

The promised CSRT process stated that detainees would be allowed to produce documentary evidence. In operation, the only documentary evidence that detainees were actually allowed to introduce were letters from family and friends. This was true even when the documentary evidence sought to be introduced was available and, in fact, even when the documents were in the Government's possession -- such as passports, hospital records, and even judicial proceedings. In these cases, the detainee insisted that the documents would prove that the charges against him could not be true, but none of the documents was permitted to be introduced.

The detainee's personal representative was totally silent in 12% of the hearings, and in only 52% of the hearings did the personal representative make substantive comments. However, sometimes the substantive comments of the personal representative advocated for the Government and against the detainee. At the end of the hearing, the personal representative had a last opportunity to make comments, but 98% of the time the personal representative explicitly chose not to do so.

In sum, while the promised procedures stated that detainees were allowed to present evidence (witnesses and documents), the only evidence that the detainees were permitted to offer in the vast majority of the cases was their own testimony. As a result, the only option available to the detainee was to make a statement attempting to rebut what he could glean from the summary of classified evidence that he could not see. In 81% of the cases reviewed, the Tribunals made their decision the same day as the hearing. Among the 102 records reviewed for this report, the ultimate decision was always unanimous, and all detainees reviewed were ultimately found to be enemy combatants. It is true that Government statements indicate that 38 of 558 detainees were ultimately found not/no longer to be enemy combatants, but no such determinations are found in the full CSRT records reviewed.

While all detainees reviewed were ultimately found to be enemy combatants, not all Tribunals found the detainee to be an enemy combatant. On a few occasions, a Tribunal initially found that the detainee was not/no longer an enemy combatant. In such cases, the detainee was never told of this decision. Instead, the Tribunal's decision was reviewed at multiple levels in the Defense Department chain of command and eventually a new Tribunal was convened. However, some detainees were still found not/no longer to be enemy combatants. At least one detainee's record indicates that after a second Tribunal found him no longer an enemy combatant, the process was repeated and sent back for a third Tribunal which found him to be an enemy combatant.

THE DATA

In response to *United States v. Rasul* and *Hamdi v. Rumsfeld*, on June 28, 2004 the Department of Defense created the Combatant Status Review Tribunal system and processed each detainee. This report analyzes the data released by the Department Defense about the CSRT proceedings in response to Freedom of Information Act requests and through discovery during *habeas* lawsuits. Substantive data regarding individual detainees has never been voluntarily released by the Department of Defense.

According to the available Department of Defense data, there have been 759 total detainees ever incarcerated at Guantanamo; 558 detainees at Guantánamo Bay have been reviewed by the CSRT process.[1] The Department presumably created a file for each of the 558 CSRT proceedings, which we will refer to as the full CSRT Record. Since the Government has not released these files, except under court orders entered in the various habeas proceedings, the 102 full CSRT returns are the only full CSRT records that can be analyzed in this Report.

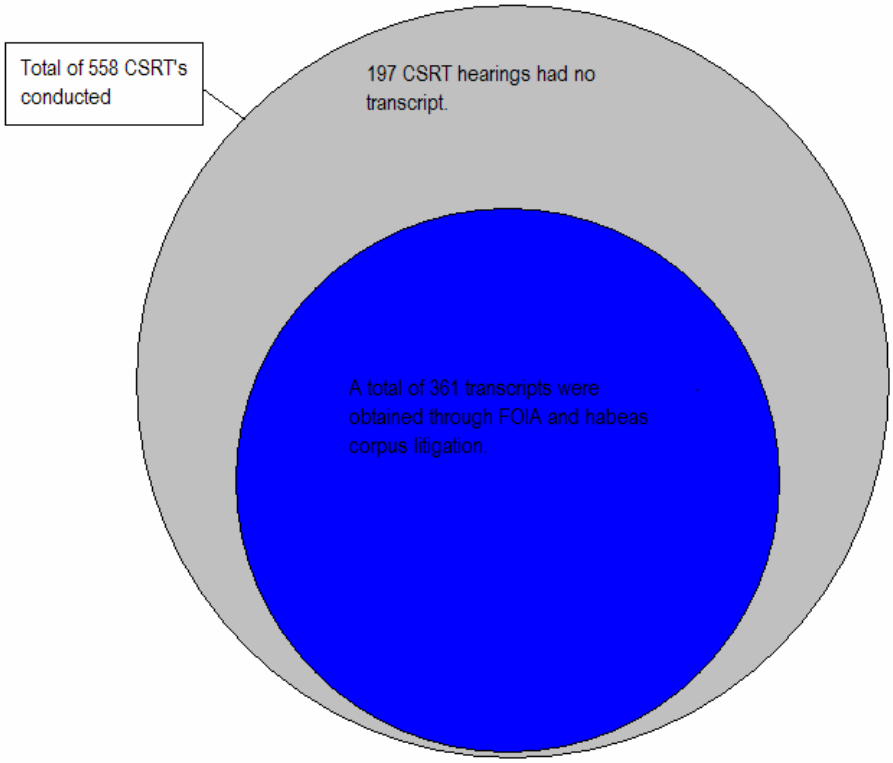
Each detainee was provided the right to appear before the CSRT Tribunal. At least 361 detainees chose to participate, and a Summarized Detainee Statement was prepared from their testimony in each case. This report refers to these Summarized Detainee Statements as "transcripts," although they are not verbatim records. A transcript is provided for those Tribunals in which the detainee is physically present and for those Tribunals in which the detainee has the personal representative read a statement into the record. The Department of Defense initially refused to release any of these transcripts, but a Freedom of Information Act lawsuit brought by the Associated Press succeeded and the Department of Defense was ordered to release these documents.[2] This Report examines these 102 full CSRT returns and 356 transcripts, as those are the only documents that the Government has released.[3] See Diagram I.

[1] This report does not consider the recent "high value detainees" transferred to Guantanamo in September 2006. See "High Value Deatinees Moved to Gitmo; Bush Proposes Detainee Legislation," (Sept. 6, 2006), http://www.defenselink.mil/news/NewsArticle.aspx?ID=721.

[2] The Department of Defense released 356 transcripts through the FOIA request, but there are 4 additional detainee transcripts available among the 102 full CSRT returns reviewed in this report.

[3] 5 of the 102 CSRT returns include transcripts that were not produced in conjunction with the AP FOIA request. Therefore, a total of 361 transcripts exist.

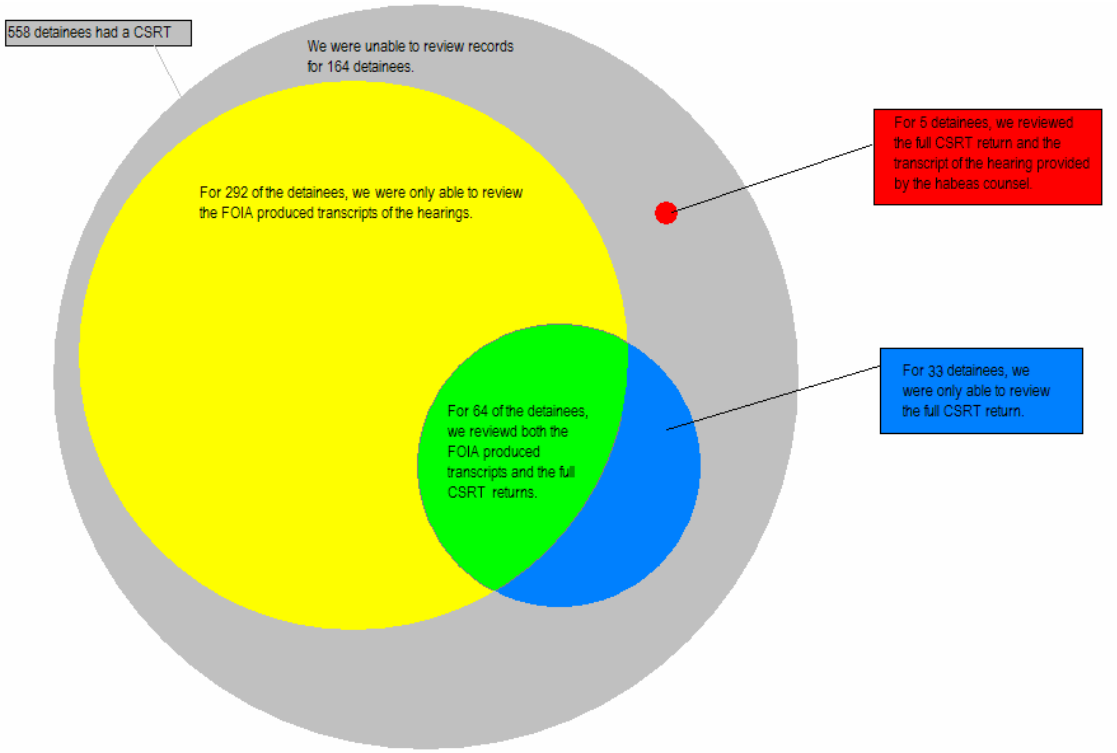
DIAGRAM I



Since only 356 transcripts were released, 202 of the 558 detainees apparently did not participate in the CSRT process; however, because 5 of the 102 full CSRT returns contain transcripts that are not present in the FOIA released 356 transcripts, these 356 transcripts do not contain the records of all detainees who participated in the CSRT.

Although the 102 full CSRT returns contain 69 returns with transcripts, in 11 of these cases the transcripts only record conversations between the personal representative and the Tribunal. Therefore 102 Full CSRT records reviewed include records of 58 detainees who appeared in the CSRT proceeding and 43 detainees who did not physically appear. See **Diagram II.**

DIAGRAM II



This results in full CSRT returns (including transcripts) for 69 detainees. The 38 full CSRT returns of detainees who do not have transcripts released in the Associated Press FOIA are for detainees about whom no other information has been released by the Department of Defense. Eleven detainees who were not physically present at their hearing are among the 69 for whom a transcript is available. The 356 FOIA transcripts combined with the 38 full CSRT returns total 394 detainee records which make up our full sample set. These 394 records reveal that 324 detainees physically appear before the Tribunal.

The data collected on these 38 detainees without a FOIA released transcript constitutes the only information available about the 202 detainees whose transcripts were not produced by the FOAI request.

In short, of the entire 558 detainees at Guantánamo who have been provided the CSRT process, there is some documentation for 394 detainees: the 356 FOIA released transcripts (64 of which also have full CSRT returns) and the 38 full CSRT returns whose transcript was not released by the FOIA.[4]

[4] The two different data sets upon which this report is based have been compared with the profile of all of the detainees that was published February 8, 2006. Mark Denbeaux, *et. al.*, REPORT ON GUANTANAMO DETAINEES: A Profile of 517 Detainee through Analysis of Department of Defense Data (2006), available at *http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf* . The correlation between the data

CREATION OF THE COMBATANT STATUS REVIEW TRIBUNALS

United States v. Rasul and *Hamdi v. Rumsfeld* were decided on June 28, 2004. The Department of Defense issued Establishing and Implementing Orders on July 7 and 29, 2004, respectively.[5] Guantanamo personnel hand-delivered a letter to every detainee, advising him both of the upcoming Combatant Status Review Tribunal and of his right, independent of the CSRT, to file a habeas corpus suit in United States District Court.[6] Therefore the entire CSRT procedures were promulgated in only 32 days.

As the CSRT's were being convened in Guantánamo, the Department of Defense was responding to habeas proceeding in Washington, D.C. The response, beginning in August 2004, justified the CSRT as providing the appropriate hearing detainees were entitled to under *Rasul.* On October 4, 2004 the Defense Department advised the Court that the CSRT's were being processed and described the process that each detainee was being provided. The goal was to demonstrate that, since a sufficient hearing had been held for each detainee, no habeas hearing by a federal court was required.

According to the CSRT procedures established in the July 29, 2001 memo, prior to the commencement of any CSRT proceeding, the classified evidence relevant to that detainee had to be reviewed, a "summary of evidence" prepared, a personal representative appointed for the detainee, the personal representative had to meet with the detainee, and a Tribunal impaneled. The first hearing, according to the records reviewed was of ISN #220[7] and held on August 2, 2004. For that first hearing, the personal representative met with the detainee on July 31, 2004, two days after the CSRT procedures were promulgated. This was the only meeting between this detainee and his personal representative and it lasted only 10 minutes, including translation time. On Monday, August 2, 2004, two days after the meeting between the personal representative and the detainee, the CSRT Tribunal was empanelled, the hearing held, the classified evidence evaluated and the decision issued. This detainee did not participate in his CSRT hearing.

The remainder of the habeas detainees whose CSRT returns were in the 102 considered in this report were processed rapidly: 49% of the hearings were held and

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previously analyzed and the data considered in this report is very strong. That correlation is presented in Appendix 1.

[5] Paul Wolfowitz, *Order Establishing Combatant Status Review Tribunal* (Jul. 7, 2004), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf; Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

[6] While the right, to proceed in federal court may have been extinguished by the Military Commissions Act of 2006, Pub. L No. 109-366, the meaning and constitutionality of that statute is not addressed by the present Report.

[7] Mr. Abdullah Saleh Ati Ai Ajmi, ISN #220, is represented by counsel in habeas litigation. He represents one of the 35 detainees who refused to participate in the CSRT process but whose Full CSRT Return was obtained by his attorney under court order in the *habeas* litigation.

decisions reached by September 30, 70% by October 31, and fully 96% were completed by the end of November 2004. This haste can be seen not only in the scheduling of the hearing but in the speed with which the Tribunals declared a verdict. Among the 102, in 81% of the cases, the decision was reached the same day as the hearing.

The progress of the CRST hearings is reflected in Chart I, "Timeline of CSRT for 102 full CSRT returns" which displays the history of the 102 full CSRT returns by tracking four separate events for each detainee. "R-1" (dark blue line) is the declassified "Summary of Evidence" for each detainee; "1st D-A" (pink line) is the document prepared by the personal representative either during or after the first meeting between he and the detainee. "Hearing" (yellow line) is the date the CRST convenes to consider evidence and hear from the detainee. "Decision" (light blue line) is the date of the CRST decision (in most cases closely tracking the hearing date). It is apparent that the proceedings were commenced and completed in a very short period. [8]

CHART I

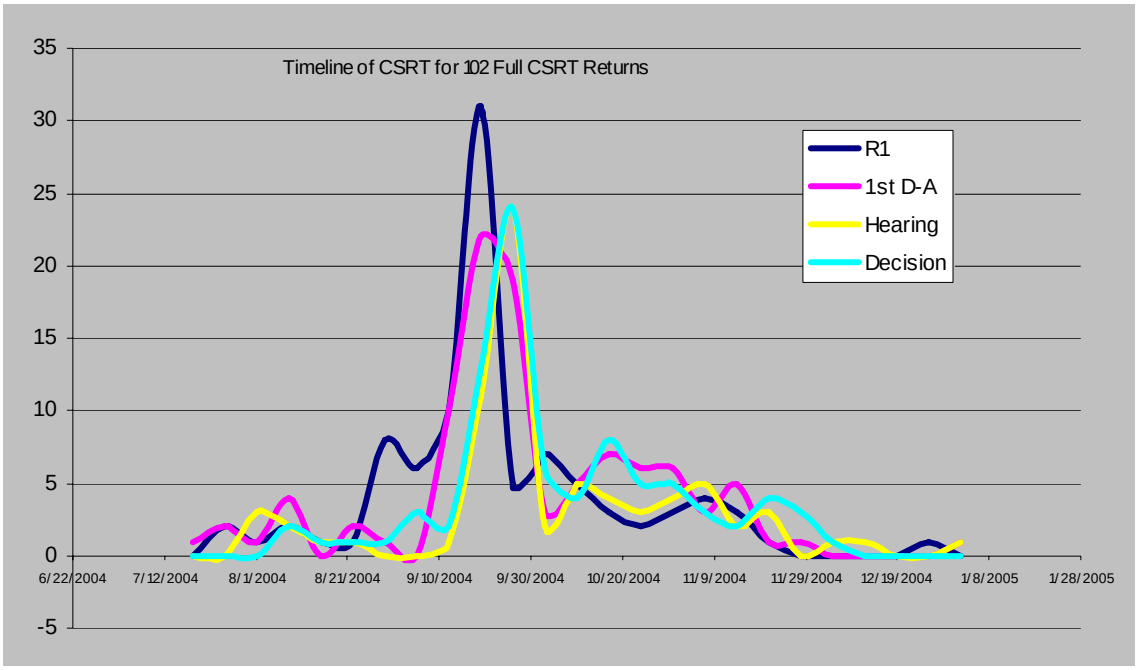
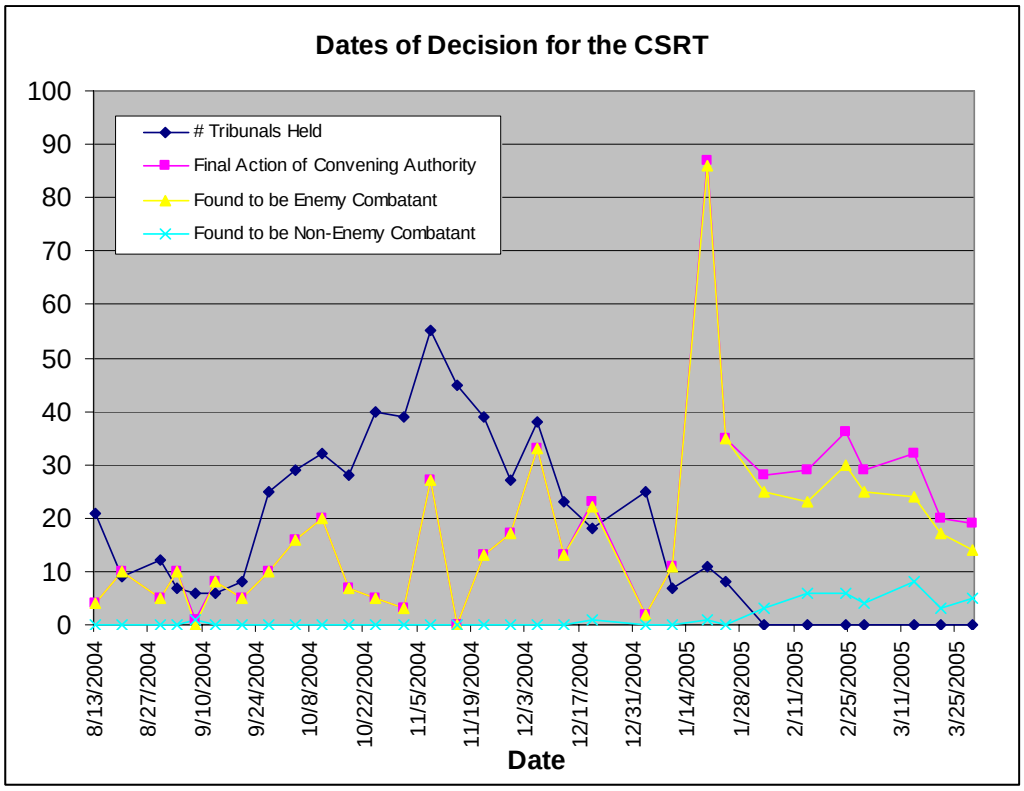


Chart I can be profitably compared with Chart II, the "Dates of Decision for the CSRT," which presents the pattern of decision making of the CSRT's for all of the detainees as published by the Department of Defense in March 29, 2005. Chart II chart

[8] The Defense Department reported in 2005 that, to the best of their knowledge, there were only 5 personal representatives participating in the CSRT process. Affidavit on file at Seton Hall University School of Law.

shows the timing of the decisions for all of the detainees' CSRT proceedings. According to Chart II, the detainees' final administrative decisions tended to cluster at the end of the time frame, long after the decisions of the Tribunals. Almost 40% of the final decisions were made after the last Tribunal decision. During this six weeks after the Tribunals ended and the bulk of the decisions were made, 35 of the 38 detainees who were found to no longer be enemy combatants were determined.

CHART II



THE DECISION TO PARTICIPATE

Each of the 558 detainees who received a CSRT proceeding was advised on at least three occasions that he would also have a right to a habeas corpus proceeding in United States District Court in Washington D.C.

The Department of Defense Order of July 7, 2004 directed that each detainee be told within 10 days that he would have a CSRT proceeding and that each detainee was also entitled, should he so choose, to proceed with habeas litigation in United States District Court challenging their detention at Guantánamo Bay. Pursuant to this Order, each detainee was hand-delivered a formal written notice so specifying.


[9]

The English version of this Notice, prepared for and delivered to every detainee in translation in accordance with the DOD July 7, 2004 Order provided as follows:

> The U.S. Government will give you an opportunity to contest your status as an enemy combatant. Your case will go before a Combatant Status Review Tribunal, composed of military officers. This is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held…
>
> As a matter separate from these Tribunals, *United States courts have jurisdiction to consider petitions brought by enemy combatants held at this facility that challenge the legality of their detention.* You will be notified in the near future what procedures are available should you seek to challenge your detention in the U.S. courts. Whether or not you decide to do so, the Combatant

[9] 07/13/2004 Guantánamo Bay, Cuba - The Combatant Status Review Tribunal Notice is read to a detainee. Photo by Airman Randall Damm, USN http://www.defenselink.mil/news/Jul2004/2004071604b.jpg. This picture was obtained from the Department of Defense and depicts the service of the formal written notice, duly translated, advising the detainee of the CSRT and his right to challenge his detention in United States District Court.

> Status Review Tribunal will still review your status as an enemy combatant.[10]

This document, then, informs each detainee he will be accorded a CSRT, whether or not he chooses to participate. It also informs the detainee that the CSRT is only one of his legal rights, the other being petitions to "United States courts."

THE PERSONAL REPRESENTATIVE

The CSRT procedures provide that there must be a "personal representative" for each detainee, and also require the personal representative to meet with the detainee before the CSRT hearing. The personal representative must advise the detainee of the CSRT process, and also advise the detainee, for a second time, that he has an independent right to habeas corpus.[11]

The records of meetings between detainees and their personal representatives indicate that in 78% of the 102 full CSRT returns, the detainee and the personal representative met only once. Such meetings were typically brief: 91% percent of these meetings were two hours or less, 51% were an hour or less, 6% were 30 minutes or less, 13% were 20 minutes or less, and 2% were ten minutes or less.

The time spent in the meetings includes the time spent translating and the time spent conveying specific information about the process, the personal representative's role, and the option of going to federal court. The length of these meetings did not leave much time for detailed communication, much less meaningful consultation between the personal representative and detainee.

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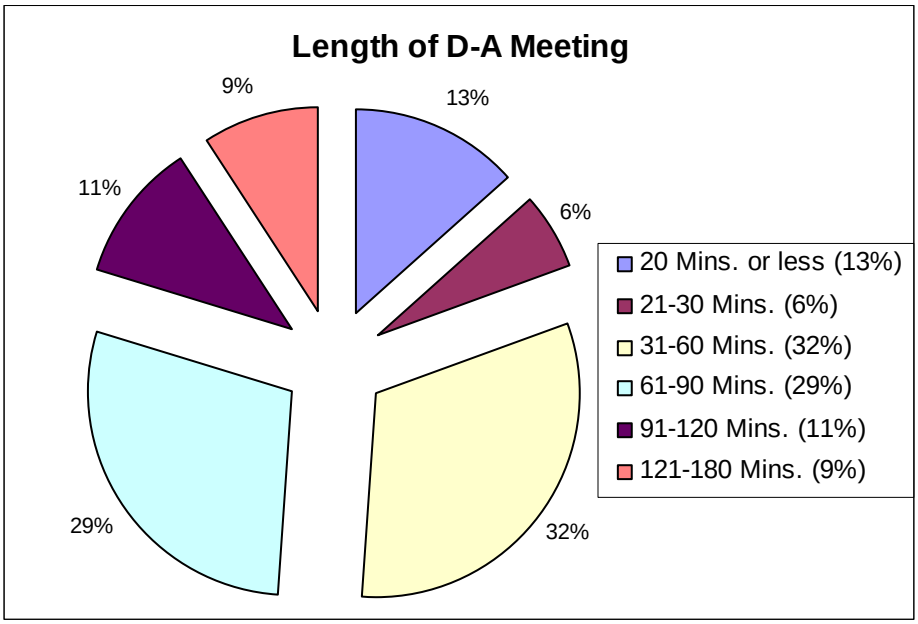
[10] Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf, (emphasis added).
[11] *Id.*

DIAGRAM III



At that initial meeting with each detainee, the personal representative had several tasks, including warning the detainee that the personal representative was not the detainee's lawyer and that nothing discussed would be held in confidence:

> I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. *None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing.* I am available to assist you in preparing an oral or written presentation to the Tribunal should you desire to do so.[12]

This statement makes clear both that the detainee has no advocate in the process and that the detainee has the right to not participate in his process. After receiving this information, 32% of the detainees opted not to participate in the CSRT proceeding.

The meetings with the personal representative occurred very shortly before the Tribunal hearing. The records of meetings between detainees and their personal representatives indicate that for 24% of the detainees, the meeting with the personal representative was held the day of or the day before the CSRT proceeding. For 55% of the detainees, the meeting was between two days and a week before the hearing. Only 7% of the detainees met with their personal representative more than two weeks prior to the CSRT proceeding. See Diagram IV.

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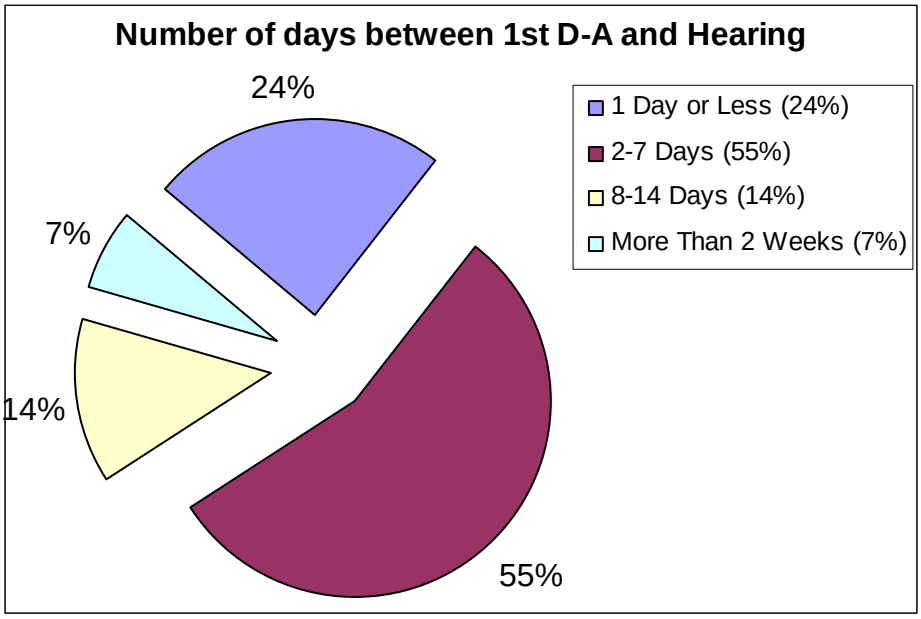
[12] Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf, (emphasis added).

DIAGRAM IV



In 52% of the cases, the personal representative made substantive statements to the Tribunals. However, many times they did not say a word (12 %) and other times they made only formal non-substantive comments (36%). Furthermore, in a number of cases, the personal representative advocated for the Government.

Detainees frequently expressed the view that the CSRT process was not an opportunity to "contest" their status as enemy combatants, but rather another form of interrogation. Seven percent of the detainees who *did* physically appear in their CSRT proceeding made voluntary statements on the record indicating that they understood this to be a continuation of their interrogation and not a true hearing.

The documents show that some detainees objected to the personal representative's role as an aid to the Tribunal rather than as an assistant to the detainee. In 8% all records reviewed, the detainees suggested, without being asked, that the personal representative or the Tribunal were a form of interrogation rather than a hearing. In every occasion when the detainee objected to his personal representative serving as the Government's agent against him, the detainee's objections were ignored.

Contained in the records for detainee ISN #1463 is the following exchange:

> Detainee: My personal representative is supposed to be with me. Not against me. Now he is talking like he is an interrogator. How can he be an attorney? I said all of these allegations were fabricated and I told you I had nothing to do with them. It's up to

> the Recorder or Reporter to respond or provide the proof. I'm afraid to say anything that you might use against me. As you know, there is no attorney here today and I don't know anything about the law. I don't know which of these statements are going to be used for me or against me. Whoever is representing the Government needs to provide evidence.
>
> I cannot say anything that can be used against me. I am even afraid to say what my name is
>
> Anything else I say, I am afraid is going to be used against me.
>
> I hope that you can forgive me.[13]

Although the CSRT procedure requires the personal representative to advise the detainee of the Tribunal process and the detainee's rights under the process, the personal representative on a number of occasions neglected to do this.

ISN #45, Ali Ahmed Mohammed Al Rezehi, did not appear at his CSRT hearing. His personal representative received the "Summary of Evidence" against Mr. Al Rezehi on September 23, 2004 and met with him for 20 minutes on September 28, 2004. According to the "Conclusions of the Tribunal" section the Summary of the Basis for Tribunal Decision, Mr. Al Rezehi declined to participate in his CSRT proceeding:

> The detainee understood the Tribunal Proceedings, but chose not to participate . . . The Tribunal questioned the personal representative closely on this matter and was satisfied that the personal representative had made every effort to ensure that the detainee had made an informed decision.

The Tribunal's close questioning of the personal representative is problematic because the form the personal representative presented to the Tribunal stated that the he had neither read nor left a written copy of the procedures with the detainee.

According to the CSRT record, the detainee's brother submitted a sworn affidavit on behalf of Mr. Al Rezehi. The Tribunal declined to consider the sworn affidavit, determined that the detainee had chosen not to participate in the CSRT, and found Mr. Al Rezehi to be an enemy combatant. The personal representative made no comment during the proceeding.

At least once, the personal representative did not advise the detainee of his right to appear before the Tribunal until after that hearing had already taken place and the Tribunal made its decision. The Detainee Election Form is the document that each personal representative was required to complete as soon as he finished his first meeting with each of his detainees. In the case of Musa Abed Al Wahab, ISN #58, the Combatant

[13] Quotes taken from detainee transcripts are available on file at Seton Hall University School of Law.

Status Review Tribunal Decision Report Cover Sheet concludes that the detainee was determined to be an enemy combatant by a Tribunal, following a hearing with which he chose not to participate in, on October 20, 2004. There is nothing remarkable about this, except for the fact that the Detainee Election Form (Exhibit D-a) is dated *October 25, 2004*. It is not clear how the personal representative could have advised the Tribunal that the detainee had affirmatively declined to participate when he had yet to meet with the detainee.

BURDEN OF PROOF AND PRESUMPTION OF VALIDITY OF GOVERNMENT EVIDENCE

A. Burden of Proof

The published rules for CSRT proceedings formally place the burden of proof that the detainee is an enemy combatant upon the Government, not the detainee:

> Tribunals shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant.[14]

That language might seem inconsistent with the notice read to each detainee in notifying them of the CSRT procedures:

> The U.S. Government will give you an opportunity to contest your status as an enemy combatant. Your case will go before a Combatant Status Review Tribunal, composed of military officers. This is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held....[15]

The language "…an opportunity to *contest* your status as an enemy combatant" (emphasis added) might suggest that it is the detainee, and not the Government, that bears the burden of proof to demonstrate that the detainee is *not* an enemy combatant. Indeed, the July 7th Order also referred to determinations of combatant status that the military had made before the CSRT process. "Each detainee subject to this Order has been determined to be an enemy combatant *through multiple levels of review* by officers of the Department of Defense." (emphasis added)

Further, the summary of evidence provided to each detainee at the start of the first meeting with the personal representative repeats this refrain. Each summary of evidence includes the following statement:

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[14] Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.
[15] *Id.*

> The United States Government has *previously determined* that the detainee is an enemy combatant. This determination is based on information possessed by the United States that indicates that the detainee is....
> (Emphasis added)

In sum, while the burden of proof was placed formally on the Government, the controlling documents clearly suggest the presumptive correctness of the detentions. A Tribunal would have to find that "multiple levels" of military review were all in error in order to find a detainee to not be an enemy combatant. In any event, the debate about who bore the burden of proof may not be worth pursuing in light of the presumption of the validity of the evidence that the procedures mandated, which is detailed below.

B. Presumption of Validity of Government Evidence

While the CSRT procedures formally place the burden of persuasion on the Government, they simultaneously mandate that the Tribunal consider the classified evidence as presumptively valid:

> There is a rebuttable presumption that the Government Evidence, as defined in paragraph H (4) herein, submitted by the Recorder to support a determination that the detainee is an enemy combatant, is genuine and accurate[16]

The effect of this presumption of validity of classified evidence is to meet, if not lift, the Government's burden of proving by a preponderance of the evidence that the detainee was properly classified as an enemy combatant. The detainee is presumed to be an enemy combatant based upon the classified evidence. Although the detainee may in theory rebut the presumption, the requirement that he do so effectively shifts the burden of persuasion to him.

However objectionable it may be to place the burden of proof on the Government with one hand and simultaneously presume it satisfied with the other, the CSRT procedures are even more problematic in light of their concomitant command that the detainee be denied access to the evidence itself. The evidentiary presumption might in theory be rebuttable, but, since the evidence is classified and kept secret from the detainee, he is unable to challenge, explain, or simply rebut it. The rebuttable presumption of validity becomes, in practice, an irrebutable one.

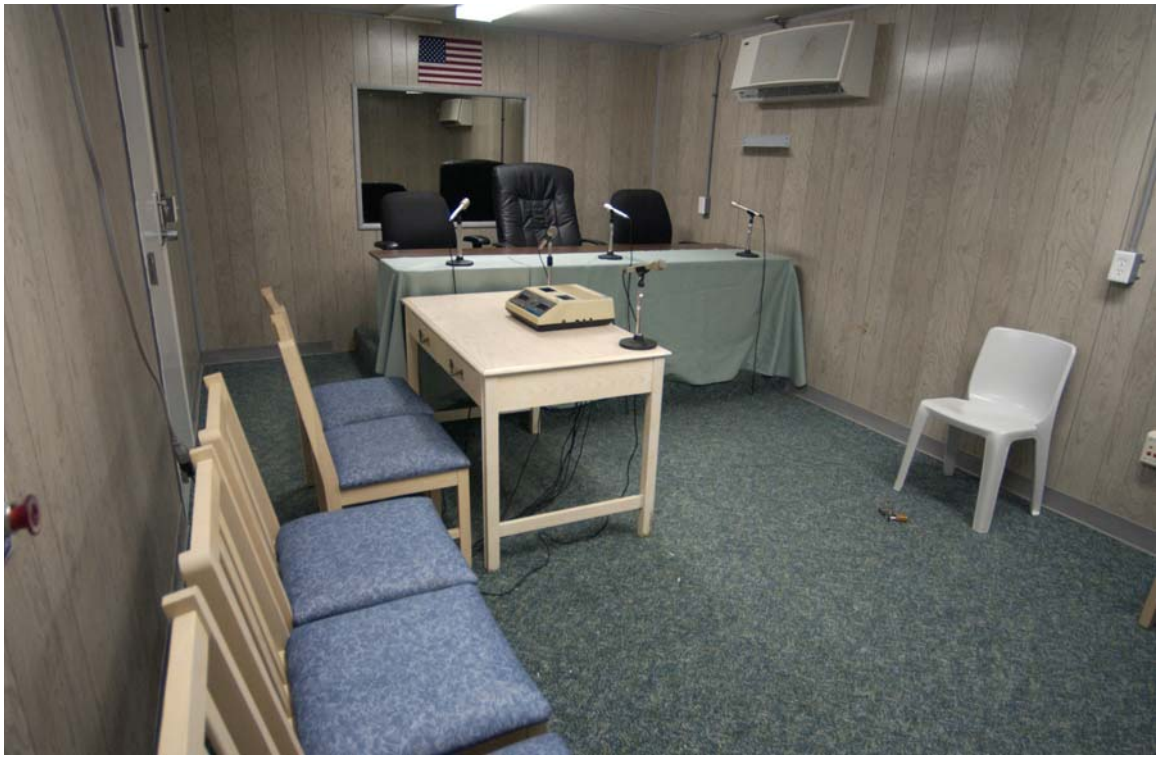
This explains why, although the burden of proof was supposedly on the Government, the Government never felt the need to present a single witness at any of the 393 CSRT hearings. Instead, it relied almost exclusively on the secret, and

[16] Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

presumptively valid, classified evidence. In reality, the burden was on the detainee to prove that the classified evidence was wrong. And the detainee was denied access to the evidence that might have enabled him to do so.

THE HEARING

Each CRST took place in a small room. Armed guards brought the detainee, shackled hand and foot, to the room, seated him in a chair against the wall and chained his shackled legs to the floor. The detainee faced the Recorder (prosecutor for this proceeding), the personal representative (seated beside the Recorder), a paralegal and the interpreter. The three (3) Tribunal members, all military officers, sat to the right of the detainee behind the covered table. The scene is captured in the photograph below.[17]



[17] 07/29/2004 Guantánamo Bay, Cuba - The facility where the Combatant Status Review Tribunals (CSRT) will take place for detained enemy combatants. U.S. Navy photo by Photographer's Mate 1st Class Christopher Mobley (RELEASED) http://www.defenselink.mil/news/d20040805pic4.jpg

THE EVIDENCE

Typically the Government provided the detainee only the document known as the "Unclassified Summary of the Evidence" and marked R-1 by the Recorder.[19] The boilerplate Discussion of Unclassified Evidence in most record reads:

> Exhibit R-1 is the Unclassified Summary of Evidence. While this summary is helpful in that it provides a broad outline of what the Tribunal can expect to see, *it is not persuasive in that it provides conclusory statements without supporting unclassified evidence.*

(Emphasis added)

The Unclassified Summary of Evidence often made it impossible for detainees to address its thrust. For example, the transcript of the proceeding for detainee ISN# 1463 recounts:

> Detainee: That is not true. I did not help anybody and whoever is saying that I did, let them present their evidence. If I know that somebody presented any evidence, then somebody can tell me what that evidence is so that I can respond to it. If there is any evidence at all.…
>
> Detainee: That's not true. Again, whoever has any evidence to prove, let them present it. If somebody submitted any evidence, I'd like to take a look at it to find out if that evidence is true….
>
> Detainee: It's not fair for me if you mask some of the secret information…. How can I defend myself?

The CSRT Procedures as promulgated by the July 29, 2004 memo accord a broad range of powers to the Tribunals for the production of evidence. The Tribunal has the power to order witnesses who are members of the United States military to appear, the power to request civilian witnesses to testify, and the power to order production of any document in the possession of the United States Government. For none of the 393 detainees for whom records have been released did the Government *ever* produce a single witness, military or civilian, during the unclassified portion of the record. The CSRT Procedures accord the detainee a right to question witnesses against him, but that right is academic because the Government never presented any witness.

A. Government Unclassified Documentary Evidence

The CSRT Procedures anticipate that the Government will produce unclassified evidence at the hearing. The Procedures explicitly require that the personal representative advise the detainee of his right to see such unclassified evidence.[20] According to the 102 full CSRT returns the Government did not present any witnesses and rarely presented non-testimonial evidence to the detainee prior to the hearing. A review of the 361 transcripts reveals that the Government may have shown the detainee some evidence before he began his statement in 4% of the cases. When the hearing began, 89% of the detainees had no facts to rebut, whether from witnesses or from documentary evidence. The same documents also reveal that the Tribunal showed the detainee unclassified information in 7% of the hearings. It is unclear why the Tribunal showed unclassified evidence in some cases but not in others.

As explained below, 49% of the 102 full CSRT returns contain some form of unclassified evidence presented by the Government. This number is in stark contrast to the 4% of detainees who had access to unclassified information prior to their hearings, and to the 7% of detainees who were shown unclassified information during their hearings.

Each CSRT Return includes an Unclassified Summary of the Basis for Tribunal Decision, including the unclassified evidence against the detainee. Twenty nine of the 102 full CSRT returns also contain a Recorder's Exhibit List, which cites every piece of classified and unclassified evidence that the Tribunal considers. In addition, sometimes unclassified evidence is appended to the full CSRT returns. These appended exhibits may or may not be listed in either the Recorder's Exhibit List or the Unclassified Summary of Basis. Based on these three sources, unclassified evidence against detainees appears in 48% of the 102 full CSRT returns.

Thus, for 52% of the CSRT hearings, the Government had no unclassified evidence and relied solely upon the presumptively valid classified evidence to meet its burden of proof.

1. Types of Government Unclassified Evidence Presented to the Tribunal

The Government introduced five types of unclassified evidence in the CSRT hearing:

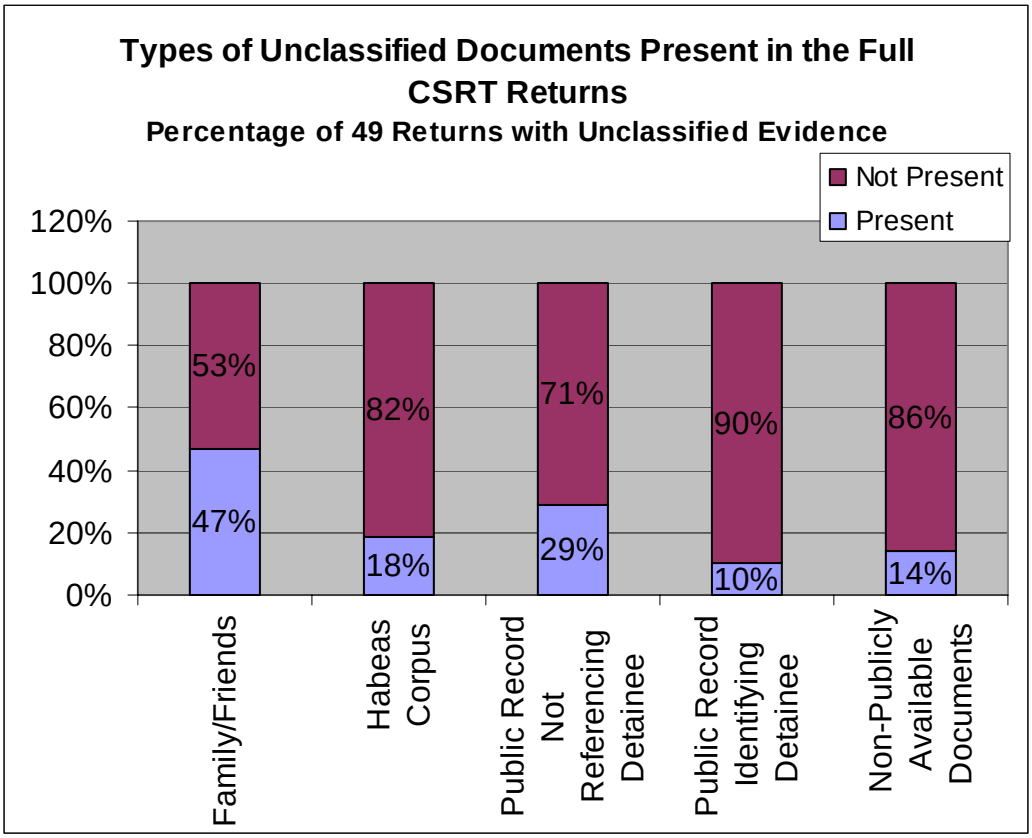
1. Documents from friends and family
2. Submissions from habeas corpus litigation
3. Publicly available documents either released by the Government or published by the press that name the detainee at issue

[20] Enclosure (3) page 3, Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

4. Publicly available documents either released by the Government or published by the press that do not name the detainee
5. Non-publicly available documents that particularly concern the detainee.

These are reflected in Chart III

CHART III



For 47% of the detainees whose Tribunal consider unclassified documents, this evidence consisted of documents and letters written by friends and family of the detainees. Correspondence written by family and friends generally lacks inculpatory value.

Eighteen percent of the records contain habeas corpus pleadings. Motions taken from habeas corpus proceedings also lack inculpatory value.

Of the full CSRT returns that consider unclassified documents, 29% contain public records that do not refer to the detainee. The inculpatory value of these documents is tenuous because the documents are used to establish that certain groups are terrorist organizations while not directly accusing the detainee of any wrongdoing.

Of the full CSRT returns that reflect unclassified documents, 10% contain public records that identify the detainee by name. The inculpatory value of these documents is more apparent.

An additional 14% contain non-publicly available documents directly pertinent to the detainee. Included in this group are documents that are labeled FOUO, as discussed below, as well as a Bosnian court investigation documents and a mental health record. The inculpatory value of these documents seems more apparent -- however, there is no indication the detainees ever saw these documents.

Most unclassified documents in a detainee's full CSRT return do not allow the detainee to effectively contest his status as an enemy combatant particularly when the detainee is usually not allowed to view this unclassified evidence.

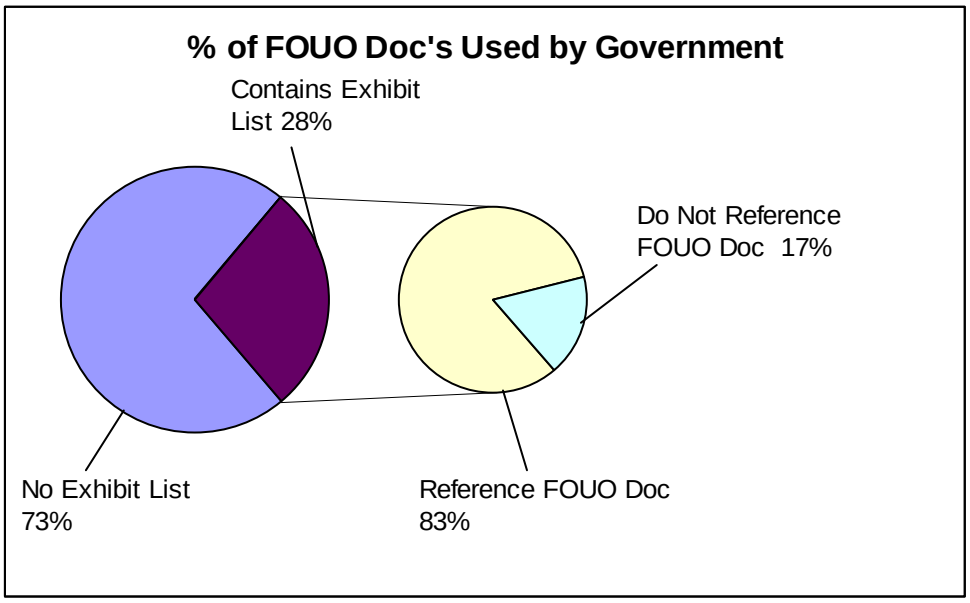
2. Unclassified FOUO Evidence Withheld from Detainee

Unclassified evidence includes, but is not limited to, documents labeled "For Official Use Only" ("FOUO"). However, the CSRT process consistently treated FOUO documents as if they are classified. For example, the record does not discuss these documents in the unclassified summary of the basis for decision. The FOUO documents primarily consist of interrogations of the detainee. Without access to these FOUO documents, the detainee is not able to clarify statements made or claim the statements were made as a result of torture.

The existence and reliance upon FOUO evidence is not revealed in any of the 356 FOIA-produced transcripts. Its existence was revealed, in most instances, in the Recorder's Exhibit List, which was produced only as part of the habeas compelled full CSRT returns. But for the habeas petitions, therefore, the Government's reliance on this variety of secret evidence would never have been revealed.

This Report was able to review the Recorder's Exhibit list for only 28% of the detainees' full CSRT returns. However, Exhibit Lists, when present, show that the Government relied upon unclassified FOUO evidence *for 83% of the detainees*. The record also shows that, when the Government relied upon unclassified FOUO evidence, it was always withheld from the detainee. See Chart IV.

CHART IV



In essence detainees were not shown any evidence against them, classified or unclassified. Not only was the FOUO evidence withheld from the detainee in violation of the CSRT procedures, but other declassified evidence was also withheld.

B. The Detainee's Opportunity to Present His Evidence

Records indicate that as many as 96% of the detainees began their presentation of their case without hearing or seeing any facts upon which the Government based its determination that the detainee was an enemy combatant other than the unclassified summary of evidence. The detainee began to present his case without knowing the facts he had to rebut. All data within this section is based upon the 102 full CSRT returns reviewed.

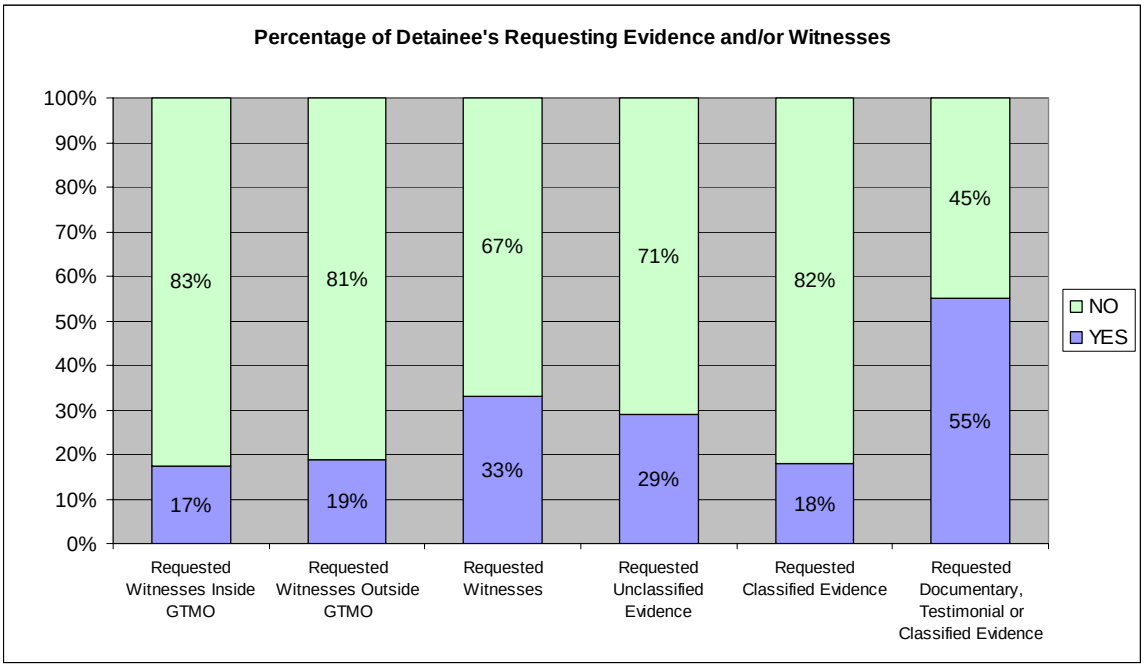
The CSRT procedures provided that each detainee would have the right to present his evidence to the Tribunal. The CSRT procedures provide that:

> (6) **The detainee may present evidence to the Tribunal**, including the testimony of witnesses who are reasonably available and whose testimony is considered by the Tribunal to be relevant. Evidence on the detainee's behalf (other than his own testimony, if

offered) may be presented in documentary form and through written statements, preferably sworn.[21]

Of the detainees who chose to participate in their Tribunal, more than half[22] (55%) attempted either to inspect the classified (or perhaps unclassified) evidence or to produce their own witnesses or documentary evidence. Most requests for the production of evidence at the Tribunal, however, were denied. Chart V reflects the requests made by type of evidence.

CHART V



1. Witness Requests

One third of detainees who participated requested that witnesses testify on their behalf. In some cases, requests were denied as being made too late to be considered, as during the hearing. Still other detainees refused to participate because their requests were denied.

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[21] Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

[22] Some detainees sought more than one kind of evidence. Some detainees sought witnesses and/or non-testimonial evidence and/or the opportunity to review classified evidence. The analysis that follows reviews the evidence requested and permitted without associating it with the total requests of any particular detainee.

Chart VI below shows that, among those records, only 26% of the detainees that requested witnesses were able to get *any* of those witnesses produced by the Tribunal. Even detainees who requested the testimony of other detainees at Guantánamo were often denied the right to call such witnesses.

CHART VI

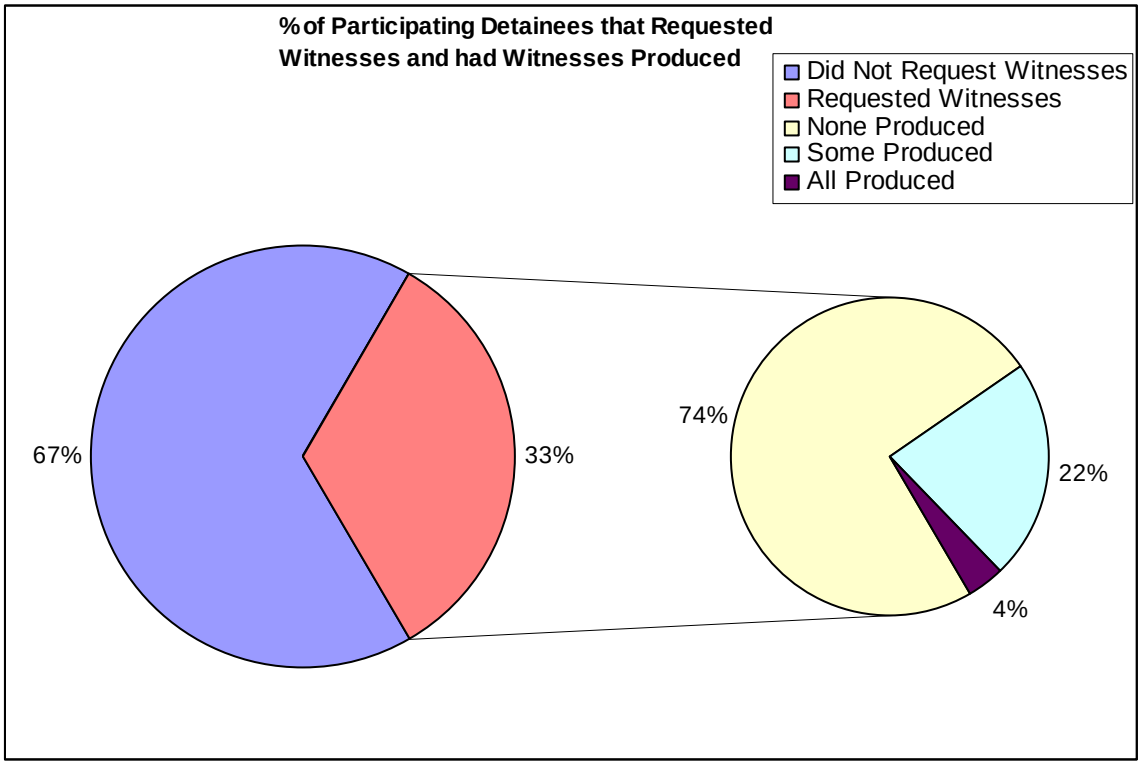
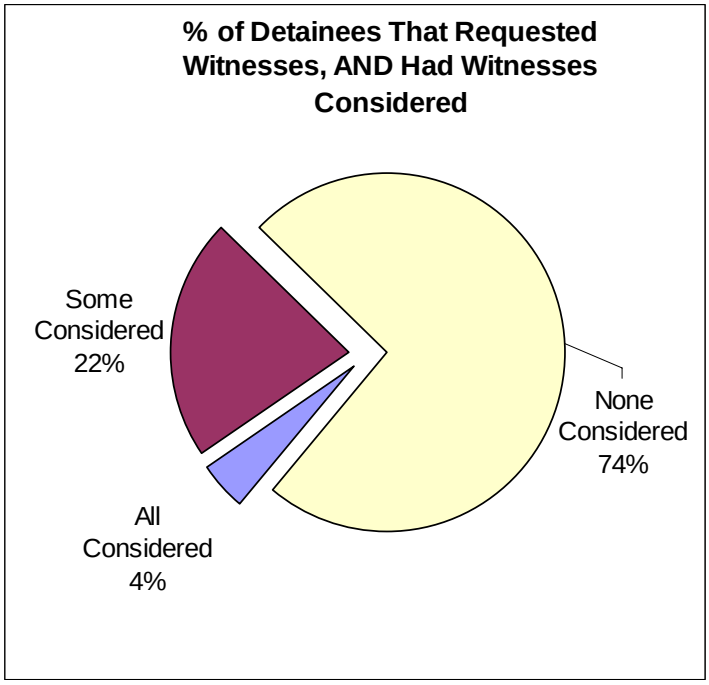


Chart VII further breaks down the data by showing that only 4% of these detainees were able to obtain *all* of their witnesses, and 22% of these detainees were able to have only *some* of their witnesses produced. Fully 74% of the detainees who requested witnesses were denied the production of all witnesses by the Tribunal. The Tribunal denied witness requests if it deemed the witnesses either "not reasonably available," "irrelevant," or at least one egregious example, because "the Tribunal would have been burdened with repetitive, cumulative testimony."[23]

CHART VII



Some detainees requested witnesses located outside Guantánamo and some requested witnesses from within the Base -- always another detainee. More than half of the detainees who requested witnesses, requested the testimony of witnesses who were not at Guantánamo. *All requests* for the testimony of detainees not detained at Guantánamo were denied.

The detainees who asked for witnesses from inside Guantánamo were successful in producing some witnesses only 50% of the time.

[23] For example, ISN 277 requested 17 witnesses, and the Tribunal President decided that he could only have two of them, because he determined that "all of the witnesses would probably testify similarly, if not identically." No basis is given for the belief that the witnesses would testify similarly or identically, and, as ISN 277's personal representative pointed out to the Tribunal, there is no basis in the CSRT procedures for denying a witness based on redundancy.

Nineteen percent of the participating detainees requested witnesses from outside Guantánamo. However, these requests were *never successful*. Thus, as the data shows, the only witnesses that any of the detainees were able to produce to testify on their behalf were other detainees.

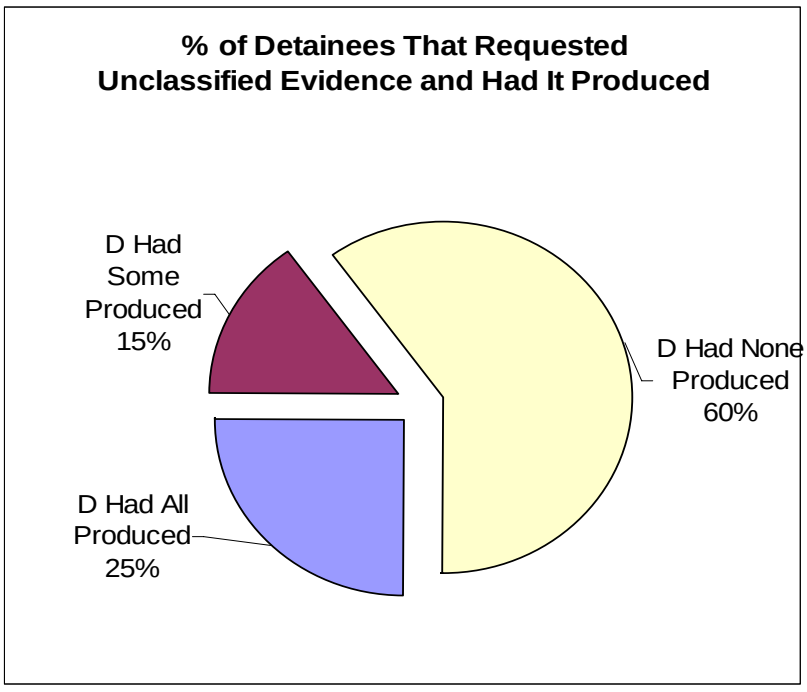
The Unclassified Summary of the Basis for Decision lists the evidence that it considered and the evidence that the Tribunal did not consider. The data shows that only 26% of the detainees who requested witnesses had witnesses whose testimony was considered by the Tribunal. Broken down further, only 4% of the detainees who requested witnesses had all of their witnesses considered by the Tribunal. All of the witnesses considered were detainees testifying for each other.

In sum, the detainees were denied the right to produce any testimonial evidence other than the testimony of some of the fellow detainees.

2. Unclassified Evidence Requests

Twenty-nine percent of the detainees requested unclassified documentary evidence prior to their hearings. Chart VIII analyzes participating detainees' unclassified evidence requests and the disposition of the requests. For the detainees who requested unclassified evidence, it was only produced 40% of the time. Twenty-five percent of the detainees who requested this evidence had all of their evidence produced, while 15% of these detainees had only some of the requested evidence produced. The documentary evidence that the Tribunal allowed the detainee to bring mostly letters from parents and friends that was accorded little weight by the Tribunal.

CHART VIII



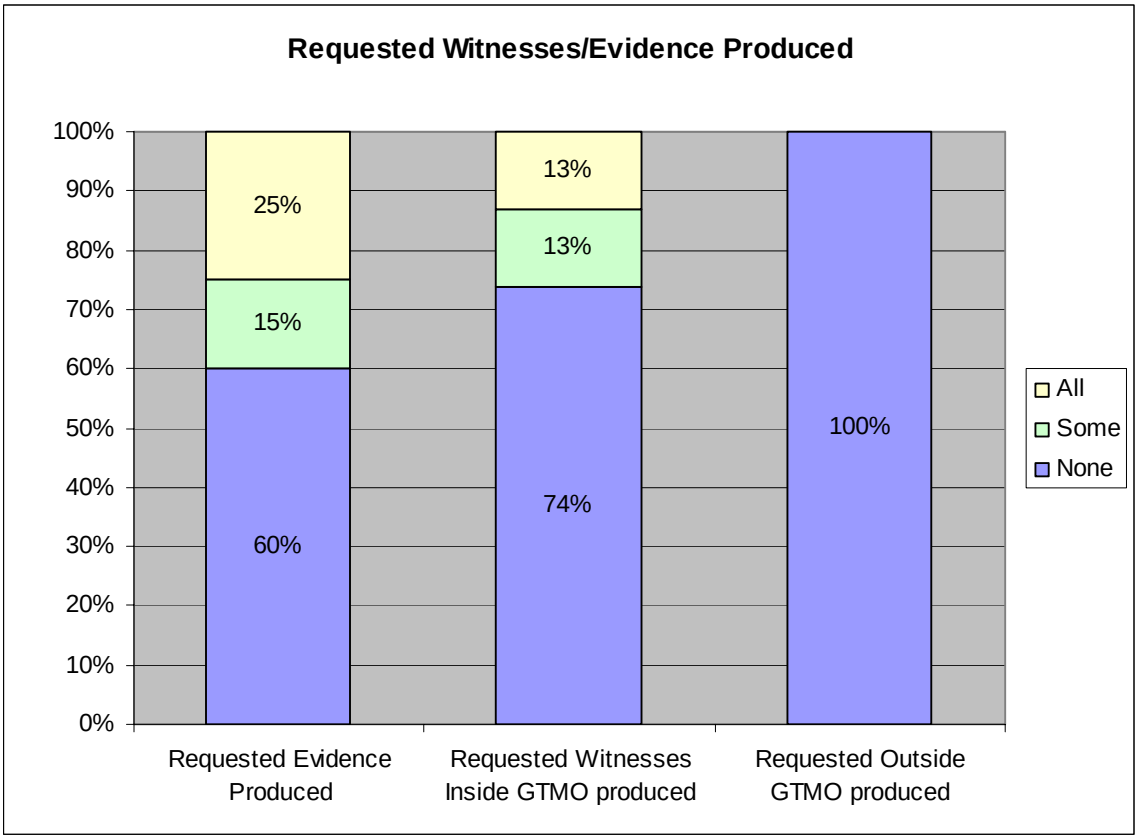
3. Requests to See Classified Evidence

During their hearing, more than 14% of the detainees requested the opportunity to view the classified evidence against them.[24] These requests were always denied.

4. Evidence Detainees were Permitted to Present

The Tribunals denied more evidence than they permitted, and denied almost all evidence that would be persuasive. Detainees' requests for witnesses not detained in Guantanamo were always rejected. Detainees requests to see any of the Government's classified evidence was always denied. Detainees' requests for testimony from other detainees was usually denied. The detainees, however, were allowed to present their documentary evidence, at least in part, 40% of the time.

CHART IX



[24] An examination of the 361 available transcripts reveals 18% made a request for classified evidence, but for purposes of this section analyzing all evidentiary requests, 14% corresponds to the 102 full CSRT returns.

The picture of what kind of evidence was permitted and rejected is bleak. However, when the number of detainees who have any evidence to present upon their behalf is considered, the picture is bleaker still. Based upon the 361 available transcripts, for as many as 89% of detainees, no evidence was presented on their behalf. The evidence the remaining 11% had was limited to testimony from other detainees and letters from friends and families. Taken as a whole, 96% of the detainees were shown no facts by the Government to support their detention as enemy combatants and 89% of the detainees had no evidence to present, and the 11% who did were allowed only unpersuasive evidence: family letters and other testimony from other detainees.

5. Reasons for Denying the Detainees' Evidence

The Procedures empower the CSRT Tribunal to:

> Order U.S. military witnesses to appear and to request the appearance of civilian witnesses if, in the judgment of the Tribunal President those witnesses are *reasonably available*.[25]

The Procedures also permit the CSRT Tribunal to:

> [R]equest the production of such *reasonably available* information in the possession of the US. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings[26]

The CSRT procedures do not define "reasonably available" and the detainee has no right to appeal a determination that certain evidence is either unavailable or "irrelevant." The reasons the Tribunals gave for the refusal to allow detainees to present evidence vary. The three most common reasons were:

1. The evidence/witness was not "reasonably available"
2. The evidence/witness was not relevant, or
3. The request for production of evidence/witness was not made to the personal representative during the D-A meeting and was thus too late.

[25] Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.
[26] *Id.*

The Tribunals sometimes did not give any reason for denying evidence. The Tribunals sometimes also refused to permit the introduction even of documentary evidence in the possession of the United States Government.

Mohammad Atiq Al Harbi (ISN #333) appeared before a Tribunal and identified documents which he said would exonerate him and explain that he was not an enemy combatant:

> It is important you find the notes on my visa and passport because they show I was there for 8 days and could not have been expected to go to Afghanistan and engage in hostilities against anyone.

During the proceeding for detainee ISN #680, the following exchange took place:

> Questions to Recorder by Tribunal Members
> Q: Are you aware if the passport is in control of the U.S. Government here in Guantánamo?
> A: No, sir, I'm not aware.
> Questions to Detainee by Tribunal Members
> Q: If we were to see a copy of your passport, what are the dates it would say you are in Pakistan?
> A: The date of my entry to Pakistan, the dates I have on my visa, they all exist there. Even in Pakistan, we were received by American investigators. We were interrogated by American interrogators in Pakistan.
> Q: How long have you been here at the camp?
> A: I really don't know anymore, but most likely 2 to 2 1/2 years.

The passport was neither located nor produced and the detainee was promptly found to be an enemy combatant.

For Khi Ali Gul, ISN# 928, the Tribunal President said:

> [W]e will keep this matter open for a reasonable period of time; that is, if we receive back from Afghanistan this witness request, even if we close the proceedings today, with new evidence, we would be open to introducing or re-introducing any witness statements we might receive.

Khi Ali Gul's requested that his brother be produced as a witness and provided the Tribunal with his brother's telephone number and address. Instead of calling the phone number provided, which might have produced an immediate result, the Government instead sent a request to the Afghan embassy. The Afghan embassy did not respond within 30 days and the witness was not produced. The witness was then found not to be reasonably available by the Tribunal, the detainee determined to be an Enemy Combatant, and the hearing was never reopened.

In another case, an Algerian detainee requested court documents from his hearing in Bosnia at which the Bosnian courts had acquitted him of terrorist activities. The Tribunal concluded that these official Court documents were not "reasonably available" even though the Unclassified Summary of the Basis for Decision discussed another document from the same Bosnian legal proceedings. The aspects of the Bosnian proceedings which the Tribunal considered were not the records that the detainee requested. Apparently, according to the Government, some records from a formal Bosnian trial are "reasonably available" but others are not. There was no explanation in the record to explain why the Government did not obtain the requested records. This detainee, like the others, was determined to be an enemy combatant.

In the case of Allal Ab Aljallil Abd Al Rahman Abd, ISN #156, the detainee sought the production of medical records from a specified hospital.

> During the hearing, the detainee requested that the Tribunal President obtain medical records from a hospital in Jordan . . . The Tribunal president denied the request. He determined that, since the detainee failed to provide specific information about the documents when he previously met with his PR, the request was untimely and the evidence was not reasonably available.

CSRT Procedures provide for two reasons to deny requested evidence: that it is irrelevant and that it is "not reasonably available." That the detainee did not mention this request to his personal representative is not a reason to deny the evidence, at least according to the Procedures set forth in the July 29, 2004 memo.

TRIBUNAL EVALUATION OF THE EVIDENCE

Once the detainee leaves the hearing chamber, the Tribunal is supposed to review and evaluate the classified evidence for the first time. What occurred after each detainee left the hearing is never recorded, or at least no record has been released. While we have no access to the classified evidence, much of the classified evidence is apparently hearsay. The CSRT procedures permit the use of hearsay, but require the Tribunal to first determine the reliability of the hearsay:

> The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it. *At the discretion of the Tribunal, for example, it may consider hearsay evidence*, taking into account the reliability of such evidence in the circumstances. (emphasis added) [27]

[27] This language can be found in both the Wolfowitz and England memos at Jul. 7 2004 § G(9) and Jul. 29 2004 § G(7)). Paul Wolfowitz, *Order Establishing Combatant Status Review Tribunal* (Jul. 7, 2004), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf; Gordon England, *Implementation*

The Tribunal's Basis for its Decision describes the rationale for determining that a detainee is an enemy combatant. However, the 102 full CSRT returns reviewed, all obtained only through the habeas litigation, show that the Tribinal apparently never questioned the reliability of any hearsay.

This failure to analyze the reliability of the hearsay is all the more serious because three issues arise concerning the reliability of the hearsay. First, the source of the hearsay is usually or always anonymous; second, there is great confusion about the names of the detainees; and third, there is some evidence of the coercion of declarants.

A. Hearsay from Anonymous Sources

Each Tribunal decision was reviewed by a Legal Advisor. It is not possible to definitively analyze the quality of the hearsay evidence since it is unavailable, but the statement of the Legal Adviser reviewing the Tribunal's decision for ISN #552 demonstrates the problem:

> Indeed, the evidence considered persuasive by the Tribunal is made up almost entirely of hearsay evidence recorded by unidentified individuals with no first hand knowledge of the events they describe.

Outside of the CSRT process, this type of evidence is more commonly referred to as "rumor."

In one instance, the personal representative made the following comments regarding the Record of Proceedings for ISN #32:

> I do not believe the Tribunal gave full weight to the exhibits regarding ISN [redacted]'s truthfulness regarding the time frames in which he saw various other ISNs in Afghanistan. It is unfortunate that the 302 in question was so heavily redacted that the Tribunal could not see that while ISN [redacted] may have been a couple months off in his recollection of ISN [redacted]'s appearance with an AK 47, that he was six months to a year off in his recollections of other Yemeni detainees he identified. I do feel with some certainty that ISN [redacted] has lied about other detainees to receive preferable treatment and to cause them problems while in custody. Had the Tribunal taken this evidence out as unreliable, then the position we have taken is that a teacher of the Koran (to the Taliban's children) is an enemy combatant (partially because he slept under a Taliban roof).

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of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (Jul. 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

B. Possible False Identities or Misnomers

It is black letter evidence law in normal settings that, while hearsay may sometimes be admissible, the reliability of hearsay evidence always depends upon the reliability of the hearsay declarant. The problem of reliability in the case of the detainees is apparent because the Government's records of its detainees themselves misidentified the detainees more than 150 times.

On April 19, 2006 the Government published the names of the 558 detainees who have had CSRT proceedings at Guantanamo.[28] On May 15, 2006 the Government also published a list of 759 names which represents all those ever detained at Guantánamo.[29] The Government has also released transcripts and other documents related to Administrative Review Board hearings that also contain detainee names.[30]

These three records contain more than 900 different versions of detainee names.. Adding other Government documents, such as the full CSRT returns and other legal documents, the number rises to more than 1000 different names. Yet, according to the Government there only 759 detainees have passed through Guantánamo "between January 2002 and May 15, 2006."[31] The more 1000 different names does not mean that there were more than 1000 detainees at Guantánamo; but it does establish the difficulty of identifying individuals in these circumstances.

If, after more than four years of interrogation, the Government does not know the names of its own detainees, confusion about the identity of detainees clouds any analysis of the evidence at the CSRT hearings. In short, there should be considerable concern when a Tribunal relies upon hearsay declarants who may be talking about someone other than the detainee to whom the declaration is supposedly directed. For example, one detainee responded to the claim that his name was found "on a document." The detainee states:

> There are several tribes in Saudi Arabia and one of these tribes is Al Harbi. This is part of my names and there are literally millions that share Al Harbi as part of their name. Further, my first names Mohammad and Atiq are names that are favored in that region. Just knowing someone has the name Al Harbi tells you where they came from in Saudi Arabia. Where I live, it is not uncommon to be in a group of 8-10 people and 1 or 2 of them will be named

[28] Available at: http://www.defenselink.mil/pubs/foi/detainees/detainee_list.pdf
[29] Available at: http://www.defenselink.mil/pubs/foi/detainees/detaineesFOIArelease15May2006.pdf
[30] The Procedures provide that each prisoner found an Enemy Combatant must go through an Administration Review Board process (ARB) every year following the CSRT conclusion that the detainee is an Enemy Combatant.
[31] This is the language used to describe the list of 759 detainee produced by the Government on May 15, 2006.

> Mohammed Al Harbi. If fact, I know of 2 Mohammed Al Harbis here in Guantánamo Bay and one of them is in Camp 4. The fact that this name is recovered on a document is literally meaningless.[32]

3. Possible Coercion

No Tribunal apparently considered the extent to which any hearsay evidence was obtained through coercion. While the effects of torture, or coercion more generally, would obviously apply to inculpatory statements from the detainee himself, the possibility should also have been considered by a Tribunal weighing all statements and information relating to the detainee which may have been, in the words of the Detainee Treatment Act of 2005 "obtained as a result of coercion…."[33] This statute was not the enacted until December 2005, after the CSRT process was complete, but indications of torture or coercion by a detainee should have at least raised hearsay concerns, which the Tribunal is required to consider.[34] The record does not indicate such an inquiry by any Tribunal. Instead, the Tribunal usually makes note of allegations of torture, and refers them to the convening authority. This is less surprising than the fact that several Tribunals found a detainee to be an enemy combatant before receiving any results from such investigation. While there is no way to ascertain the extent, if any, that witness statements might have been affected by coercion, fully 18% of the detainees alleged torture; in each case, the detainee volunteered the information rather than being asked by the Tribunal or the personal representative. In each case, the panel proceeded to decide the case before any investigation was undertaken.

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[32] Mohammad Atiq Al Harbi, ISN #333, goes on to state that there are documents available to the United States that will prove that his classification as an enemy combatant is wrong. He also objects to anonymous secret evidence "It is important you find the notes on my visa and passport because they show I was there for 8 days and could not have been expected to go to Afghanistan and engage in hostilities against anyone. . . . I understand you cannot tell me who said this, but I ask that you look at this individual very closely because his story is false. If you ask this person the right question, you will see that very quickly. I am trusting you to do this for me."

[33] The Detainee Treatment Act of 2005 provides in part:

b) CONSIDERATION OF STATEMENTS DERIVED WITH COERCION.--

> (1) ASSESSMENT.--The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative Tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, 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 any such statement.

[34] Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

DECISIONS OF TRIBUNAL WHEN A DETAINEE PREVAILS

Despite all this, the detainees sometimes won, at least initially The orders of July 29, 2004 state that:

> [t]he Director, CSRT, shall review the Tribunal's decision and may approve the decision and take appropriate action, or return the record to the Tribunal for further proceedings. In cases where the Tribunal decision is approved and the case is considered final, the Director, CSRT, shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies.[35]

If the Director of the CSRT wishes, he may send any decision back to the CSRT for further proceedings, which means that the detainee can be subjected to multiple Tribunals until the Government is satisfied with the ruling. The additional hearings are always conduced without the detainee himself, who was never notified of his ”victory” in the first proceeding.

At least three detainees were initially found not to be enemy combatants and then subjected to multiple re-hearings until they were found to be enemy combatants. This fact is not formally published in any records but was discovered through a careful review of documents produced under court order in the *habeas* litigations.

Several detainees had second hearings and at least one detainee, after his first and second Tribunals unanimously determined him to not be an enemy combatant, had yet a third Tribunal — again *in abstentia* — which finally found him to be properly classified as an enemy combatant. The Government’s record for one detainee whose proceeding was returned for a second hearing states:

> On 24 November 2004, a previous Tribunal [unanimously] determined, by a preponderance of the evidence, that Detainee #654 was not properly designated as an enemy combatant.

It continues,

> On 25 January 2005, this Tribunal, upon review of all the evidence, determined that detainee #654 was properly [unanimously] designated as an enemy combatant.

A more egregious record of a detainee twice subjected to Tribunals is that of Detainee #250. The following excerpts present a vivid example of just how little is needed to determine that a detainee is not an enemy combatant. Detainee #250 elected to not appear in person before the Tribunal, but his statement was considered and he was unanimously found *not to have been properly designated as an enemy combatant.*

[35] *Id.*

However, that decision did not long stand. The Government's own Legal Sufficiency Review as written by Commander, United States Navy, James R. Crisfield, Jr. synopsizes the processing of Detainee #250's case.

> A letter from the personal representative initially assigned to represent the detainee at Guantanamo Bay, Cuba, reflects the detainee's elections and is attached to the Tribunal Decision Report as exhibit D-b. The original Tribunal proceedings were held *in absentia* outside Guantanamo Bay with a new personal representative who was familiar with the detainee's file. This personal representative had the same access to information and evidence as the personal representative from Guantanamo Bay. The addendum proceedings were conducted with yet a third personal representative because the second personal representative had been transferred to Guantanamo Bay. This personal representative also had full access to the detainee's file and original personal representative's pass-down information. The detainee's personal representatives were given the opportunity to review the respective records of proceedings and both declined to submit post-Tribunal comments to the Tribunal.

Despite the initial finding that the detainee was not an enemy combatant and the obvious difficulties reflected in this tortured process, Commander Crisfield concluded that "The proceedings and decision of the Tribunal, as reflected in enclosure (3), are legally sufficient and no corrective action is required." He recommended approval of the decision of the subsequent Tribunal finding #250 to be an enemy combatant.

The record of the third decision for yet another detainee, ISN #556, whose proceeding was returned twice, states in the memorandum following his third Tribunal:

> On 15 December 2004, the original Tribunal unanimously determined that the detainee should no longer be designated as an enemy combatant.

Following the initial Tribunal, its membership was changed. The record continues:

> Due to the removal of one of the three members of the original Tribunal panel, the additional evidence, along with the original evidence and original Tribunal Decision Report, was presented to Tribunal panel #30 to reconsider the detainee's status. On 21 January 2005 that Tribunal also unanimously determined that the detainee should no longer be classified as an enemy combatant.

The Tribunal was changed again:

> Once again, additional information regarding the detainee was sought, found, and presented to yet a third Tribunal. This additional information became exhibits R-23 through R-30. This time, the three members of the second Tribunal were no longer available, but the one original Tribunal member who was not available for the second Tribunal was now available for the third. That member, along with two new members, comprised Tribunal panel #34 and sat for the detainee's third Tribunal. Following their consideration of the new additional information along with the information considered by the first two Tribunals, this Tribunal determined that the detainee was properly classified as an enemy combatant.

The records of other detainees suggest additional instances of rehearings. In these proceedings, the Tribunal reconvenes and considers an issue about the quality of the evidence, but there is no record of what transpired at the first hearing or why the second hearing occurred or the effect of the issues of concern about the quality of the evidence.

BOTTOM LINE

"And again, to review, the CSRT is a one-time review to determine if a person, a detainee, is or is not an enemy combatant."[36]

Five hundred fifty-eight detainees went through the process of a Combatant Status Review Tribunal. Thirty-eight detainees, or 7% of the total, were released from Guantánamo as a result of the CSRT process. They were labeled either "non enemy combatants" or "no longer enemy combatants." In contrast to these numbers, no detainee in the sample set was ultimately found to be a non/no longer enemy combatant as a result of the CSRT although some were initially found to be either a "non" or "no longer" enemy combatant by a first (or even a second) Tribunal.

The difference between a "non" enemy combatant and a "no longer" enemy combatant is not clear, but the label "non enemy combatant" implies that the Government was mistaken when it detained the prisoners, while "no longer enemy combatant" implies that, while the prisoner was once an enemy combatant, Guantánamo Bay served as a successful rehabilitation program. Despite these connotations, the Government appears to consider the labels interchangeable.

For example, Secretary of the Navy Gordon England used both terms when he described the CSRT process on March 29, 2005. "The Tribunals also concluded that 38 detainees were found to no longer meet the criteria to be designated as enemy combatants. So 520 enemy combatants, 38 non-enemy- combatants…It should be

[36] Gordon England, *Defense Department Special Briefing on Combatant Status Review Tribunals* (Mar. 29, 2005), http://www.defenselink.mil/transcripts/2005/tr20050329-2382.html.

emphasized that a CSRT determination that a detainee no longer meets the criteria for classification as an enemy combatant does not necessarily mean that the prior classification as EC was wrong."[37]

CONCLUSION

This Report lays out the CSRT Process, both as it exists on paper and as it was implemented in Guantánamo. The reader may judge whether that process meets the fundamental requirements of due process. Regardless of the answer, at this point in time, more than two years after the Supreme Court's decisions in *Rasul v. Bush*, and *Hamdi v. Rumsfeld* the CSRT is the only hearing that the detainees have received. The Government is attempting to replace habeas corpus with this no hearing process.

[37] *Id.*

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APPENDIX I

Return & Transcript Sample Set		% variation	Original 517 Records		% variation	Return Sample Set	
associated with Total	58%	-2%	associated with Total	60%	-1%	associated with Total	59%
fighter for Total	7%	-1%	fighter for Total	8%	3%	fighter for Total	11%
member Total	32%	2%	member Total	30%	-1%	member Total	29%
none alleged Total	3%	1%	none alleged Total	2%	-1%	none alleged Total	1%
Grand Total	100%		Grand Total	100%		Grand Total	100%

Return & Transcript Sample Set		% variation	Original 517 Records		% variation	Return Sample Set	
Al Qaeda Total	31%	-1%	Al Qaeda Total	32%	22%	Al Qaeda Total	54%
Al Qaeda & Taliban Total	26%	-2%	Al Qaeda & Taliban Total	28%	-4%	Al Qaeda & Taliban Total	24%
Al Qaeda OR Taliban Total	6%	-2%	Al Qaeda OR Taliban Total	7%	-4%	Al Qaeda OR Taliban Total	3%
none alleged Total	3%	1%	none alleged Total	2%	-1%	none alleged Total	1%
other Total	1%	0%	other Total	1%	-1%	other Total	0%
Taliban Total	23%	1%	Taliban Total	22%	-9%	Taliban Total	13%
Unidentified Total	11%	3%	Unidentified Total	8%	-4%	Unidentified Total	4%
Grand Total	100%		Grand Total	100%		Grand Total	100%

Return & Transcript Sample Set		% variation	Original 517 Records		% variation	Return Sample Set	
3-b Present	44%	-1%	3-b Present	45%	-3%	3-b Present	42%
3-b Not Present	56%	1%	3-b Not Present	55%	3%	3-b Not Present	58%
Grand Total	100%		Grand Total	100%		Grand Total	100%