

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

ELIZABETH A. HARDY*

In *Standards and Procedures for Classifying “Enemy Combatants”: Congress, What Have You Done?*, Professor Kristine A. Huskey declares Guantánamo a “virtual law-free zone.”¹ She makes three critical points. First, she argues that the Combatant Status Review Tribunals (CSRTs) were “wholly inadequate” for determining whether the men charged with being enemy combatants qualified for that designation, noting that “pursuant to a CSRT, a detainee could be determined to be an ‘enemy combatant’ based on second-hand statements of unknown individuals that were produced as a result of torture and that the detainee never has an opportunity to see and respond to.”² Second, she criticizes Congress for twice ratifying the inadequate CSRT process by passing the Detainee Treatment Act of 2005 (DTA) and the Military Commissions Act of 2006 (MCA):

Given the circumstances surrounding the initial capture of the detainees and the available Department of Defense (“DoD”) data regarding the CSRTs and ARBs, it is clear that members of Congress had no real understanding of the procedures they had approved, and no knowledge of how the tribunals and boards were conducted or their actual results.³

Finally, Huskey declares that congressional action to prevent confessions obtained through torture was “too little, too late.”⁴ I suspect she believes the same could be said of congressional action to halt the derogation of individual liberties by the Bush administration in the so-called “war on terror.” Huskey convincingly argues that Congress, in passing the DTA and the MCA, legitimized an illegitimate process.

This response goes a step further, arguing that the judicial review process set forth by the DTA undermines the judiciary’s ability to provide substantive evaluations of the CSRT determinations. In addition to the textual restrictions in the DTA, the D.C. Court of Appeals has narrowly read the DTA to limit the government’s obligations to produce information validating the CSRT determinations. The results have been discouraging for proponents of judicial review under the DTA. Just as Congress legitimized the legal black hole of the government detention policy by ratifying the CSRT procedures post facto, the D.C.

* Clinical Instructor, The University of Texas School of Law.

1. 43 TEX. INT’L L.J. 41, 42 (2007).

2. *Id.* at 46.

3. *Id.* at 44.

4. *Id.* at 49.

Circuit has given the CSRT process the appearance of legality in two of its most recent decisions, *Bismullah I* and *Bismullah II*.⁵ These two cases suggest that the only remaining check on unfettered executive authority in the “war on terror” cases is the writ of habeas corpus.

I. PRELIMINARY RESULTS OF JUDICIAL REVIEW UNDER THE DTA

The preliminary results of judicial review under the DTA “reinforce concerns about the adequacy of actions under the DTA as a substitute for the writ of *habeas corpus*.”⁶ Many hoped that the court would expansively read the DTA to provide what Congress had not: an adequate substitute for habeas corpus. In *Bismullah I*, a three-judge panel of the D.C. Circuit considered the scope of its review powers under the DTA. *Bismullah I* was initially understood as a step toward “broad review.”⁷ The panel declared that only by seeing “all ‘reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant’”⁸ could it comply with its obligations under the DTA. Judge Ginsburg, writing for the court, stated:

[T]he Court cannot, as the DTA charges us, consider whether a preponderance of the evidence supports [an enemy combatant] status determination without seeing all the evidence, any more than one can tell whether a fraction is more or less than one half by looking only at the numerator and not at the denominator.⁹

This decision, if sustained, could have provided detainees a reasonable chance of getting substantive review of their CSRT determinations.

However, the court assumed that the government had complied with its own regulations during the CSRT process, an assumption that Judge Rogers had already called into question, stating, “The gap between Congress’s aspirations for the DTA and the Executive’s implementation of the CSRT procedures for compiling the record, which has come to light during briefing in this case, presents new questions that also cannot be resolved today.”¹⁰ Here, Judge Rogers alluded to declarations filed during the course of briefing in *Bismullah* that indicated that the administration had failed to conduct even superficial examinations of reasonably available evidence that might have refuted a detainee’s enemy combatant designation.¹¹ Worse still, the

5. *Bismullah v. Gates (Bismullah I)*, --- F.3d ----, Nos. 06-1197, 06-1397, 2007 WL 2067938 (D.C. Cir. July 20, 2007); *Bismullah v. Gates (Bismullah II)*, --- F.3d ----, Nos. 06-1197, 06-1397, 2007 WL 2851702 (D.C. Cir. Oct. 3, 2007).

6. *Bismullah I*, 2007 WL 2067938, at *15 (Rogers, J., concurring).

7. Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/uncategorized/wider-inquiry-into-detainee-confinement-ordered> (July 20, 2007, 10:35 EST) (stating that “[t]he D.C. Circuit Court, in a partial but significant setback for the Bush Administration, ruled on Friday that it will engage in a broad review as it decides whether to uphold military decisions to continue to hold detainees at Guantanamo Bay, Cuba . . .”).

8. *Bismullah I*, 2007 WL 2067938, at *13.

9. *Id.* at *6.

10. *Id.* at *14.

11. See, e.g., Reply to Opposition to Petition for Rehearing app. (Declaration of Lt. Col. Stephen Abraham, U.S. Army Reserve), *Al Odah v. United States*, No. 06-1196 (U.S. June 22, 2007) [hereinafter

CSRTs appeared designed to condemn those facing the tribunal—a finding that the detainee was not an enemy combatant resulted not in the detainee’s release, but in a second CSRT.¹² The modus operandi appeared to be “try, try again” until the detainee was determined to be an enemy combatant. The failures in the CSRT process greatly implicated the court’s ability to validate the proceedings.

The modest victory on behalf of the detainees in *Bismullah I* was met with rigorous challenge by the Government, which swiftly moved for a rehearing, claiming that the *Bismullah I* decision threatened national security and created an impossible burden on the Government to produce information it no longer had.¹³ In support of the Government’s claims that production of the information would endanger national security, the Department of Justice submitted five declarations by high-level officials, including declarations by Michael Hayden, Director of the Central Intelligence Agency, and Robert Mueller, Director of the Federal Bureau of Investigation. The Government argued that production of the information to the detainees’ lawyers would compromise security and that disclosure to those outside the intelligence community would increase the risk of inadvertent disclosure. In addition, the Government stressed the implications to its intelligence gathering initiatives, arguing that in the future it would have to disclose to potential sources of intelligence that any information those sources provided would be subject to review both by a court and by a detainee’s lawyers. The Government did not mention that the same information that *Bismullah* required disclosed was compiled for the initial CSRTs by unnamed civilian contractors after two weeks of training, nor did it explain why disclosure to civilian contractors with limited training was proper while disclosure to trained attorneys with Top Secret clearances would lead to a grave security breach.

The Government’s second argument against disclosure, that the collection of evidence required by *Bismullah I* would create an impossible burden, is even more disturbing. The Government claimed that it did not maintain the information it was required to collect during the initial CSRTs and that the court’s order would thus require it to re-collect information it no longer had.¹⁴ The Government claimed it could not reasonably be expected to collect this information within the time the court demanded¹⁵—this despite evidence that the government conducted 558 CSRTs within six months, each requiring, among other things, collection of the same information that the court sought in *Bismullah*.¹⁶ This statement is tantamount to an

Abraham Declaration] (presenting, in the context of *Bismullah*’s companion case, difficulties that military lawyers have had obtaining and utilizing exculpatory evidence favoring detainees).

12. Abraham Declaration para. 23.

13. Petition for Rehearing and Suggestion for Rehearing En Banc at 1–2, *Bismullah I*, Nos. 06-1197, 06-1397, (D.C. Cir. Sept. 7, 2007).

14. I believe that Dahlia Lithwick put it best when she wrote, “[T]he only thing more terrifying than convictions based on secret evidence is the possibility that when it comes time to fight those convictions, the secret evidence might just disappear.” *The Dog Ate My Evidence*, SLATE, Oct. 16, 2007, <http://www.slate.com/id/2176017>.

15. Petition for Rehearing and Suggestion for Rehearing En Banc, *supra* note 13, at 11.

16. See News Release, U.S. Dep’t of Defense, First Combatant Status Tribunal Conducted at Guantanamo Today (July 30, 2004), <http://www.defenselink.mil/releases/release.aspx?releaseid=7593>; Gordon England, Sec’y of the Navy, Defense Department Special Briefing on Combatant Status Review Tribunals (Mar. 29, 2005), <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2504> (stating that the last of 558 CRST hearings was held on January 22, 2005).

admission that the CSRTs failed to follow the government's own standards and procedures.¹⁷

Despite the weaknesses in the Government's arguments, the court narrowly construed its review powers under the DTA¹⁸ and, in doing so, eviscerated whatever chances the detainees had for adequate review of the CSRTs under the DTA. The court in *Bismullah II* reconsidered the Government's objections to its decision in *Bismullah I* in three ways. First, the court narrowed the scope of the information that the Government was required to produce, essentially encouraging the Government to declare that documents were not "readily available" to avoid production.¹⁹ Second, the court found that the Government had an alternative to providing the Government Information obtained by the recorder in the CSRT proceedings: it could conduct new CSRTs.²⁰ Finally, the court suggested that it would be more willing to look at classified documents *ex parte* than either the Government or the detainees originally understood.²¹ The Government quickly indicated that it would consider massive CSRT redos. In *Chaman v. Gates*, the Department of Justice told the court that "[t]he Government would need sufficient time to make an assessment of this case and other DTA cases so as to make a determination on whether to convene a 'new CSRT' in accordance with the panel's suggested alternative [to providing the Government Information compiled in the initial CSRT hearing]."²²

II. JUDICIARY, WHAT HAVE YOU DONE?

Just as Congress legitimized the legal black hole of the government detention policy by ratifying the CSRT procedures *post facto*, the D.C. Circuit has given the CSRT process the appearance of legality through its decision in *Bismullah II*. Despite clear evidence that the government did not comply with its own procedures in the initial CSRTs, the court let the government off the hook by suggesting that the

17. The Government set forth regulations to govern the CSRTs in several Government orders. See Memorandum from Deputy Sec'y of Defense Paul Wolfowitz to the Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; Memorandum for Distribution from Sec'y of the Navy Gordon England, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Naval Base, Cuba (July 29, 2004), available at <http://www.defenselink.mil/news/jul2004/d20040730comb.pdf>. "Government Information," or the information that the government must collect before each CSRT process, is defined as

reasonably available information in the possession of the U.S. 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.

Memorandum for Distribution from Sec'y of the Navy Gordon England, *supra*, encl. 1, at 3.

18. See *Bismullah II*, 2007 WL 2851702, at *3 (stating that "[a] search for information without regard to whether it is 'reasonably available' is clearly not required by *Bismullah I*").

19. See *id.* at *3 (holding that the government need not produce information not "reasonably available").

20. *Id.*

21. See *id.* at *4 n.7.

22. Motion to Stay Order to File Certified Index of Record as Defined in *Bismullah* and to Stay Briefing Schedule at 8, *Chaman v. Gates*, No. 07-1101 (D.C. Cir. Oct. 11, 2007).

remedy for such violations was not release for the detainee, but instead a redo of the flawed procedure. Even then, the court failed to demand that the government take special care to provide sufficient due process when conducting the new CSRTs. The court’s decision indicates that it will do whatever it must to legitimize the CSRT procedures, even if that means multiple CSRT hearings and indefinite detention of individuals never properly designated. I am reminded of Justice Scalia’s strong condemnation of similar attempts by the plurality of Supreme Court in *Hamdi* to legalize the government’s detention of an American citizen “by supplying a process that the Government could have provided, but chose not to.”²³

As Huskey makes clear, ratifying a framework that is riddled with inadequate procedures “does not change Guantánamo’s status as a legal black hole; indeed, the manufactured framework exacerbates the situation by giving the Guantánamo detentions a veneer of legality.”²⁴ These judicial machinations have aided the executive in creating a virtual law-free zone. The detainees still have had no substantive review of their status determination, and not a single individual has had his CSRT determination reviewed on the merits in an Article III court.

III. CONCLUSION

Soon the Supreme Court will decide whether the detainees have habeas corpus rights after the MCA and whether the DTA is an adequate and effective substitute for habeas corpus.²⁵ The D.C. Circuit’s unwillingness to hold the government to its obligation to produce what is in fact reasonably available information demonstrates the court’s reluctance to provide robust review of the CSRT procedures under the DTA. If the *Bismullah* cases have taught us anything, it is that without robust review, the DTA review framework is no substitute for habeas corpus, and habeas corpus is the only mechanism available to protect the due process rights of detainees.

23. *Hamdi v. Rumsfeld*, 542 U.S. 507, 576 (2004) (Scalia, J., dissenting).

24. Huskey, *supra* note 1, at 2.

25. *See Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195).