

# CRS Report for Congress

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## Detainees at Guantanamo Bay

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### Summary

After the U.S. Supreme Court held that U.S. courts have jurisdiction to hear legal challenges on behalf of more than 500 persons detained at the U.S. Naval Station in Guantanamo Bay, Cuba in connection with the war against terrorism, the Pentagon established administrative hearings, called “Combatant Status Review Tribunals” (CSRTs), to allow the detainees to contest their status as enemy combatants. This report provides an overview of the CSRT procedures and summarizes court cases related to the detentions and the use of military commissions. The relevant Supreme Court rulings are discussed in CRS Report RS21884, *The Supreme Court and Detainees in the War on Terrorism: Summary and Analysis*. This report will be updated as events warrant.

In *Rasul v. Bush*, 124 S.Ct. 2686 (2004), a divided Supreme Court declared that “a state of war is not a blank check for the president” and ruled that persons deemed “enemy combatants” have the right to challenge their detention before a judge or other “neutral decision-maker.” The decision reversed the holding of the Court of Appeals for the D.C. Circuit, which had agreed with the Bush Administration that no U.S. court has jurisdiction to hear petitions for *habeas corpus* by or on behalf of the detainees because they are aliens and are detained outside the sovereign territory of the United States. Lawyers have filed more than a dozen petitions on behalf of some 60 detainees in the District Court for the District of Columbia, where judges have reached opposing conclusions as to whether the detainees have any enforceable rights to challenge their treatment and detention. Fifteen of the detainees have been determined by the President to be subject to his military order (“MO”) of November 13, 2001,<sup>1</sup> making them eligible for trial by military commission.<sup>2</sup> Military commissions were temporarily halted pending the result of one case, but are to be resumed now that the D.C. Circuit has reversed the decision of a lower court that had found the procedures for military commissions to be invalid.

<sup>1</sup> Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, November 13, 2001, 66 Fed. Reg. 57,833 (2000)(hereinafter “MO” or “military order”).

<sup>2</sup> For an analysis of the military commission rules, see CRS Report RL31600, *The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice*.

The White House determined in February 2002 that Taliban detainees are covered under the Geneva Conventions,<sup>3</sup> while Al Qaeda detainees are not,<sup>4</sup> but that none of the detainees qualifies for the status of prisoner of war (POW) under the Conventions. The Bush Administration has deemed all of the detainees to be “unlawful enemy combatants,” who may, according to Administration officials, be held indefinitely without trial or even were they eventually acquitted by a military tribunal. However, the detainees at Guantanamo Bay have been allowed to meet with representatives of the International Committee of the Red Cross (ICRC) and diplomatic representatives of their States of nationality. An unknown number of detainees is reported to be held in Afghanistan and other locations abroad. It is unclear whether these detainees will have a right to challenge their detention under the Court’s decision in *Rasul*.

**Combatant Status Review Tribunals.** In response to Supreme Court decisions in 2004 related to ‘enemy combatants,’<sup>5</sup> the Pentagon established procedures for Combatant Status Review Tribunals, based on the procedures the Army uses to determine POW status during traditional wars.<sup>6</sup> According to the Department of Defense (DoD), “any detainee who is determined not to be an enemy combatant will be transferred to their country of citizenship or other disposition consistent with domestic and international obligations and U.S. foreign policy.”<sup>7</sup> CSRTs have been completed for all detainees, and have confirmed the status of 520 enemy combatants. Of the 38 detainees determined not to be enemy combatants, 23 have been transferred to their home States. Presumably, any new detainees that might be transported to Guantanamo Bay will go before a CSRT.

The tribunals are administrative rather than adversarial, but each detainee has an opportunity to present “reasonably available” evidence and witnesses to a panel of three commissioned officers to try to demonstrate that the detainee does not meet the criteria to be designated as an “enemy combatant,” defined as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners[,] ...[including] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed

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<sup>3</sup> The two most relevant are the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317 (hereinafter “GPW”); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 (hereinafter “GC”).

<sup>4</sup> White House Memorandum, “Humane Treatment of al Qaeda and Taliban Detainees” (Feb. 7, 2002), available at [<http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf>].

<sup>5</sup> For an analysis of relevant decisions, see *The Supreme Court and Detainees in the War on Terrorism: Summary and Analysis*, CRS Report RS21884.

<sup>6</sup> See Department of Defense (DoD) Fact Sheet, “Combatant Status Review Tribunals,” available at [<http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf>]. CSRT proceedings are modeled on the procedures of Army Regulation (AR) 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997), which establishes administrative procedures to determine the status of detainees under the Geneva Conventions and prescribes their treatment in accordance with international law. For more information, see *Treatment of “Battlefield Detainees” in the War on Terrorism*, CRS Report RL31367.

<sup>7</sup> See DoD Press Release, “Combatant Status Review Tribunal Order Issued” (June 7, 2004), available at [<http://www.defenselink.mil/releases/2004/nr20040707-0992.html>].

forces.” Each detainee is represented by a military officer (not a member of the Judge Advocate General Corps) and may elect to participate in the hearing or remain silent.

The CSRTs are not bound by the rules of evidence that would apply in court, and the government’s evidence is presumed to be “genuine and accurate.” The government is required to present all of its relevant evidence, including evidence that tends to negate the detainee’s designation, to the tribunal. Unclassified summaries of relevant evidence may be provided to the detainee. The detainee’s personal representative may view classified information and comment on it to the tribunal to aid in its determination but does not act as an advocate for the detainee. If the tribunal determines that the preponderance of the evidence is insufficient to support a continued designation as “enemy combatant” and its recommendation is approved through the chain of command established for that purpose, the detainee will be informed of that decision upon finalization of transportation arrangements (or earlier, if the task force commander deems it appropriate). The rules do not give a timetable for informing detainees in the event that the tribunal has decided to retain their enemy combatant designations.

In March 2002, the Pentagon announced plans to create a separate process for periodically reviewing the status of detainees.<sup>8</sup> The process, similar to the CSRT process, affords persons detained at Guantánamo Bay the opportunity to present to a review board, on at least an annual basis while hostilities are ongoing, information to show that the detainee is no longer a threat or that it is in the interest of the United States and its allies to release the prisoner. The detainee’s State of nationality may be allowed, national security concerns permitting, to submit information on behalf of its national.

## Court Challenges to the Detention Policy

While it is now clear that the detainees have recourse to federal courts to challenge their detention, the extent to which they may enforce any rights they may have under the Geneva Conventions and other law remains unclear. The Justice Department argues that *Rasul v. Bush* merely decided the issue of jurisdiction, but that the 1950 Supreme Court decision in *Johnson v. Eisentrager*<sup>9</sup> remains applicable to limit the relief to which the detainees are entitled. While one district judge from the D.C. Circuit agreed,<sup>10</sup> others have not, holding that detainees have the right to the assistance of an attorney.<sup>11</sup> One judge found that a detainee has the right to be treated as a POW until a “competent tribunal” decides otherwise,<sup>12</sup> but the appellate court reversed. The following sections summarize the three most important decisions as they make their way through the D.C. Circuit Court of Appeals and, it is expected, to the Supreme Court.

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<sup>8</sup> See DoD Press Release, “DoD Announces Draft Detainee Review Policy” (March 3, 2004), available at [<http://www.defenselink.mil/releases/2004/nr20040303-0403.html>].

<sup>9</sup> 339 U.S. 763 (1950) (holding that the federal courts did not have jurisdiction to hear a petition on behalf of German citizens who had been convicted by U.S. military commissions in China because the writ of *habeas corpus* was not available to “enemy alien[s], who at no relevant time and in no stage of [their] captivity [have] been within [the court’s] jurisdiction”).

<sup>10</sup> *Khalid v. Bush*, 355 F.Supp.2d 311 (D. D.C. 2005).

<sup>11</sup> *Al Odah v. United States*, No. CIV.A. 02-828(CKK) (D. D.C. Oct. 20, 2004).

<sup>12</sup> *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152 (D. D.C. 2004), *rev’d* \_\_\_ F.3d \_\_\_ (D.C. Cir. 2005).

**Khalid v. Bush.**<sup>13</sup> Seven detainees, all of whom had been captured outside of Afghanistan, sought relief from their detention at the Guantanamo Bay facility. U.S. District Judge Richard J. Leon agreed with the Administration that Congress, in its Authorization to Use Military Force (AUMF),<sup>14</sup> granted President Bush the authority to detain foreign enemy combatants outside the United States for the duration of the war against al Qaeda and the Taliban, and that the courts have virtually no power to review the conditions under which such prisoners are held. Noting that the prisoners had been captured and detained pursuant to the President's military order,<sup>15</sup> Judge Leon agreed with the government that "(1) non-resident aliens detained under [such] circumstances have no rights under the Constitution; (2) no existing federal law renders their custody unlawful; (3) no legally binding treaty is applicable; and (4) international law is not binding under these circumstances."

Judge Leon rejected the petitioners' contention that their arrest outside of Afghanistan and away from any active battlefield meant that they could not be "enemy combatants" within the meaning of the law of war, finding instead that the AUMF contains no geographical boundaries,<sup>16</sup> and authorizes the President to exercise his war power wherever enemy combatants are found. The circumstances behind the off-battlefield captures did, however, apparently preclude the petitioners from claiming their detentions violate the Geneva Conventions.<sup>17</sup> Other treaties put forth by the petitioners were found to be unavailing because of their non-self-executing nature.<sup>18</sup> The court declined to evaluate whether the conditions of detention were unlawful. Judge Leon concluded that "[w]hile a state of war does not give the President a 'blank check,' and the courts must have some role when individual liberty is at stake, any role must be limited when, as here, there is an ongoing armed conflict and the individuals challenging their detention are non-resident aliens."<sup>19</sup> He dismissed all seven petitions, ruling that "until Congress and the President act further, there is . . . no viable legal theory under international law by which a federal court could issue a writ."

**In re Guantanamo Detainee Cases.**<sup>20</sup> U.S. District Judge Joyce Hens Green interpreted *Rasul* more broadly, finding that the detainees do have rights under the U.S. Constitution and international treaties, and thus denied the government's motion to dismiss the eleven challenges before the court. Specifically, Judge Green held that the detainees are entitled to due process of law under the Fifth Amendment, and that the CSRT procedures do not meet that standard. Interpreting the history of Supreme Court

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<sup>13</sup> 355 F.Supp.2d 311 (D. D.C. 2005).

<sup>14</sup> Authorization for Use of Military Force ("the AUMF"), P.L. 107-40, 115 Stat. 224 (2001).

<sup>15</sup> Although the MO states that it authorizes detention as well as trial by military commissions, only fifteen of the detainees have been formally designated as subject to the MO.

<sup>16</sup> *Khalid* at 320.

<sup>17</sup> *Id.* at 326.

<sup>18</sup> *Id.* at 327. It may be argued that the habeas statute itself (28 U.S.C. § 2241), which authorizes petitions alleging detention in violation of any treaty of the United States, provides a means for private enforcement.

<sup>19</sup> *Id.* at 330 (citations omitted).

<sup>20</sup> 355 F.Supp.2d 443 (D. D.C. 2005).

rulings on the availability of constitutional rights in territories under the control of the American government (though not part of its sovereign territory), Judge Green concluded that the inquiry turns on the fundamental nature of the constitutional rights being asserted rather than the citizenship of the person asserting them. Accepting that the right not to be deprived of liberty without due process of law is a fundamental constitutional right, the judge applied a balancing test to determine what process is due in light of the government's significant interest in safeguarding national security.<sup>21</sup> Judge Green rejected the government's stance that the CSRTs provided more than sufficient due process for the detainees. Instead, she identified two categories of defects. She objected to the CSRTs' failure to provide the detainees with access to material evidence upon which the tribunal affirmed their "enemy combatant" status and the failure to permit the assistance of counsel to compensate for the lack of access. These circumstances, she said, deprived detainees of a meaningful opportunity to challenge the evidence against them.

Second, in particular cases, the judge found that the CSRTs' handling of accusations of torture and the vague and potentially overbroad definition of "enemy combatant" could violate the due process rights of detainees. Citing detainees' statements and news reports of abuse, Judge Green noted that the possibility that evidence was obtained involuntarily from the accused or from other witnesses, whether by interrogators at Guantanamo or by foreign intelligence officials elsewhere, could make such evidence unreliable and thus constitutionally inadmissible as a basis on which to determine whether a detainee is an enemy combatant. Judge Green objected to the definition of "enemy combatant" because it appears to cover "individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies." She noted that government counsel had, in response to a set of hypothetical questions, stated that the following could be treated as enemy combatants under the AUMF: "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities, a person who teaches English to the son of an al Qaeda member, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source."<sup>22</sup> Judge Green stated that the indefinite detention of a person solely because of his contacts with individuals or organizations tied to terrorism, and not due to any direct involvement in terrorist activities, would violate due process even if such detention were found to be authorized by the AUMF.<sup>23</sup>

The D.C. Circuit Court of Appeals is considering the government's appeal with respect to the holding that the detainees have enforceable rights under the Constitution and international law, as well as appeals by some detainees with respect to other aspects of Judge Green's decision. Briefs are due June 28, 2005, with oral arguments to be scheduled at a later date. The detainees' appeal of the *Khalid* decision, *supra*, is to be heard on the same day.

**Hamdan v. Rumsfeld.**<sup>24</sup> Salim Ahmed Hamdan, who was captured in Afghanistan and is alleged to have worked for Osama Bin Laden as a body guard and

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<sup>21</sup> *Id.* at 465 (citing *Hamdi v. Rumsfeld*).

<sup>22</sup> *Id.* at 475 (internal citations omitted).

<sup>23</sup> *Id.* at 476.

<sup>24</sup> 344 F.Supp.2d 152 (D. D.C. 2004), *rev'd* \_\_\_ F3d \_\_\_ (D.C. Cir. 2005).

driver, brought this challenge to the lawfulness of the Secretary of Defense's plan to try him for alleged war crimes before a military commission convened pursuant to the President's military order. Hamdan's attorney objected to the military commission rules and procedures, which he argued were inconsistent with the UCMJ and Hamdan's right to be treated as a prisoner of war under the Geneva Conventions. U.S. District Judge Robertson agreed, finding that the Geneva Conventions apply to the whole of the conflict in Afghanistan, including under their protections all persons detained in connection with the hostilities there.<sup>25</sup> Accordingly, he ruled, Hamdan was entitled to be treated as a prisoner of war until his status was determined to be otherwise by a competent tribunal, in accordance with article 5 of the Third Geneva Convention (prisoners of war). The D.C. Circuit Court of Appeals, in an opinion written by Judge Randolph, reversed that finding, ruling that the Geneva Conventions are not judicially enforceable,<sup>26</sup> and that in any event, the military commission would qualify as a "competent tribunal" within the meaning of U.S. Army regulations implementing the Conventions.<sup>27</sup> Judge Williams wrote a concurring opinion, agreeing with the government's conception of the conflict with Al Qaida as separate from the conflict with the Taliban, but construing Common Article 3 to apply to any conflict with a non-state actor, without regard to the geographical confinement of such a conflict within the borders of a signatory state.

With respect to the President's military order establishing military commissions, the district court judge had found no inherent authority in the President as Commander-in-Chief of the Armed Forces to create such tribunals, and that existing statutory authority for military commissions is limited. Interpreting the statute in light of the Geneva Conventions, which permits the punishment of prisoners of war "only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power,"<sup>28</sup> Judge Robertson found no congressional authority for Hamdan's trial under the DoD's rules for military commissions. He found these rules to be fatally inconsistent with the UCMJ (contrary to UCMJ art. 36, 10 U.S.C. § 836) because they give military authorities the power to exclude the accused from hearings and deny him access to evidence presented against him.<sup>29</sup> The Circuit Court reversed, opining that Congress did not mean that all of the UCMJ procedural rules for courts-martial should apply to military commissions. Instead, the panel interpreted art. 36 to mean that military commission rules have only to be consistent with those articles of the UCMJ that refer specifically to military commissions. However, because the procedural rules to be used by the military commissions do not affect their jurisdiction, it was unnecessary to resolve the issue at the interlocutory stage of the case. The court left open the possibility that Hamdan can challenge the procedural rules if he is convicted by the military commission, possibly by bringing a new habeas corpus petition in federal court.

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<sup>25</sup> *Id.* at 161 (rejecting the government's position that the military is engaged in two separate conflicts in Afghanistan, respectively, against the Taliban and against Al Qaeda).

<sup>26</sup> Rumsfeld v. Hamdan, No. 04-5393, slip op. at 10 (D.C. Cir. July 15, 2005).

<sup>27</sup> *Id.* at 19.

<sup>28</sup> GPW art. 102.

<sup>29</sup> 344 F.Supp.2d at 166.