

**STATEMENT OF  
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OF THE DETENTION OF ENEMY COMBATANTS (OARDEC)**

**BEFORE THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**ON  
DETAINEES**

**JULY 14, 2005**

Senator Graham, Senator Nelson and members of the subcommittee, I appreciate the opportunity to appear before you today.

In May of last year, Deputy Secretary of Defense Paul Wolfowitz named Secretary of the Navy Gordon England the Designated Civilian Official (DCO) to supervise the process to review annually the cases of all detainees held under DoD control at the U.S. Naval Base, Guantanamo Bay, Cuba. Secretary England appointed me as the Director of the Office for the Administrative Review of the Detention of Enemy Combatants, the organization charged with carrying out the review process. We solicited input from the International Committee of the Red Cross, from non-governmental organizations, and from the Ambassadors of countries whose nationals are detained at Guantanamo Bay, and then worked across all U. S. Government agencies to develop a rigorous and fair review process called the Administrative Review Board (ARB). The purpose of the ARB process is to assess annually whether each enemy combatant at Guantanamo continues to pose a threat to the United States or its allies, or whether there are other factors that would support the need for continued detention. Based on this assessment, the ARB panel can recommend to Secretary England that individual detainees be released, continue to be detained, or be transferred to another country, typically the detainee's country of nationality. Secretary England, as the DCO, is the final decision maker for this process.

While the ARB procedures were being developed last summer, the U.S. Supreme Court issued three rulings related to detained enemy combatants. Among other things, the Court in one of those cases held that federal courts have jurisdiction, under the federal habeas corpus statute, 28 U.S.C. Section 2241, to hear challenges to the legality of the detention of Guantanamo Bay detainees. In another one of those cases, a plurality of the Court cited Section 1-6 of Army Regulation 190-8 as an example of military regulations that would suffice to satisfy the due process requirements that the plurality indicated would apply to a U.S. citizen held as an enemy combatant in the United States. In light of those decisions, the Deputy Secretary of Defense established the Combatant Status Review Tribunal (CSRT) process to assess formally whether each detainee was properly detained as an enemy combatant and to permit each detainee the opportunity to contest the enemy combatant designation. The CSRT process was based on Army Regulation 190-8, which provides policy, procedures and responsibilities for the handling of prisoners of war and certain other detainees. Specifically, it outlines provisions for tribunals that exceed the requirements of tribunals that implement Article 5 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW), which requires a competent tribunal to determine the status of belligerents in cases where any doubt arises as to whether a belligerent satisfies the requirements for prisoner of war status. The CSRT is a one-time process, and provides each detainee with the following opportunities consistent with Army Regulation 190-8:

- The opportunity for review and consideration by a neutral decision-making panel composed of three commissioned military officers sworn to execute their duties faithfully and impartially. The tribunals make their decisions by majority vote, based on the preponderance of the evidence;
- The opportunity to attend all open portions of the proceedings if he desires;
- The opportunity to call witnesses on his behalf, if those witnesses are relevant and reasonably available;
- The opportunity to question witnesses called by the tribunal;
- The opportunity to testify on his own behalf if he desires;
- The opportunity to receive assistance of an interpreter, when necessary; and
- The opportunity freely to decline to testify

The CSRT process also provides more process and protections than Army Regulation 190-8:

- The detainee is given the opportunity to receive assistance from a military officer to ensure he understands the process and the opportunities available, and to prepare for his hearing.
- The CSRTs contain express qualifications to ensure the independence and lack of prejudice of the tribunal
- The CSRT Recorder is obligated to search government files for evidence suggesting the detainee is not an enemy combatant
- In advance of the hearing, the detainee is provided with an unclassified summary of the evidence supporting his enemy combatant classification
- The detainee is allowed to introduce relevant and reasonably available documentary evidence
- The result of every CSRT is automatically reviewed by a higher authority, who is empowered to return the record to the tribunal for further proceedings, if appropriate.

Secretary England appointed me as the Convening Authority for the CSRT process. The CSRT tribunal panels were the decision makers in this process. In my Convening Authority review, I could either approve a panel's decision or return a case for further deliberations. In less than six months, tribunal hearings were conducted on all 558 detainees under Department of Defense control at Guantanamo Bay. Of the 558 cases heard, the CSRT panels determined that 520 detainees were properly classified as enemy combatants, and that 38 detainees no longer met the criteria for designation as enemy combatants. Those found no longer to meet the criteria for enemy combatant designation were processed for release. Twenty-three have been released; the Department of Defense continues to work closely with Department of State to effect the release of the remaining fifteen detainees.

The first Administrative Review Board was conducted on December 14, 2004. The ARB process is ongoing, with the expectation that we will complete the first annual review for all

eligible detainees by the end of this calendar year. The ARB process provides each eligible detainee with the following opportunities:

- The opportunity for review by a neutral decision-making panel of three commissioned military officers sworn to execute their duties faithfully and impartially. The tribunals make their assessments, in writing and by majority vote, on whether there is reason to believe the enemy combatant no longer poses a threat to the United States or its allies and any other factors bearing on the need for continued detention;
- The opportunity to attend all open portions of the proceedings;
- The opportunity to testify on his own behalf if he desires;
- The opportunity to receive assistance of an interpreter, when necessary; and
- The opportunity to receive assistance from a military officer to ensure he understands the process, and to prepare for his hearing.

Again, the intent of the ARB process is to assess annually whether each detainee continues to pose a threat to the U.S. or its allies and to recommend whether each detainee should continue to be detained, released, or transferred.

In order to accomplish this assessment, we coordinate within the Department of Defense, and with the Department of State, Department of Justice (including the FBI), Central Intelligence Agency, Department of Homeland Security, and the National Security Council staff to acquire information relevant to each detainee's situation. Additionally, unless national security concerns dictate otherwise, we coordinate through the Department of State to provide each detainee's home nation the opportunity to provide information, including the opportunity to submit information from the detainee's family.

To date, we have completed 164 ARB hearings at GTMO. Secretary England has made the final decisions on 70 of these cases, that four (4) detainees should be released, twenty-five (25) detainees should be transferred, and forty-one (41) detainees should continue to be

detained. We have notified Department of State, and they are pursuing the appropriate assurances from the detainees' countries of nationality.

A process like the ARB is not required by either the Geneva Conventions or international law; it is discretionary on the part of the U. S. Government. There are no absolutes and this process does contain some risk to American citizens, for example, the possibility of releasing a detainee who returns to the fight against U.S. forces.

However, to do it right, the ARB and CSRT processes have required time, and have not been without their challenges. For example, the pursuit of off-island witness input for CSRT hearings was very time consuming, and we have received very little input from home countries in the ARB process. But we must do this right, because there are two sides to the fairness coin. First, fairness to the American people requires that those in detention who still pose a threat should not be released and permitted to return to terrorist activities. Second, fairness to the detainee, as well as our clear desire not to detain persons any longer than necessary, would suggest that those who no longer pose a threat to the United States or our allies be released or transferred to their own countries.

However, because of the highly unusual nature of the Global War on Terrorism, and because we do not want to detain any combatant any longer than is necessary, we have taken this unprecedented and historic action to establish a process to permit enemy combatants to be heard while a conflict is ongoing.

Mr. Chairman, thank you again for the opportunity to provide you this information. I am happy to answer any questions you or your subcommittee members might have regarding the CSRT or ARB processes.