

## **Judge Green's Opinion- excerpts relating to Murat**

### **In re Guantanamo Detainee Cases**

**Civil Action Nos. 02-CV-0299 (CKK), 02-CV-0828 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK)**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

**2005 U.S. Dist. LEXIS 1236**

**January 31, 2005, Decided**

#### **OPINION:**

#### **MEMORANDUM OPINION DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW**

The Court concludes that the petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and that the procedures implemented by the government to confirm that the petitioners are "enemy combatants" subject to indefinite detention violate the petitioners' rights to due process of law. The Court also holds that at least some of the petitioners have stated valid claims under the Third Geneva Convention.

#### **I. BACKGROUND**

All of the individuals who have been detained [\*8] at Guantanamo Bay have been categorized to fall within a general class of people the administration calls "enemy combatants." It is the government's position that once someone has been properly designated as such, that person can be held indefinitely until the end of America's war on terrorism or until the military determines on a case by case basis that the particular detainee no longer poses a threat to the United States or its allies.

#### **II. ANALYSIS**

- A. EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION TO ALIENS**
- B. SPECIFIC REQUIREMENTS OF THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE**

**C. SPECIFIC CONSTITUTIONAL DEFECTS IN THE CSRT PROCESS AS WRITTEN IN THE REGULATIONS AND AS APPLIED TO THE DETAINEES [\*75]**

**1. General Defects Existing in All Cases Before the Court: Failure to Provide Detainees Access to Material Evidence Upon Which the CSRT Affirmed "Enemy Combatant" Status [\*76] and Failure to Permit the Assistance of Counsel**

The CSRT reviewed classified information when considering whether each detainee presently before this Court should be considered an "enemy combatant," and it appears that all of the CSRT's decisions substantially relied upon classified evidence. No detainee, however, was ever permitted access to any classified information nor was any detainee permitted to have an advocate review and challenge the classified evidence on his behalf. Accordingly, the CSRT failed to provide any detainee with sufficient notice of the factual basis for which he is being detained and with a fair opportunity to rebut the government's evidence supporting the determination that he is an "enemy combatant."

[. . .]

Another [\*81] illustration of the fundamental unfairness of the CSRT's reliance on classified information not disclosed to the detainees arises in the government's classified factual return to the petition filed by **Murat Kurnaz in Kurnaz v. Bush, 04-CV-1135 (ESH)**. **Mr. Kurnaz** is a Turkish citizen and permanent resident of Germany who was arrested by police in Pakistan and turned over to American authorities. The CSRT concluded that he was a member of al Qaeda and stated that this determination was based on unclassified evidence and on one classified document, attached to the factual return as Exhibit R19. Respondents' Factual Return to Petition for Writ of Habeas Corpus by **Petitioner Murat Kurnaz** (hereinafter "Kurnaz Factual Return"), filed October 18, 2004, Enclosure (2).

The Court does not find that the unclassified evidence alone is sufficiently convincing in supporting the CSRT's conclusion that he is a member of al Qaeda. n34 That evidence establishes that **Mr. Kurnaz** attended a mosque in Bremen, Germany which the CSRT found to be moderate in its views but also to have housed a branch of Jama'at-Al-Tabliq (hereinafter "JT"), a missionary organization alleged to have supported terrorist organizations. Kurnaz Factual Return, Enclosure (1) at 2. The unclassified evidence also establishes that **Mr. Kurnaz** had been friends with an individual named Selcuk Belgin, who is alleged to have been a suicide bomber, and that the detainee traveled to Pakistan to attend a JT school. Id. at 2-3. Nowhere does the CSRT express any finding based on unclassified evidence that the detainee planned to be a suicide bomber himself, took up arms against the United States, or otherwise intended to attack American interests. Thus, the most reasonable interpretation of the record is that the classified document formed the most important basis for the CSRT's ultimate determination. That document, however, was never provided to the detainee, and had he received it, he would [\*83] have had the opportunity to challenge its credibility and significance.

*[35 LINES OF TEXT REDACTED BY THE COURT.]*

n34 In fact, for reasons stated later in this opinion, even if all of the unclassified evidence were accepted as true, it alone would not form a constitutionally permissible basis for the indefinite detention of the petitioner. See *infra* section II.C.2.b.

*[TEXT REDACTED BY THE COURT]* call into serious question the nature and thoroughness of the prior "multiple levels of review" of "enemy combatant" status referenced in Deputy Secretary of Defense Paul Wolfowitz's July 7, 2004 Order establishing the CSRT system. At a minimum, the documents raise the question of *[8 LINES OF TEXT REDACTED BY THE COURT.]* Interpreted in a light most favorable to the petitioners, the CSRT's decision to deem Exhibit R19 the most credible evidence without a sufficient explanation for *[TEXT REDACTED BY THE COURT.]* the "CSRTs do not involve an impartial decisionmaker." Al Odah Petitioners' Reply to the Government's Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss," filed in *Al Odah v. United States*, 02-CV-0828 (CKK), on October 20, 2004, at [\*84] 23-24. But however the record in *Kurnaz* is interpreted, it definitively establishes that the detainee was not provided with a fair opportunity to contest the material allegations against him.

The Court fully appreciates the strong governmental interest in not disclosing classified evidence to individuals believed to be terrorists intent on causing great harm to the United States. Indeed, this Court's protective order prohibits the disclosure of any classified information to any of the petitioners in these habeas cases. Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 344 F. Supp.2d 174 (D.D.C. 2004) at P 30. To compensate for the resulting hardship to the petitioners and to ensure due process in the litigation of these cases, however, the protective order requires the disclosure of all relevant classified information to the petitioners' counsel who have the appropriate security clearances. *Id.* at PP 17-34. Although counsel are not permitted to share any classified information with their clients, they at least have the opportunity to examine all evidence relied upon by the government [\*85] in making an "enemy combatant" status determination and to investigate and ensure the accuracy, reliability and relevance of that evidence. Thus, the governmental and private interests have been fairly balanced in a manner satisfying constitutional due process requirements. In a similar fashion, the rules regulating the military commission proceedings for aliens -- rules which the government so vigorously defended in *Hamdan v. Rumsfeld* -- expressly provide that although classified evidence may be withheld from the defendant, it may not be withheld from defense counsel. Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. § 9.6(b)(3) ("A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof."). In contrast, the CSRT regulations do not properly balance the detainees' need for access to material evidence considered by the tribunal against the government's interest in protecting classified information.

The CSRT regulations do acknowledge [\*86] to some extent the detainees' need for assistance during the tribunal process, but they fall far short of the procedural protections that would have existed had counsel been permitted to participate. The implementing regulations create the position of "Personal Representative" for the purpose of "assisting the detainee in reviewing all relevant unclassified information, in preparing and presenting information, and in questioning witnesses at the CSRT." July 29, 2004 Implementing Regulations at Enclosure (1), P

C, (3). But notwithstanding the fact that the Personal Representative may review classified information considered by the tribunal, that person is neither a lawyer nor an advocate and thus cannot be considered an effective surrogate to compensate for a detainee's inability to personally review and contest classified evidence against him. *Id.* at Enclosure (3), P D. Additionally, there is no confidential relationship between the detainee and the Personal Representative, and the Personal Representative is obligated to disclose to the tribunal any relevant inculpatory information he obtains from the detainee. *Id.* Consequently, there is inherent risk and little corresponding [\*87] benefit should the detainee decide to use the services of the Personal Representative.

The lack of any significant advantage to working with the Personal Representative is [TEXT REDACTED BY THE COURT.] the Personal Representative made no request for further inquiry regarding [TEXT REDACTED BY THE COURT.] Kurnaz Factual Return, Enclosure (5). Clearly, the presence of counsel for the detainee, even one who could not disclose classified evidence to his client, would have ensured a fairer process in the matter by highlighting weaknesses in evidence considered by the tribunal and helping to ensure that erroneous decisions were not made regarding the detainee's "enemy combatant" status. The GSRT rules, however, prohibited that opportunity.

In sum, the CSRT's extensive reliance on classified information in its resolution of "enemy combatant" status, the detainees' inability to review that information, and the prohibition of assistance by counsel jointly deprive the detainees of sufficient notice of the factual bases for their detention and deny them a fair opportunity to challenge their incarceration. These grounds alone are sufficient to find a violation of due process rights and to require the denial of the respondents' motion to dismiss these [\*88] cases.

## **2. Specific Defects That May Exist in Individual Cases: Reliance on Statements Possibly Obtained Through Torture or Other Coercion and a Vague and Overly Broad Definition of "Enemy Combatant"**

Additional defects in the CSRT procedures support the denial of the respondents' motion to dismiss at least some of the petitions, though these grounds may or may not exist in every case before the Court and though the respondents might ultimately prevail on these issues once the petitioners have been given an opportunity to litigate them fully in the habeas proceedings.

- a. Reliance on Statements Possibly Obtained Through Torture or Other Coercion**
- b. Vague and Overly Broad Definition of "Enemy Combatant"**

[HN19] Whether the detention of each individual petitioner is authorized by the AUMF and satisfies the mandates of due process must ultimately be determined on a detainee by detainee basis. At this stage of the litigation, however, sufficient allegations have been made by at least some of the petitioners and certain evidence exists in some CSRT factual returns to warrant the denial of the respondents' motion to dismiss on the ground that the respondents have employed an overly broad definition of "enemy combatant." Examples of cases where this issue is readily apparent are *Kurnaz v. Bush*, 04-CV-1135 (ESH), and *El-Banna v. Bush*, 04-CV-1144 (RWR). [\*99]

As already discussed above, the unclassified evidence upon which the CSRT relied in determining **Murat Kurnaz's** "enemy combatant" status consisted of findings that he was "associated" with an Islamic missionary group named *Jama'at-Al-Tabliq*, that he was an

"associate" of and planned to travel to Pakistan with an individual who later engaged in a suicide bombing, and that he accepted free food, lodging, and schooling in Pakistan from an organization known to support terrorist acts. Kurnaz Factual Return, Enclosure (1) at 1. While these facts may be probative and could be used to bolster the credibility of other evidence, if any, establishing actual activities undertaken to harm American interests, by themselves they fall short of establishing that the detainee took any action or provided any direct support for terrorist actions against the U.S. or its allies. Nowhere does any unclassified evidence reveal that the detainee even had knowledge of his associate's planned suicide bombing, let alone establish that the detainee assisted in the bombing in any way. In fact, the detainee expressly denied knowledge of a bombing plan when he was informed of it by the American authorities. Id., [\*100] Enclosure (3) at 1 [TEXT REDACTED BY THE COURT.] n35 Absent other evidence, n36 it would appear that the government is indefinitely holding the detainee -- possibly for life -- solely because of his contacts with individuals or organizations tied to terrorism and not because of any terrorist activities that the detainee aided, abetted, or undertook himself. Such detention, even if found to be authorized by the AUMF, would be a violation of due process. Accordingly, the detainee is entitled to fully litigate the factual basis for his detention in these habeas proceedings and to have a fair opportunity to prove that he is being detained on improper grounds.

n35 [FOOTNOTE REDACTED BY THE COURT.]

n36 It is true that Exhibit R19 to the Kurnaz Factual Return does assert that [TEXT REDACTED BY THE COURT] uphold the detention of any petitioner, including **Mr. Kurnaz**, as long as "some evidence" exists to support a conclusion that he actively participated in terrorist activities. Motion to Dismiss at 47-51. Hamdi, however, holds that the "some evidence" standard cannot be applied where the detainee was not given an opportunity to challenge the evidence in an administrative proceeding, 124 S. Ct. at 2651, and **Mr. Kurnaz** was never provided access to Exhibit R19. Additionally, in resolving a motion to dismiss, the Court must accept as true the petitioner's allegations and must interpret the evidence in the record in the light most favorable to the nonmoving party. Because Exhibit R19 [TEXT REDACTED BY THE COURT] the Court cannot at this stage of the litigation give the document the weight the CSRT afforded it.