

Written Testimony of

Joseph Margulies

before the

U.S. Senate Committee on the Judiciary

September 25, 2006

**Senator Specter, Senator Leahy, and Members of the Committee:**

Thank you for inviting me to provide this statement in connection with the hearing to be held Monday, September 26, 2006 (“Examining Proposals to Limit Guantanamo Detainees’ Access to Habeas Corpus Review.”) I write to address whether the proposed legislation provides an adequate substitute for habeas. I am an Associate Clinical Professor of Law and an attorney with the MacArthur Justice Center at Northwestern University Law School in Chicago, Illinois. I was lead counsel in *Rasul v. Bush*, 542 U.S. 466 (2004), and have been intimately involved in the continuing efforts to implement *Rasul* in the lower courts. In that capacity, I was one of the attorneys who argued before Judge Joyce Hens Green in the United States District Court for the District of Columbia. My argument focused on the inadequacy of the Combatant Status Review Tribunals. Judge Green’s decision in January 2005 remains the only judicial treatment of the CSRTs to date. As the Committee is aware, she held that the CSRTs do not satisfy the demands of due process. I also testified about the CSRTs before this Committee at its only other hearing on detainee issues in June 2005. Finally, I am the author of *Guantánamo and the Abuse of Presidential Power* (Simon and Schuster 2006), which discusses the CSRTs at considerable length.<sup>1</sup>

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<sup>1</sup> Margulies, *Guantánamo and the Abuse of Presidential Power* at 157-170.

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Section 6 of the proposed legislation strips the federal courts of jurisdiction over all claims brought by alien prisoners in U.S. custody. As others have persuasively demonstrated, this provision is almost certainly unconstitutional. *See, e.g.*, Written Testimony of Jonathan Hafetz (September 25, 2006). I do not intend to repeat their arguments, though I agree with their conclusions. Instead, my statement today is directed to whether the alternative created by the legislation – a CSRT followed by limited review in the Court of Appeals for the District of Columbia – provides an adequate substitute for the rights guaranteed by habeas. In a word, the answer is no.

Woodrow Wilson cautioned long ago that “one cool judgment is worth a thousand hasty counsels. The thing to do is to supply light and not heat.” In the interest of shedding light, let me be as plain as I can: as the Administration concedes, the CSRT allows a prisoner to be declared an enemy combatant based on evidence secured by torture or unlawful coercion. No process that relies on evidence wrung from a prisoner by the simple expedient of brute force can possibly be an adequate substitute for one that does not. If the Committee knew nothing more about the CSRTs than this one fact, it would be enough to dismiss out of hand the remarkable suggestion that it provides an adequate substitute for habeas, where courts have excluded evidence secured by unlawful coercion since the dawn of the common law. Regrettably, however, this fact does not exhaust the litany of flaws in the CSRT.

Before Judge Green, I described the CSRTs as the “perfect storm” of procedural inadequacy. Picking carefully from an array of possible procedures, the Administration deliberately chose the worst features available, and combined them in a grotesque parody

of due process. As a result, and *for the first time in United States history*, a prisoner's liberty has been made to depend on a process that allows the decision-maker to rely on secret evidence secured by unlawful means but nonetheless presumed to be accurate. At this proceeding, the prisoner has the burden of proof and must rebut this evidence, even though he is not allowed to learn what it is. He must meet his burden years after, and thousands of miles removed, from his arrest. He must go forward without the guiding hand of counsel, and with no effective means of presenting his evidence. And finally, he must present his case to a panel of military personnel whose superiors have all repeatedly and explicitly prejudged the outcome.<sup>2</sup> The entire process is utterly unprecedented.

Innumerable cases could be marshaled to demonstrate the deficiencies in the CSRT, and one of my colleagues in this litigation, Mr. Thomas Sullivan of Jenner & Block, presents some of these examples in his written statement to the Committee. *See* Statement of Thomas P. Sullivan Regarding Proposed Military Commissions Bill (September 25, 2006). Allow me to focus on one case with which I am especially familiar. I represent Mr. Mamdouh Habib, an Australian citizen who was incarcerated at Guantánamo from April 2002 till January 2005. The allegations against Mr. Habib were extremely serious. At least prior to the arrival of the 14 so-called "high value detainees," Mr. Habib was the only prisoner at Guantánamo alleged to have been directly involved in the 9/11 hijackings. According to the Administration, he allegedly trained the 9/11 hijackers in the martial arts. At one point, he was supposed to join them on their suicide mission. In Afghanistan he allegedly helped unload a truckload of chemical weapons.

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<sup>2</sup> *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba*, July 29, 2004, at §§ (g)(11)-(12), available at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>; *see also In re Guantanamo Detainee Cases*, 355 F. Supp.2d 443, 468-477 (D.D.C. 2005).

He also conducted surveillance of other potential terrorism targets. Based on these allegations, the CSRT found him to be an enemy combatant.

Yet the evidence against Mr. Habib derived entirely from “confessions” he made after his arrest in Pakistan and rendition to Egypt, where he was tortured for six months. The torture Mr. Habib endured has been described in a number of public documents, including the decision by Judge Green.<sup>3</sup> Mr. Habib told the CSRT his statements had been secured by torture, and the CSRT took his allegations seriously enough to order an investigation, but that investigation was not part of the CSRT. Instead, the CSRT presumed the accuracy of the Administration’s evidence, as it had to do under the rules.<sup>4</sup> Based on that presumption, the panel ruled against Mr. Habib.

At Guantánamo, I met repeatedly with Mr. Habib and I can assure this Committee that we intended to press his allegations vigorously. In connection with his habeas litigation, I filed pleadings in his case that described the circumstances of his “confessions” in considerable detail. Five days after these pleadings were released to the public, the Administration announced that Mr. Habib would be released. I had the privilege of accompanying him on the flight back to Australia – the only time a lawyer has been allowed to accompany his client off the base – and he is now reunited with his wife and young children in Sydney. Officials with the CIA later told Australian authorities that Mr. Habib was released because the Agency did not want a judge inquiring into the circumstances of his rendition and torture.<sup>5</sup> In short, therefore, Mr.

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<sup>3</sup> *In re Guantanamo Detainee Cases*, 355 F.Supp.2d at 473.

<sup>4</sup> *Id.*

<sup>5</sup> See Raymond Bonner, “Australia Uneasy About U.S. Detainee Case,” *New York Times*, April 10, 2005, A10.

Habib is home only because the habeas statute gave me a forum to litigate the lawfulness of his detention. Were it not for habeas, Mr. Habib would still be at Guantánamo as a “confessed” terrorist. The Administration, meanwhile, has never defended the truth of his “confessions.”

Some have suggested that deficiencies of the sort that marred Mr. Habib’s CSRT could be corrected by the statutory review provided by the D.C. Circuit. This is simply not correct. Unless the law is changed, review in the Court of Appeals assumes the factual accuracy of the record created before the CSRT and would not allow the prisoner to expand on that record. There is no opportunity, in other words, to challenge or rebut the facts relied upon by the CSRT. The fundamental protection provided by habeas, therefore, which is an opportunity to test the legal *and factual* basis of the detention in open court, is lost. It is, almost literally a case of “garbage in, garbage out.” Accordingly, review in the appellate court is virtually meaningless, and certainly no substitute for habeas.

### **CONCLUSION**

Thank you for the opportunity to provide this statement. My colleagues and I welcome the inquiry provided by this Committee, and stand ready to assist you.

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September 24, 2006