

PROCESSES FOR GUANTANAMO DETAINEES

Combatant Status Review Tribunals (CSRT):

- ❑ A one-time administrative review for each detainee in DoD control at GTMO to determine whether the detainee should still be classified as an enemy combatant (EC).
- ❑ Authorized and required by Deputy Secretary of Defense Order of July 7, 2004; and implemented by Secretary of the Navy Memorandum of July 29, 2004.
- ❑ Provides each detainee with the opportunity to:
 - appear before and present information to the CSRT, which is comprised of three neutral U.S. military officers; and
 - be assisted by a military officer in the preparation and delivery of information to the tribunal.
- ❑ Unclassified portions of CSRTs are open to media and ICRC observation.
- ❑ CSRTs determine whether the preponderance of information supports EC determination.
- ❑ CSRT objective: ensure a professional, rigorous, fact-based, and fair process.
- ❑ Satisfies due process requirements of notice and opportunity to be heard, applicable to U.S. citizens, as suggested by *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
- ❑ Under the law of armed conflict, the only obligation to hold a tribunal to determine the status of a detainee is that found in Article 5 of the Third Geneva Convention of 1949.
 - Article 5 does not apply to Al Qaida detainees.
 - Even if it did apply, the CSRT procedures now in effect more than satisfy Article 5.

Administrative Review Boards (ARB):

- ❑ Annual DoD administrative review at GTMO to determine whether each detainee should be released, transferred, or further detained.
- ❑ Outcome based primarily on threat assessment and intelligence value of each detainee.
- ❑ Authorized and required by Deputy Secretary of Defense Order 06942-04 of May 11, 2004; and implemented by Designated Civilian Official Directive of September 14, 2004.
- ❑ All enemy combatants not pending Military Commission prosecution are eligible.
- ❑ Provides each detainee an opportunity to:
 - appear before and present information to ARB comprised of three neutral U.S. military officers; and
 - be assisted by a military officer in the preparation and delivery of the detainee's information to the ARB.
- ❑ Unclassified portions of ARBs are open to media and ICRC observation.
- ❑ ARB members whether the detainee is still a threat to the United States and its allies, and whether there are other reasons (e.g., intelligence value) to continue to detain, and makes recommendation.
- ❑ Designated Civilian Official makes the final decision to release, transfer, or continue to detain.
- ❑ ARB process is unprecedented in the history of war and completely discretionary.
 - Combatant is provided an opportunity to be heard while hostilities are ongoing;
 - Not required by Geneva Conventions, international or domestic law; and
 - Mitigates concern about prolonged detention during this unconventional war.

Military Commissions:

- ❑ A detainee who the President has reason to believe engaged in war crimes may be prosecuted by military commission.
- ❑ Historical precedent dating from the U.S.-Mexican War (1846-1848); validity of military commissions tested fully during the U.S. Civil War.
- ❑ President's authority to constitute military commissions is:
 - inherent in constitutional authority as Commander in Chief; and
 - recognized by statute: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions ... of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions" 10 U.S.C. § 821.
- ❑ President's Military Order of Nov 13, 2001 concerning the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism":
 - Order applies to those who are not U.S. citizens who the President determines that:
 - ❑ "(1) there is reason to believe that such an individual, at the relevant times,
 - (i) is or was a member of the organization known as al Qaida;
 - (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
 - (iii) has knowingly harbored one or more [such] individuals...; and
 - ❑ (2) it is in the interest of the United States that such individual be subject to this order."
 - Directs the Secretary of Defense to issue implementing orders.
- ❑ A military commission is composed of a presiding officer and at least 3 other members (all military officers).
- ❑ Military commission procedures incorporate many of the protections found in American criminal jurisprudence, including:
 - Presumption of innocence;
 - Proof of guilt beyond a reasonable doubt;
 - Representation by a licensed attorney;
 - ❑ Attorney-client privilege pertains;
 - ❑ Representation by military defense counsel at no expense; and
 - ❑ Option for additional civilian defense counsel at no expense to the U.S.
 - The defense may call/cross-examine witnesses and present/challenge evidence.
 - Evidence may be admitted that "would have a probative value to a reasonable person":
 - ❑ Takes into account unique battlefield environment that is different from peacetime law enforcement practices;
 - ❑ Admitted evidence must still meet "full and fair" trial standard; and
 - ❑ Evidence rules apply to both prosecution and defense.
 - No adverse inference if the accused chooses to remain silent.
 - The proceedings are open to the public, except during the presentation of protected information.
 - Appellate review will be available by a three-member review panel and as provided for under the Detainee Treatment Act of 2005.
- ❑ Objective of military commission: provide for a full and fair trial while protecting national security information.