

**CITY ON THE HILL OR PRISON ON THE BAY?
THE MISTAKES OF GUANTANAMO AND THE
DECLINE OF AMERICA'S IMAGE, PART II**

HEARING
BEFORE THE
SUBCOMMITTEE ON INTERNATIONAL
ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT
OF THE
COMMITTEE ON FOREIGN AFFAIRS
HOUSE OF REPRESENTATIVES
ONE HUNDRED TENTH CONGRESS
SECOND SESSION

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**CITY ON THE HILL OR PRISON ON THE BAY?
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TUESDAY, MAY 20, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS,
HUMAN RIGHTS, AND OVERSIGHT,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:12 p.m. in room 2172, Rayburn House Office Building, Hon. William D. Delahunt (chairman of the subcommittee) presiding.

Mr. DELAHUNT. The hearing will come to order.

Let me explain somewhat the delay. We are receiving testimony via video link from Germany. So it is my understanding that the microphone is off at the particular venue in Germany, but myself and Ranking Member Rohrabacher will proceed with our opening statements; and hopefully, by the time that we have concluded, we will be able to take testimony via the video conference.

Today we continue our examination of the operation of the detention facility at Guantanamo and how that operation influences the perception of the United States by the international community and the resulting consequences for American national security and foreign policy objectives.

Years after Secretary Rumsfeld described the Gitmo detainees as the worst of the worst, I think it is fair to say, as one of our prior witnesses stated at an earlier hearing, that many are more accurately described as the unluckiest of the unlucky. It is important to understand that a majority of the detainees that are currently, or were, incarcerated at Guantanamo were victims of a bounty system that made them easy prey for local thugs who seized an opportunity to make a fast dollar.

It is also important to note that only 5 percent of the inmates were captured by American forces; the rest were primarily purchased from Afghans and Pakistanis.

Now, the fact that mistakes are made in the fog of war is understandable, and as in any human endeavor, mistakes are to be expected. But what is a trait embedded in American history is that, once discovered, we acknowledge our mistakes and we fix them; and as needs be, we design a system that allows redress, that embraces the rule of law in full measure and demonstrates to the world that American justice is not afraid of the truth, but rather seeks the truth, however embarrassing that may be.

However, no admission that mistakes were made is forthcoming from this White House. But this is not the rule; rather this is the rule, it is not the exception.

They appear to be in a constant state of denial. In response to the Supreme Court's decision in Hamdi, they compounded their mistakes by setting up a review process at Guantanamo that makes a mockery of the unique American respect for the rule of law and due process.

As we shall hear today, that process, known as the Combatant Status Review Tribunals, or CSRTs, were not established to search for the truth about the guilt or innocence of detainees; instead, their sole purpose was to legitimize the administration's detention of these people. If a CSRT issued a determination that someone was not an enemy combatant, they could merely convene a new panel, a new CSRT, to overrule the decision of the first. And as we shall hear today from Lieutenant Colonel Abraham, the results were often fixed. They were a sham.

Exculpatory evidence was ignored in the case of many detainees, including German resident Murat Kurnaz, from whom we will hear shortly. But that wasn't all that was ignored. America's adherence to the rule of law was ignored, and American values were also ignored.

The treatment of these detainees, both in Gitmo and elsewhere, has been appalling. As we will hear today, this includes sticking someone's head in a bucket of water, while punching them in the stomach and demanding they confess. This includes hanging them by their wrists. This includes placing them in metal boxes, with no natural light, for 22 hours a day, with nothing to read or to do—even 14-year-olds.

This is conduct that every American finds repugnant.

It is important to remember that this conduct is corroborated by reports, and I understand one is being issued today or tomorrow, that the FBI, our own Federal Bureau of Investigation, raised concerns about U.S. interrogators mistreating detainees in Guantanamo and, as a result, withdrew from participating in the questioning of those individuals.

What sets America apart among the family of nations is our adherence to principles, principles of justice, principles of respect for all human beings. These are the principles that have defined us as a nation. They are not to be ignored when inconvenient; they are not to be ignored even when dealing with bad people. Rather, in the treatment of our enemies we shall be judged ourselves.

And if we adhered to these American principles, had we provided these detainees with a fair assessment of their status, as we have always done, we would have found that many of these detainees were neither enemies nor even combatants. Based on the statistics from the Department of Defense, as analyzed by Professor Denbeaux, only 4 percent of the 516 CSRTs even alleged that a detainee had been on a battlefield.

As we heard in previous hearings, decisions on release often had more to do with whether a country was advocating or pushing to get its citizens back or not and whether they were considered allies. That is why some get sent back even when they are dan-

gerous, and many who are not dangerous are not released—Alice in Wonderland, if you will.

And when we do send them back, some have been sent back on the basis of so-called “diplomatic assurances,” in other words, promises from the receiving country that the detainee would not be tortured. This is a purported way to meet our obligations under the Convention against Torture, which we have ratified and are a signatory to. But we sent back detainees to countries such as Libya, Tunisia, Kazakhstan, and Iran. These are all Nations which our State Department describes as practitioners of systematic torture.

But we have to give the government credit for one thing, recognizing that diplomatic assurances from the Chinese, who wanted the Uighurs back, wouldn’t pass the laugh test. Now we find ourselves in a quandary. What are we to do with the Uighurs? We can’t seem to find a country that will accept them. Albania has accepted, I understand, some five. Are they to be held indefinitely in solitary in Guantanamo? Of course not; we cannot tolerate that as Americans.

Let’s be clear what is at stake here. The damage goes far beyond just the families and the inmates at Guantanamo. This place has single-handedly dealt a blow to the Nation’s image in the world that will take decades to overcome. Consequences to our national interests are devastating. The State Department’s own Advisory Group on Public Diplomacy for the Arab and Muslim World concluded that hostility toward the U.S. makes achieving our public policy goals far more difficult.

Any injury is not just limited to the Middle East or to the Islamic world. As the 2005 GAO report concluded, a poor reputation seriously undermines our ability to pursue our foreign policy objectives across the globe in an array of spheres, whether it is establishing a security alliance or selling American goods.

In our efforts to claim a moral authority, Guantanamo is a serious obstacle. Sixty-eight percent of the people polled across the globe disapprove of how the United States Government has treated detainees in Guantanamo. In several countries, including Germany, Great Britain, Argentina, and Brazil, disapproval rates on our handling of the detainees at Guantanamo surpass 75 percent.

It is well past time for us to deal with our mistakes. We all must work aggressively to free everyone whom we agree, after thorough review, can depart. If no nation can be found to which these detainees could be safely sent without risk of torture, then we need to think creatively about alternative solutions, including bringing some to the United States. Particularly for the Uighurs, resettlement in the U.S. is the obvious choice. For those the administration still consider a threat, let’s just give them their day in court.

Now let me turn to my friend and colleague, the ranking member, Mr. Rohrabacher of California.

[The prepared statement of Mr. Delahunt follows:]

REMARKS PREPARED FOR DELIVERY

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THE DECLINE OF AMERICA'S IMAGE, Part II**

**Hearing before the House Foreign Affairs Subcommittee on
International Organizations, Human Rights and Oversight**

May 20, 2008

OPENING STATEMENT OF CHAIRMAN BILL DELAHUNT

This hearing will come to order.

Today we continue our examination of the detention facility at Guantanamo. And how its operation influences the perception of the United States by the international community and the resulting consequences for American national security and foreign policy objectives.

Years after Secretary Rumsfeld described the GTMO detainees as the 'worst of the worst' we can now conclude -- as one of our prior witnesses stated, that many are more accurately described as "the unluckiest of the unlucky." It is crucial to understand that a majority of the detainees were the victims of a bounty system that made them easy prey for local thugs who seized an opportunity to make a quick buck. Remember that only 5% of the inmates were captured by American forces. The rest were primarily purchased from Afghanis and Pakistanis.

The fact that mistakes are made in the fog of war is understandable and -- as in any human endeavor -- mistakes are to be expected. But what is a historical American trait -- once discovered -- we acknowledge them and fix them. And if need be, we design a system that allows redress -- that embraces the rule of law in full measure -- and that shows the world that American justice is not afraid of the truth but rather seeks the truth -- however embarrassing.

However, no admission that mistakes were made is forthcoming from this White House. But this is the rule not the exception. They appear to be in a constant state of denial.

In response to a the Supreme Court's decision in Hamdi, they compound their mistakes by setting up review processes at Guantanamo that makes a mockery of the unique American respect for the rule of law. As we shall hear today, that process, known as the Combatant Status Review Tribunals or "CSRTs" were not established to search for the truth about the guilt or innocence of detainees. Instead, their sole purpose was to legitimize the Administration's detention of these people. If a CSRT issued a determination that someone was not an enemy combatant, they merely convened a new CSRT to overrule the decision of the first. As we shall hear from today from Lt. Col. Abraham, the results were often fixed. They were a sham. Exculpatory evidence was ignored in the case of many detainees, including German resident Murat Kurnaz from whom we will hear shortly.

But that wasn't all that was ignored-- America's adherence to the rule of law was ignored --- and American values were also ignored --The treatment of these detainees -- both in Gitmo and elsewhere has been appalling. As we will hear today, this includes sticking someone's head in a bucket of water while punching them in the stomach and demanding they confess. This includes hanging them by their wrists. This includes placing them in metal boxes with no natural light 22 hours a day with nothing to read or do. Even 14 year olds! This is conduct that every patriotic American should find repugnant. It is important to remember that this is corroborated by reports that the FBI raised concerns about US interrogators mistreating detainees in Guantanamo and withdrew from participating in the questioning of inmates.

What sets America apart among the family of nations is our adherence to principles. Principles of justice -- Principles of respect for all human beings -- These are the

principles that have defined who we are as a nation. They are not to be ignored when inconvenient. They are not to be ignored even when dealing with evil people. Rather, in the treatment of our enemies we are judged.

And if we had adhered to these American principles -- had we provided these detainees with a fair assessment of their status -- as patriotic Americans have always done -- we would have found that many of these detainees were neither enemies nor even combatants. Based on the statistics from the Defense Department, as analyzed by Prof. Denbeaux, only 4% of the 516 CSRTs even alleged that a detainee had been on a battlefield.

As we heard in our last hearing, decisions on release often had more to do with whether a country was pushing to get its citizens back or not and whether they were considered allies. That is why some get sent back even when they are dangerous, and many who are not dangerous stay behind.

And when we do send them back, some have been sent back on the basis of 'diplomatic assurances' -- in other words, promises from the receiving country that the detainee would not be tortured. Countries like Libya, Tunisia, Kazakhstan and IRAN! These are all nations which our State Department describes as practitioners of systematic torture. But we have to give the government credit for one thing -- recognizing that diplomatic assurances from the Chinese who wanted the Uighurs back couldn't pass the laugh test. And now we find ourselves in a quandary. What to do with the Uighurs -- we can't seem to find a country that will accept them -- are they to be held in captivity indefinitely in Guantanamo?

Let's be clear about what is at stake here -- the damage from Guantanamo goes well beyond the pain and suffering of these individuals and their families. This place has singlehandedly dealt a blow to the nation's image in the world that will take decades to overcome.

The consequences to our national interest are devastating. The State Department's own Advisory Group on Public Diplomacy for the Arab and Muslim World concluded that "hostility toward the U.S. makes achieving our public policy goals far more difficult." But the injury is not limited to the Middle East. As a 2005 GAO report concluded, a poor reputation seriously undermines our ability to pursue our foreign policy objectives across the globe, in an array of spheres, whether it be establishing a security alliance or selling American goods.

In our efforts to claim a moral authority, Guantanamo is a serious obstacle. Sixty eight percent of people polled across the globe disapprove of how the US government has treated detainees in Guantanamo and other prisons. In several countries, including Germany, Great Britain, Argentina and Brazil, disapproval rates on our handling of detainees in Guantanamo surpass seventy five percent.

It is well past time for the Bush Administration to deal with its mistakes. We all must work aggressively to free those who everyone agrees after thorough review can depart. If no nation can be found to which detainees could safely be sent without risk of torture, then we need to think creatively about alternative solutions, including bringing some to the United States. Particularly for the Uighurs, resettlement in the US is the obvious choice. For those the Administration still considers a threat, give them their day in court.

Let me now turn to my friend and colleague, Mr. Rohrabacher, for any statements he may care to make.

Mr. ROHRBACHER. Thank you very much, Mr. Chairman.

Having seen some of the statements from our witnesses today, about guards putting out their cigarette butts on a man's arm and 24-hour neon lights, I need to say that if this is indeed true and these incidents happened, then we need definitely to get to the bottom of these types of activities that are totally unacceptable. And we need to make sure that the policy of the United States Government is that these types of incidents will not become standard, that they will not become acceptable to those who are running the various systems that we have, whether in Guantanamo or anywhere else.

With that said, Mr. Chairman, I don't believe many of the charges that have been leveled at Guantanamo. I don't believe them. I believe that there is an effort to undermine the war effort throughout the world, and Guantanamo has been used as a vehicle—not to say there aren't some bad things that have happened there. Just like Abu Ghraib does not in any way characterize our entire efforts in Iraq, perhaps one or two incidents or several incidents or instances in the past that happened in Guantanamo do not reflect what is going on there and what is the purpose of Guantanamo Bay and our efforts there.

The effort to portray our servicemen as being sadists, as has been indicated by some of the witnesses from last week, as well as perhaps this week, I think is a disgraceful ploy by attorneys to further the interests of their client. We see that here in the United States, where no matter what a police officer does to bring a criminal into custody, invariably the criminals talk about how excessive force was used. And there are all sorts of stories, even though perhaps the police officer was having to subdue someone who was engaged in an altercation and fighting, not to be taken into custody.

Last week, in fact, one of the witnesses described how their client was—had gone through this altercation, their face was pushed against the wall and fingers were twisted back. And, of course, when it came down to what it was all about was, there was a strip search order issued for everyone there—as happens in our own prisons in the United States—and this prisoner refused to do that; and when the guards tried to do their duty, to make sure weapons had not been smuggled in, or drugs or whatever they were trying to look for, this altercation took place.

Was that, and if things like that happen is that, some type of crime against humanity? Are those guards really guilty of some horrible behavior? Should that have been broadcast all over the world? I don't think so, Mr. Chairman.

Mr. Chairman, in our own prison system, if people do not submit to searches which they have in prisons to make sure there haven't been things smuggled in, et cetera, these altercations happen. And this is what goes along with criminal justice here and everywhere in the world.

Now, to someone who is not engaged in this type of aggressive and physical activity, certainly physical punishment on the part of guards to prisoners is totally unacceptable. There is no doubt about that. But as I listened to these stories and I asked questions, you look into the details. In many cases, this is not the case of a sadistic guard being given his freedom to do whatever he wants by sa-

distic policymakers who run Gitmo. In fact, apparently, in those abuses that have taken place, people have gone out of their way to try to correct the abuses that have taken place in the past. And it is a very difficult job, what our military is trying to do, whether it is in Gitmo or in Iraq.

And every time a mistake is made, every time a guard gets out of line or a soldier does something like, as we have seen recently, there was a sharpshooter in Iraq who had used a Koran as a target, that is totally unacceptable. Our people corrected that, apologized to the people of that area that this soldier, American soldier, had done this.

American soldiers sometimes are not sophisticated and sometimes get caught up in the lust of war and do such things. It is up to us to correct that behavior. But it is not an excuse for pulling out every sharpshooter in Iraq.

I am sure that the chairman knows that those guarding Iraq in these last few years included 329 National Guard troops from Massachusetts who honorably—I am not sure how to pronounce that—who honorably served at Gitmo from 2003 to 2004. Not only they, but thousands of other reservists, ordinary Americans from all over the region, have received their training for interrogation and for the treatment of prisoners at Fort Devens in Massachusetts.

While no one is suggesting we shut down Fort Devens because some of the interrogators may not have followed the procedures that they were taught or that, somehow, Fort Devens is a cesspool of criminal activity and thus, just like Gitmo, should be shut down, nobody is suggesting that.

Well, it makes a lot of sense that we interrogate people in Gitmo in Gitmo, rather than bringing them to the United States. It makes more sense that we interrogate them in Gitmo than it does for us to have left them in Afghanistan and turned them over to various governments there in that region where, my guess is, their treatment would have been a lot worse.

But with that said, let's not say, and I am not suggesting that everything has been perfect, just like I have never seen a perfect military operation. And I grew up in the Marine Corps. My dad was a career Marine officer, and I can tell you the drill sergeants in the Marine Corps certainly treated their men very roughly and many times crossed the line. And the Marine Corps corrected that problem.

The Marine Corps is not inherently a bad organization. And imprisoning people in Gitmo is not inherently something that is evil, even though there have been mistakes that have been made. In fact, more than 500 prisoners have been released from Guantanamo, from their captivity in Guantanamo.

Let me repeat that: 500 have already been released, and only 270 still remain.

Well, considering the fact that a significant number of those who have been released go on to kill other innocent people and rejoin the radical Islamic fight suggests that we should be very cautious in making sure that those 270 that remain are not released unless we know they are not going to go out and kill other people or participate in other terrorist activity.

Last week, when I mentioned this, I did submit for the record the names of the people who were released that the Department of Defense had given us. Those were released. The witnesses who were with us said, well, many times those people who they say went back to the fight never actually did, and this was all made up by the Department of Defense.

I asked them to look at the record and give me the specific names of the people who were being mischaracterized in this report. And my office has received—and although the witnesses from last week said that they were going to do that, I have received no feedback from those witnesses to give specifics to the charge that basically dismisses the list of 30 people.

So I will be happy to take—and if some of these people did not go back, let's take their names off the list. But let's recognize that many of those 30 people, if not almost all of them, went back and got involved in terrorist activities.

One, the day before our hearing, was engaged in a bombing in Iraq that took the lives of six people. This is someone whom we graciously, due to international pressure, decided to let go from Guantanamo because it couldn't be proven that he was a terrorist. And that, by that action, cost the lives of six people, not to mention the many others that were injured and put into critical condition.

So these are—you know, this is a very serious matter. What I find is that we have got this mixed up quite a bit in the United States with the idea that we should be treating prisoners like this as basically people who are being accused of crime, who have the same rights as any American would have, and thus we have to operate like that or we cannot keep these people; they have to just be freed.

Well, understanding that there are criminal justice requirements in the United States which would suggest that anyone accused of—any foreigner picked up in Afghanistan who just happened to be there during this big upheaval, who is then—and who almost everybody identified at the scene as being part of the al-Qaeda foreign legion that bin Laden had put together, that in order to make that stick, in order to keep him incarcerated, we would have to bring accusers, and the accusers would have to go publicly and accuse the accused, which is part of what our criminal justice law is all about.

Well, we can handle it that way. You can expect a lot more terrorists to go free and a lot more victims, not only Americans but other people overseas, to be created by these people whom we are letting go.

I would suggest there have probably been mistakes made, and we need to do our very best to make sure that we make the best possible determination whether or not these people are actually the terrorists that we believe them to be. And we also have to do our best to make sure the people, whether they are terrorists are not, are not abused, are not abused and are not tortured in prison.

But let us again note that quite often what is described as torture, whether it is loud shouting or whether it is having a dog bark at you, is only considered that in a very small portion of the world; and that physical—yes, physical torture is something that we are concerned about. But let us note that we have used waterboarding,

which is something that has been, I say, vilified, perhaps second only to the vilification of the way we treated prisoners in general at Guantanamo—but waterboarding has only been used three times. Officially, it has been used three times; if it has been used more than that, we need to know.

But the waterboarding, one of the people who were waterboarded was—and what is waterboarding? Interestingly enough, all of our Special Forces, all of them go through waterboarding. Are we torturing our own people? No, we are teaching them how to cope with what is not physical abuse, but psychological pressure put on someone.

And we waterboarded Khalid Sheikh Mohammed, who admitted, thus admitted, that he had been the mastermind of the 9/11 attack, which cost the lives of 3,000 Americans, and the mastermind of several other attacks; and tipped us off as to other plans that were happening, perhaps saving the lives of hundreds if not thousands of other people, including a plot that was going to down a number of jet airplanes with bombs that were going to be placed on those airplanes.

Now, was that waterboarding, which was vilified the same way we hear Guantanamo people, the way we have been handling them there vilified, was that justified in retrospect? I would say so. And I would hope that our—I would hope that the waterboarding of Sheikh Mohammed and the other two people, one of whom was publicly responsible for the beheading of an American journalist, I think that it would be good to find out who his cohorts were in that crime.

And putting the psychological pressure of waterboarding was a good thing. Let's make sure that we do not try to grandstand on phony moralism that suggests that the likes of Khalid Sheikh Mohammed and terrorists who kill innocent women and children in order to pressure societies to go in certain directions, that they are nothing more than the people who are robbing the supermarket back in our hometown.

No, the people who rob the supermarket are Americans who have criminal justice rights. That's correct. They are not terrorists, and we are not at war with them. We are at war now with radical Islam, which has declared war on us, and willing to use terrorism to achieve it.

Lastly, but—the last point I would like to make is the following. There have been numerous trips by our colleagues to Guantanamo. The Red Cross and Amnesty International and others have had numerous visits to Guantanamo. When they found flaws or misbehaving, those—efforts were made to correct those flaws.

But by and large what we have had is a system that has had great scrutiny and is being portrayed to the people of the world as if these people are cut off from all disclosure. Well, that is just not the case. We have had several hundred of our colleagues, and I will put in the record for—I won't read all of these, but there are statements by about 10 of our colleagues here who visited Guantanamo, Republicans and Democrats, and did not find the type of, let's say, consistent abuse that we are led to believe takes place in Guantanamo.

And I would suggest those—many of our colleagues; I believe there have been about 107 of them—who have gone to Guantanamo and these other organizations are not a bunch of morons and idiots; that they went there and were serious about looking at what was happening, and they did not find the type of abuse that we are being told is commonplace today.

So with that said, I want to just remind us, we are, we are at war with radical Islam. And the followers of radical Islam are perfectly willing to kill thousands and thousands of civilians in order to terrorize the West into retreating from what they believe is their part of the world.

We cannot—terrorism is different. They aren't wearing uniforms. It is harder to cope with, harder to identify, because it is not like the Nazis wore their uniforms and were easy to identify.

But we must do what is necessary to make sure that this threat is met, just as we did in World War II with the Japanese and the Germans, just as we did during the Communist days. And we must make sure that our people are protected. And that doesn't excuse bad behavior, but it just means that it is a tough job, and our people shouldn't be vilified if one person makes a mistake and that's being portrayed as our policy.

So thank you very much, Mr. Chairman.

Mr. DELAHUNT. Mr. Rohrabacher, if you want to submit the names of those Members of Congress that have visited Guantanamo, I would entertain a unanimous consent request.

Mr. ROHRABACHER. Thank you. So made.

[The information referred to follows:]

FOR OFFICIAL USE ONLY

As of 31 May 2006

MEMBERS/STAFF WHO HAVE TRAVELED TO GTMO

26 Senators
119 Representatives +
145 Members of Congress traveled to GTMO
 &
 Staffers have traveled to GTMO 174 times

Many members have traveled to the detention facility at GTMO multiple times since January 2002.

*In red, members and staff from the Services' travel records
 *In blue, from SOUTHCOM J3 travel records

SENATORS

- 1) D. Akaka (D-HI), 15 Jul05
- 2) J. Bunning (R-KY), 26 Jun05
- 3) R. Bennett (R-UT), 22 May06
- 4) Cantwell N- 10 Dec03
- 5) Chambliss N- 5 Mar02, 6 Dec02, 25 Jul05
- 6) Cornyn, 4 Aug03
- 7) J. Corzine (D-NJ), 23 Dec04
- 8) M. Crapo (R-ID), 26 Jun05
- 9) DeWine 6 Dec02,
- 10) D. Feinstein (D-CA), 27 Jan02
- 11) Graham (R-SC) N- 10 Dec03, 15 Jul05
- 12) C. Hagel (R-NE), 9 Jul05
- 13) Hatch, A-27 Feb04, 14 May04
- 14) K.B. Hutchinson (R-TX), 27 Jan02
- 15) J. Isakson (R-OK), 26 Jun05
- 16) D. Inouye (D-HI), 27 Jan02
- 17) T. Kennedy (D-MA), 15 Jul05
- 18) Levin , 19 Feb04
- 19) McCain N- 10 Dec03
- 20) B. Nelson (D-FL) A-Jan02, 21 Dec03, 26 Jun05
- 21) P. Roberts (R-KS), 9 Jul05
- 22) J. Sessions (R-AL) A-Jan02, 15 Jul05
- 23) A. Specter (R-PA), 15 Aug05
- 24) T. Stevens (R-AK), 27 Jan02
- 25) J. Warner (R-VA), 15 Jul05
- 26) R. Wyden (D-OR), 26 Jun05

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REPRESENTATIVES

- 1) T. Allen N-Mar02
- 2) Bartlett 6 Jun03
- 3) Bass A-Jan02
- 4) Bereuter A-Jan02
- 5) Bishop A-Feb02
- 6) M. Blackburn (R-TN) 25 Jun05
- 7) M. Bordallo (D-GU), 25 Jun05
- 8) D. Boren (D-OK), 25 Jun05
- 9) H. Brown A-Jan02
- 10) Burr N-5Mar02
- 11) G. Butterfield (D-NC), 25 Jun05
- 12) Buyer A-Jan02
- 13) K. Calvert (R-CA), 25 Jun05
- 14) D. Camp 29 Feb04
- 15) Cardin AF- 25 Jul03
- 16) D. Cardoza (D-CA), 22 May06
- 17) Castle A-Jan02
- 18) S. Chabot (R-OH), N-Mar02, 3 May04, 16 Jan06
- 19) D. Christensen 29 Feb04
- 20) C. Cholola (R-IN), 30 Jul05
- 21) Coble 3 May04
- 22) T. Cole (R-OK), 25 Jun05
- 23) M. Conaway (R-TX), 25 Jun05
- 24) J. Cooper (D-TN), 25 Jun05
- 25) Cox 29 Feb04
- 26) Crowley A- 9 Dec03
- 27) Cunningham A-Jan02
- 28) J. Davis AF- 25 Jul03
- 29) S. Davis (D-CA), 11 Jul05
- 30) T. Davis (R-VA), 1 Aug05
- 31) Diaz-Balart 29 Feb04
- 32) N. Dicks N-Mar02
- 33) DeFazio A-Jan02
- 34) J. Doolittle A-Jan02
- 35) Dunn 29 Feb04
- 36) Ethridge, (D-CA) 6 Jul05
- 37) Everett N-5Mar02
- 38) M. Ferguson (R-NJ), 30 Jul05
- 39) Flake A- 9 Dec03
- 40) M. Foley A- 9 Dec03
- 41) R. Forbes 3 May04
- 42) Fosella A-Jan02, 23 Mar 05(SOUTHCOM)
- 43) R. Frelilnghuysen (R-NJ), 11 Jul05
- 44) Gibbons A-Jan02

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- 45) Gingrey 6 Jun03, A-25 May04
- 46) L. Gohmert (R-TX), 16 Jan06
- 47) Goodlatte 29 Feb04
- 48) Goss A-Jan02, 13 Oct03
- 49) Hastings A-Feb02
- 50) Harman N-5 Mar02, 6 Dec02, 13 Oct03
- 51) M. Hart 3 May04
- 52) R. Hayes (R-NC), 25 Jun05
- 53) J. Hefley (R-CO), 9 Sep05
- 54) Hobson N-Mar02:A- 14 Jul02
- 55) Hoekstra N-5Mar02
- 56) E. Holmes Norton (D-DC) 1 Aug05
- 57) Holt (D-NJ), 23 Dec 04
- 58) J. Hostettler (R-IN), 30 Jul05
- 59) D. Hunter (R-CA) 25 Jun05
- 60) Issa (R-CA) A-Jan02, 31 May06
- 61) Inhofe, A-Jan02
- 62) Jackson-Lee A-Jul02, 25 Jun05
- 63) Kerns A-Jan02
- 64) J. Kline (R-MN), 11 Jul05
- 65) LaHood N-5Mar02, 13 Oct03
- 66) T. Latham (R-IA), 24 Jan06
- 67) Larsen A-Jan02
- 68) F. Lobiondo (R-NJ), 11 Jul05
- 69) Meek A-25 May04
- 70) Menendez (D-NJ), 23 Dec 04
- 71) Mica A-Jan02
- 72) D. Miller, N-Mar02
- 73) J. Miller (R-FL), 6 Jul05
- 74) J. Moran (D-VA), 1 Aug05
- 75) C. Morrella A-Jan02
- 76) J. Nadler (D-NY), 16 Jan06
- 77) Pelosi
- 78) Platts N-Mar02
- 79) T. Poe (R-TX), 25 Jun05
- 80) J. Porter (R-NV), 1 Aug05
- 81) T. Price (R-GA), 6 Jul05, 24 Jan06
- 82) M. Ramstad A-Jan02
- 83) Renzi AF- 25 Jul03
- 84) Reyes N-5Mar02, 30 Jul05
- 85) B. Riley A-Jan02
- 86) H. Rogers (R-KY), 24 Jan06
- 87) M. Rogers (R-AL), 11 Jul05
- 88) Ros-Lehtinen A-Jan02, A-9 Dec03
- 89) Ruppertsberger AF- 25 Jul03
- 90) T. Ryan (D-OH), 11 Jul05

- 91) J. Ryun (R-KS), 11 Jul05
- 92) M. Sabo (D-MN), 24 Jan06
- 93) L. Sanchez (D-CA) 6 Jun03
- 94) J. Saxton (R-NJ), 11 Jul05
- 95) Schiff 3 May04
- 96) J. Schwartz (R-MI), 25 Jun05, 12 Apr 06
- 97) J. Sensenbrenner (R-WI) A-Feb02
- 98) Shakowsky AF- 25 Jul03
- 99) Shays
- 100) B. Shuster A-Jul02
- 101) Rob Simmons (R-CT), 11 Jul05
- 102) Skeen N-Mar02
- 103) Slaughter
- 104) V. Snyder A-Jan02
- 105) C. Smith AF- 25 Jul03
- 106) J. Spratt (D-SC), 30 Jul05
- 107) E. Tauscher (D-CA), 25 Jun05
- 108) B. Thompson 29 Feb04
- 109) W. Thornberry (R-TX), 9 Sep05
- 110) Tiahrt (R-KS) N-Mar02, 9 Sep05
- 111) P. Tiberi A-Jul02
- 112) Turner A-Feb02, 29 Feb04
- 113) M. Udall (D-CO), 11 Jul05, 30 Jul05
- 114) Underwood N-Mar02
- 115) Vitter N-Mar02
- 116) Walden A-Jan02
- 117) D. Watson (D-CA) A- 9 Dec03, 1 Aug05
- 118) E. Whitfield A-Jan02
- 119) J. Wilson (R-SC), 25 Jun05, 11 Jul05

PSMs

- 1) Mr. T. Sample, A-Jan02.
- 2) Mr. M. Meermans, A-Jan02
- 3) Mr. M. Lang, A-Jan02
- 4) Mr. L. Lewis A-Jan02
- 5) Mr. R. Dehobes, SASC A-Jan02
- 6) Mr. S. Stucky, SASC A-Jan02
- 7) Mr. S. Shapiro, LD, Nelson A-Jan02
- 8) Mr. E. Haden, MSD, SIC A-Jan02
- 9) Mr. C. Zur, HASC A-Jan02
- 10) Mr. G. Withers, DSD, HASC A-Jan02
- 11) Mr. P. Kiko, GC, HJC A-Jan02
- 12) Ms. M. Peterlin, HPSCI, A-Feb02
- 13) Mr. M. Sheehy, HPSCI, A-Feb02
- 14) Mr. J. Jakub, HASC, N-5Mar02
- 15) Mr. J. Lewis- N-5Mar02
- 16) Ms. C. Bartholomew N-5Mar02
- 17) Mr. B. McFarland N-5Mar02
- 18) Ms. V. Baldwin, HAC MILCON N-Mar02
- 19) Mr. T. Forham- HAC N-Mar02; A-Jul02
- 20) Mr. S. Lilly- SD, HAC MILCON N-Mar02
- 21) Mr. J. Blazey, HAC N-Mar02
- 22) Mr. K. Kraft, MLA (Hobson) N-Mar02
- 23) Mr. Paul Ostrowski, MLA (SKEEN) N-Mar02
- 24) Mr. S. Cash, HPSCI, N-Apr02
- 25) Ms. M. Lang, HPSCI, N-Apr02
- 26) Mr. B. Filippone, SSCI, N-Apr02
- 27) Ms. M. Lettre, HPSCI, N-Apr02
- 28) Mr. T. Sample, HPSCI, N-Apr02
- 29) Brian Potts, HAC, A- 14 Jul02
- 30) Mr. T. Sample, HPSCI, 6-8 Aug02
- 31) Mr. T. Corcoran, SSCI, 6 Dec 02
- 32) Mr. J. Jakub, HASC, 6 Dec 02
- 33) Ms. M. Lettre, HPSCI, 6 Dec 02
- 34) Ms. C. Still, SASC, 16 Apr03
- 35) Ms. C. Still, SASC, 22 Apr03
- 36) Mr. J. Larivier, HASC, 6 Jun03
- 37) Ms. E. Conaton, HASC, 6 Jun03
- 38) Mr. M. Leed, SASC, 6 Jun03
- 39) Ms. D. Taft, HIRC, 25 Jul03
- 40) Mr. R. McNamara, HIRC, 25 Jul03
- 41) Ms. E. Schlager, HIRC, 25 Jul03
- 42) Mr. R. Thomasson, Comyn Staff, 4 Aug03
- 43) Mr. C. Alsup, HASC, 9 Oct03
- 44) Ms. E. Farkas, HASC, 9 Oct03

- 45) Ms. L. Ruston, HASC, 9 Oct03
- 46) Mr. P. Murray, HPSCI, 13 Oct03
- 47) Ms. M. Lang, HPSCI, 13 Oct03
- 48) Ms. S. Spalding, HPSCI, 13 Oct03
- 49) Mr. M. Kostiw, HPSCI, 13 Oct03
- 50) Mr. M. Moorhead, HPSCI, 13 Oct03
- 51) Ms. K. Garlock, HIRC, A-Dec03
- 52) Mr. Hans Hogrefe, HIRC, A-Dec03
- 53) Mr. P. Oostberg, HIRC, A-Dec03
- 54) Mr. C. McCarry, HIRC, 9 Dec03
- 55) Mr. A. Jarvis, Sen. Graham, 10 Dec03
- 56) Mr. C. Paul, Sen. McCain, 10 Dec03
- 57) Mr. P. Mitchell, Sen. Nelson, 21 Dec03
- 58) Mr. R. Cairo, (interpreter), 21 Dec03
- 59) Mr. R. Debobes, SASC, 19 Feb04
- 60) Ms. E. Farkas, SASC, 19 Feb04
- 61) Mr. J. Gannon, HSCHC, 29 Feb04
- 62) Mr. D. Schanzer, HSCHC, 29 Feb04
- 63) Mr. T. Dilenge, HECC, 29 Feb04
- 64) Mr. L. Christian, Staff Member, 29 Feb04
- 65) Mr. B. Atrim, SJC, 27 Feb04
- 66) Ms. P. Knight, Sen. Hatch, 27 Feb04
- 67) Mr. W. Castle, SJC, 27 Feb04
- 68) Ms. G. Becker, SJC, 27 Feb04
- 69) Ms. J. Wagner, Sen. Hatch, 27 Feb04
- 70) Mr. P. Tahtakran, HJC, 3 May04
- 71) Mr. B. Apperson, HJC, 3 May04
- 72) Mr. B. Atrim, SJC, 14 May04
- 73) Ms. P. Knight, Sen. Hatch, 14 May04
- 74) Mr. W. Castle, SJC, 14 May04
- 75) Ms. G. Becker, SJC, 14 May04
- 76) Ms. J. Wagner, Sen. Hatch, 14 May04
- 77) Mr. B. Tolman, SJC, 14 May04
- 78) Mr. B. Milhom, SSCI, 14 May04
- 79) Mr. T. Corcoran, SSCI, 14 May04
- 80) Mr. H. Johnston, HASC, 23 Nov04
- 81) Mr. E. Sterner, HASC, 23 Nov04
- 82) Mr. B. Nattier, HASC, 23 Nov04
- 83) Ms. E. Conaton, HASC, 23 Nov04
- 84) Mr. J. Green, HASC, 23 Nov04
- 85) Mr. J. Scharfen, HIRC, 23 Nov04
- 86) Mr. D. Abramowitz, HIRC, 23 Nov04
- 87) Ms. R. Austell, HIRC, 23 Nov04
- 88) Mr. L. Bellocchi, HJC, 23 Nov04
- 89) Ms. M. Lang, HPSCI, 23 Dec04
- 90) Mr. E. Gottesman, Sen. Corzine, 23 Dec04

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- 91) Mr. S. Stucky, SASC, 18 Jan05
- 92) Ms. D. Tabler, SASC, 18 Jan05
- 93) Mr. W. Monahan, SASC, 18 Jan05
- 94) Mr. C. Alsup, SASC, 18 Jan05
- 95) Ms. R. Dubey, SASC, 18 Jan05
- 96) Mr. T. Corcoran, SSCI, 28 Mar 05
- 97) Mr. J. Livingston, SSCI, 28 Mar 05
- 98) Mr. M. Davidson, SSCI, 28 Mar 05
- 99) Ms. C. Healey, SSCI, 28 Mar 05
- 100) Mr. C. Walker, House Speaker Staff, 25 Jun05
- 101) Mr. J. Schweiter, HASC, 25 Jun05
- 102) Mr. R. Simmons, HASC, 25 Jun05
- 103) Mr. J. Green, HASC, 25 Jun05
- 104) Mr. M. Lewis, HASC, 25 Jun05
- 105) Mr. R. (H.) Johnston, HASC, 25 Jun05
- 106) Mr. W. Natter, HASC, 25 Jun05
- 107) Mr. J. Holly, HCEd&Wk - Dir. Media, 25 Jun05
- 108) Mr. J. Dickas, SSCI, 26 Jun05
- 109) Ms. A. Tejral, Sen. Nelson (NE), 26 Jun05
- 110) Mr. W. Henderson, Sen. Bunning, 26 Jun05
- 111) Mr. P. Fischer, Sen. Crapo, 26 Jun05
- 112) Mr. D. Morriss, SASC, 26 Jun05
- 113) Ms. S. Sanok, HASC, 6 Jul05
- 114) Ms. L. Dealy, HASC, 6 Jul05
- 115) Mr. B. Duhnke, SSCI, 9 Jul05
- 116) Mr. J. Hensler, SSCI, 9 Jul05
- 117) Mr. T. Corcoran, SSCI, 9 Jul05
- 118) Mr. D. Dick, SSCI, 9 Jul05
- 119) Mr. E. Rosenbach, SSCI, 9 Jul05
- 120) Ms. J. Russell, SSCI, 9 Jul05
- 121) Mr. T. Hawley, HASC, 11 Jul05
- 122) Mr. B. Natter, HASC, 11 Jul05
- 123) Mr. H. Bope, HASC, 11 Jul05
- 124) Mr. M. Meermans, HPSCI, 13 Jul05
- 125) Mr. D. Buckley, HPSCI, 13 Jul05
- 126) Mr. R. Perdue, HPSCI, 13 Jul05
- 127) Mr. D. Stone, HPSCI, 13 Jul05
- 128) Ms. C. York, HPSCI, 13 Jul05
- 129) Ms. C. Lyons, HPSCI, 13 Jul05
- 130) Mr. David Addington, EOP ASST to VP, 15 Jul05
- 131) Ms. Judy Ansley, SASC, 15 Jul05
- 132) Mr. Sid Ashworth, SAC-D, 15 Jul05
- 133) Mr. Chuck Alsup, SASC, 15 Jul05
- 134) Mr. Mark Esper, Sen. Warner, 15 Jul05
- 135) Ms. Meredith Moseley, Sen. Graham, 15 Jul05
- 136) Mr. Alan Hanson, Sen. Sessions, 15 Jul05
- 137) Mr. Scott Stucky, SASC, 15 Jul05
- 138) Ms. Mieke Eoyang, Sen. Kennedy, 15 Jul05

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- 139) Darcie Tokioka, Sen Akaka, 15 Jul05
- 140) Dr. Evelyn Farkas, SASC, 15 Jul05
- 141) Mr. Clyde Taylor, Sen. Chambliss, 25 Jul05
- 142) Mr. John Andrews, SSCI, 25 Jul05
- 143) Ms Caroline Tess, Sen Nelson, 25 Jul05
- 144) Mr. Paul Lewis, HASC, 30 Jul05
- 145) Mr. William Natter, HASC, 30 Jul05
- 146) Ms. Jeanette James, HASC, 30 Jul05
- 147) Mr. D. Brog, SJC & Specter, 15 Aug05
- 148) Mr. Evan Kelly, SJC, 15 Aug05
- 149) Ms. Carolyn Short, SJC 15 Aug05
- 150) Mr. William Reynolds, Sen. Specter 15 Aug05
- 151) Mr. Donald Stone, HPSCI 9 Sep05
- 152) Mr. Paul Lewis, HASC 9 Sep05
- 153) Mr. Jamal Ware, HPSCI 9 Sep05
- 154) Mr. William Ostendorf, HASC 9 Sep05
- 155) Mr. John Mackey, HIRC 16 Jan06
- 156) Mr. Bart Forsythe, HIRC 16 Jan06
- 157) Ms. Kimberly Betz, HJC 16 Jan06
- 158) Mr. Jeffrey Ashford, HAC-HS 24 Jan06
- 159) Ms. Beverly Aimaro-Pheto, HAC-HS 24 Jan06
- 160) Mr. Ben Nicholson, HAC-HS 24 Jan06
- 161) Mr. Shaun Parkin, Sen. Bennett MLA, 22 May06
- 162) Mr. Mark Morrison, Sen Bebbett Leg Dir, 22 May06
- 163) Mr. Kevin Coughlin, HASC Counsel, 31 May06
- 164) Ms. Lorry Fenner, HASC PSM, 31 May06
- 165) Ms. Miriam Wolf, HASC Press Office, 31 May06
- 166) Ms. Regina Burgess, HASC Research Asst, 31 May06
- 167) Mr. Jay Heath, HPSCI Counsel, 31 May06
- 168) Mr. Don Stone, HPSCI Dep Staff Dir, 31 May06
- 169) Ms. Kim Knur, HPSCI Counsel, 31 May06
- 170) Mr. Jeremy Bash, HPSCI Counsel (Minority), 31 May06

Names of the 4 staffers on the Gingrey/Mceek CODEL of 25 May 04

Totals:

26 Senators
119 Representatives +
 145 Members of Congress traveled to GTMO
 &
 Staffers have traveled to GTMO 174 times

Many members have traveled to the detention facility at GTMO multiple times since January 2002.

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Mr. DELAHUNT. And those names are obviously entered. I would like to make the point that I have no doubt and I would stipulate as to that number.

I would also suggest—and maybe we can ask the second panel how many of our colleagues have ever interviewed a detainee while on a visit at Guantanamo. Let me suggest that you and I engage in a friendly little wager: I would submit, none has ever had an opportunity to go directly one-on-one with a detainee. And I know there are attorneys and counsel that are present here; and I am confident that, when inquired of, they would be willing to sign a waiver so that you and I could go down there and actually go and interview their clients and hear firsthand, rather than through some filter, what their impressions are, how they see the facts.

I think it is very important that we get to the facts, as opposed to being told what the facts are by others who have an interest in giving us their spin.

I would also take—raise a question. And again I have great affection for my ranking member, as he knows. But he mentions Khalid Sheikh Mohammed and, as a result of enhanced interrogation techniques, that certain results were produced. I challenge that. I don't know if I believe that. It has never been demonstrated; it has only been hinted at.

Let's find the truth as to that, too. Let's not just make assumptions for the sake of an argument. In fact, I read a report once that said he gave information that was totally inaccurate, that led our forces on wild goose chase after wild goose chase.

It is important to get the facts. I agree with you.

And I also want to point out to you that one of our witnesses today, Professor Denbeaux, can speak to the issue of those that have returned to the battlefield. He has done an analysis. We welcome his testimony. Let's look at it.

As I said to you at our last hearing, I think it is incumbent upon, particularly you and me, since we are the senior members of the Foreign Affairs Subcommittee on Oversight, to visit Guantanamo and talk directly to all of those that are involved and find out what the facts are.

I would welcome the Department of Defense to come in and to be transparent and lay the facts out for our review and for the review of the American people. That is what we are about. We want to find the facts out. I don't want to reach conclusions without hearing the facts. However, I am disturbed by the facts that I have heard as of this date.

And you are right, we don't want to see people with animus toward and hostility toward the United States that will do us harm. So we need a process, a process that clears the innocent and convicts the guilty.

This isn't just simply letting people go. That's not what I am looking for, and I know that's not what you are looking for. We are looking for the truth. We need a process that the American people and the rest of the global community can have confidence in that we are acting according to our better angels, if you will, as we have had historically in terms of American jurisprudence. So we need to make sure this process is a valid one and is one that produces the truth.

I know that you read the testimony of Colonel Abraham; and his testimony, his written testimony, was powerful—a man who has a heritage, that knows of lies, and knows of the violation of human rights on a scale that we have never seen before—and what he relates in his testimony is disturbing.

And we have statement after statement coming now from people in the military, people who know the system, who say, for example, strategic political value of putting prominent detainees on trial before the 2008 Presidential election. That was Colonel Davis who made that comment, the man in charge of this process.

What are we to believe? Well, we have a witness before us today who will give us his view. Let me introduce him. And let me introduce his American attorney, Mr. Azmy.

I am not going to go into your curriculum vitae; it is considerable.

He certainly is good counsel and has done a remarkable job for his client.

And I also want to acknowledge that we have been joined by a member of the Appropriations Committee, Congressman Jim Moran of Virginia, who has had an abiding interest in this issue; and I want to welcome him to the dais.

Murat Kurnaz is a 26-year-old Turkish citizen who was born and raised in Bremen, Germany. For 5 years he was detained at Guantanamo Bay, Cuba. This happened despite the fact that publicly released documents indicated that both German and United States authorities determined early on that he had no affiliation with al-Qaeda or any other terrorist group.

He authored a book about his experience, “Five Years of My Life.” He is joined by his German counsel, Bernhard Docke. Here in Washington, we are joined by his, as I said, his American counsel, Professor Baher Azmy.

Welcome to all of you.

Mr. Kurnaz, please proceed with your statement. If you could tell—can you hear me? We are having an audio problem. If we could just suspend for a moment and let’s see if we can make this work. We need a good technician.

Professor? We are having trouble. If you could come forward for a minute.

Why don’t we suspend for a few moments?

[Brief recess.]

Mr. DELAHUNT. We will come to order, and we have reached a decision.

Mr. Azmy, what we will do is ask you to move aside. We will bring in the second panel. I will introduce them. And we will wait to see whether we can resolve the technical issues that we have.

So if the second panel could come forward, we will go first with Mr. Sulmasy, who I know has a commitment today.

But let me begin by introducing Lieutenant Colonel Steve Abraham. He is presently an attorney in the law firm of Fink and Abraham in Newport, California. He has previously served 26 years in military intelligence on active duty and in the Reserves. From September 2004 until March 2005 he served with the Office for the Administrative Review of the Detention of Enemy Combatants; this is

the division within the Department of Defense for conducting the administrative reviews of detainees at Guantanamo.

He is a highly decorated officer, having received, among other commendations, the Defense Meritorious Service Award and the Global War on Terrorism Service Medal. He is a graduate of the University of California, Davis, and the University of Pacific McGeorge School of Law.

Welcome, Colonel Abraham.

Colonel ABRAHAM. Thank you, sir.

Mr. DELAHUNT. Professor Mark Denbeaux is the director of the Seton Hall Law School Center for Policy and Research, which is best known for its production of the internationally recognized series of reports on the Guantanamo Bay detention camp. His interest in the conditions of detainment arose from his representation as co-counsel with Joshua Denbeaux of two detainees.

He graduated from the College of Wooster and New York University Law School. He joined the Seton Hall Law School faculty, and in his career there he has served as a director and then chair of the board of the New York City Legal Services Corporation.

Stafford Smith is the founder of Reprieve and has spent 25 years working on behalf of death row inmates and Guantanamo detainees. After graduating from Columbia Law School in New York, he spent 9 years as a lawyer with the Southern Center for Human Rights.

In 1993, he moved to New Orleans, and launched the Louisiana Crisis Assistance Center. In 1999, he founded Reprieve, and the following year he was awarded an OBE (Order of the British Empire) presumably, for humanitarian services.

Mr. Stafford Smith was made a Rowntree Visionary and Echoing Green fellow in 2005. He has written about his Guantanamo experience in his book, "The Eight O'Clock Ferry to the Windward Side: Fighting the Lawless World of Guantanamo Bay."

Glenn Sulmasy is a national security and human rights fellow at the Carr Center for Human Rights Policy, the Kennedy School of Government at Harvard University. He also serves on the law faculty of the United States Coast Guard Academy, an outstanding institution, as well as an outstanding military service. After tours in the Caribbean fighting the drug war in the late 1980s, he served with the Eisenhower Battle Group during the first Gulf War.

Professor Sulmasy has been a Federal prosecutor, on the faculty of the U.S. Naval War College, a congressional fellow, and a visiting fellow at the Heritage Foundation. He has written and lectured widely on national security law, and is co-editor of International Law Challenges, Homeland Security, and Combating Terrorism.

He is a graduate of the Coast Guard Academy and the University of Baltimore School of Law and holds a master's in law degree from Berkeley Law School.

Last but not least is a fellow from Massachusetts. Sabin Willett is a partner at the law firm of Bingham McCutchen. He concentrates his practice in commercial litigation and bankruptcy litigation. He is experienced in complex commercial disputes and the representation of lenders and others institutional creditors in lend-

er liability cases and complex Chapter 11 disputes. He has tried approximately 12 jury trials.

Since 2005, he has also been active in the Guantanamo issue. He is a graduate of Harvard College and Harvard Law School.

Welcome, Sabin.

I understand, again, that Professor Sulmasy has an engagement later this day. I understand it is the graduation exercises at the Coast Guard Academy.

Mr. SULMASY. It is.

Mr. DELAHUNT. Semper paratus, Mr. Sulmasy. Why don't you proceed?

STATEMENT OF GLENN M. SULMASY, ESQ., NATIONAL SECURITY AND HUMAN RIGHTS FELLOW, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY

Mr. SULMASY. Thank you very much, Mr. Chairman.

Chairman Delahunt and members of the subcommittee, I am honored to be before the subcommittee today and to address the legal ambiguities about the detention facility in the United States Naval Station at Guantanamo Bay, Cuba.

I believe the issues surrounding Gitmo and the military commissions are the seminal ones of our time. How we detain, adjudicate, and handle detainees captured in the war against al-Qaeda help to define America as to who we were, who we are, and who we will be in the future. Resolving these ambiguities is crucial to America's ability to lead in the new world order of the 21st century.

I appreciate the subcommittee taking the time to address these concerns and, hopefully, to entertain fresh, new ideas for the way ahead.

Up front, I must emphasize I attend the hearing in my personal capacity, and my views are mine alone, and do not imply endorsement by any of the entities, governmental or otherwise, that I am associated with.

Almost 7 years after the attack of 9/11, it is critical to move this debate forward. We must refrain from partisanship, constant criticism, calling one another unpatriotic, or labeling people as war criminals, and rise above the bickering and look to find real solutions.

Thus far, the advocacy has essentially been divided into two paradigms, one viewing it as a law enforcement action and applying a law enforcement model, and second, viewing it as a war and applying a strict law of armed conflict analysis. Unfortunately, neither solution is working effectively. It seems as though both sides are trying to jam a proverbial square peg into a round hole.

Unfortunately, if we remain on this tack, nothing will ever be resolved, and U.S. foreign policy will continue to be hampered. Advocates on both sides of the debate, rather than attacking each other, should be viewed as thoughtful patriots, each viewpoint earnestly promoting what they believe to be the correct way to handle the detention and trial of the captured al-Qaeda fighter. All policy-makers, academics and lawyers are trying to determine the best course to proceed.

This new armed conflict of the 21st century has shattered all previous notions of traditional warfare. It offers an enemy who is

not a signatory to Geneva, does not represent a nation-state, does not wear a uniform, violates the laws of war doctrine, and as a nonstate actor, has declared war upon the United States. Thus, neither paradigm is fitting neatly. In fact, both sides, in many respects, are right on many issues and wrong on many issues when applying their analyses to the current threat.

The armed conflict we are fighting is truly a mix of law enforcement and warfare, and the al-Qaeda fighter himself is a mix of international criminal and traditional warrior. Viewing the conflict in this fashion, as a hybrid, makes both of the prevailing paradigms ineffective as a framework for detention and prosecution.

Having asserted this, I will briefly analyze Gitmo from three perspectives: One, from the legal perspective; second, from a policy perspective; and last, a recommendation.

Different from others on the panel, I believe the military commissions are lawful as a matter of history, statute, and Supreme Court precedent. They have evolved and will continue to evolve and morph into the future. Contrary to some assertions, the administration did not make up the idea of using military commissions as the proper venue to try illegal belligerents in times of war.

In fact, they have been used throughout history. The most famous commission being employed early on was by General Washington against Major Andre during the American Revolution. Field commanders and Presidents throughout American history have made use of the commission for handling illegal belligerents with virtually little, if any, input from the Congress. Generals Washington and Jackson, Presidents Lincoln and Franklin D. Roosevelt all made use of military commissions during periods of armed conflict.

The Uniform Code of Military Justice, enacted by Congress in 1950, provides at least two sections of legislative authority to use such tribunals. And in *Ex Parte Quirin*, the case most relied upon by the Bush administration, the Supreme Court unanimously upheld the use of commissions.

The President's order of November 13, 2001, and the choice of initially choosing Gitmo as a location for many of the detainees was made during a period of attack or, at the minimum, an armed conflict of some sort, was a reasonable, legally supportable decision to make in the atmosphere of the post-9/11 environment. Intelligence reports and the chatter being intercepted revealed imminent attacks were operational, and the American citizenry, as well as the government, all anticipated additional attacks.

As ongoing combat was taking place in Afghanistan, a decision had to be made as to the best way to detain and adjudicate the war crimes being committed by the illegal belligerents—or enemy combatants, as they are now called. Thus, the President and his staff appropriately relied on the historical use of military commissions during a period of armed conflict by warfare commanders and Presidents, the statute authority embodied in the UCMJ, as well as Supreme Court precedent.

The original order of November 13, 2001, however, did not remain stagnant for long. It began to mature into 21st century military law jurisprudence. It matured itself. The Department of De-

fense issued new orders in the spring of 2002 and updated their orders.

In the spring of 2003, the Department of Defense again updated and modified their orders. It was, in fact, modified and updated over the next few years, some of which was *sua sponte*, and some at the prompting of the Congress, academics, and the bar itself. The Supreme Court also became involved in *Hamdi* and *Rasul*, creating minor adjustments, until the *Hamdan* case came along in 2006, which declared military commissions unlawful as presently constructed.

Congress did react and, in bipartisan fashion, enacted the Military Commissions Act in October 2006, just 4 months after the decision by the Supreme Court in *Hamdan*. The MCA addressed the two major concerns by the Court: One, that Congress must approve the military commissions; and second, that Common Article 3 of the Geneva Conventions must apply. It is under this legislation, the MCA, that the commissions currently are operating.

Contrary to many reports about the lack of process afforded detainees, the fact remains that many of the detainees have greater rights than they would receive in their home countries. Additionally, the detainees at Gitmo now enjoy greater rights than would a prisoner of war, under the Geneva Conventions, who would never have access to a United States court to challenge their jurisdiction, as the detainees do now.

Objectively—and if it we look at it objectively—the detainees have a laundry list of due process rights that are written in my formal statement. It seems the commissions have morphed, adapted, and changed since 2001, with input from the executive branch, the military, the judiciary and, most recently, the Congress.

In a new war, in a new century, we have watched our Republic deal with detainees in a most uncomfortable fashion. The process is evolving and morphing before our eyes.

As currently constructed, the military commissions, to me, appear lawful. From a policy perspective, however, beyond the legality of the Detention Center, policy issues must be measured. Critics of the commissions and Gitmo itself have increased dramatically over the past 3 years. We have not had a single prosecution in the 7 years since the order of 2001.

Allegations that Gitmo is the “gulag of our time,” by Amnesty International in 2005, had a major impact on how the commissions were viewed internationally. Allegations of torture by the detainees, particularly after the Abu Ghraib incident, added to concerns both domestically and internationally. Greater focus was placed on the operations at Gitmo by nongovernmental organizations, the media, and the U.S. Government. Some of these allegations may have been accurate, and we will hear some today, while others were hyperbolic or were exaggerated.

Indeed, several of these allegations have been used as propaganda tools by al-Qaeda. It is part of their doctrine. An example of hyperbole was Newsweek Magazine’s—which was later retracted—article about soldiers flushing Korans down the toilet. This story fueled suspicion of our actions by many within the international community about our intentions in our war on terror.

Regardless of merit or exaggeration, however, the impression by most, both domestically and internationally, is that Gitmo has been tainted. Affirming some of these suspicions or criticisms is the glaring fact that some 275 persons remain at Gitmo without a single trial being completed and the likelihood for any successful, fair prosecutions diminishing daily. Many question the United States' commitment to human rights and to our role as a world power.

Gitmo, regardless of blame or fault, has hurt the United States in its ability to prosecute the war on al-Qaeda and lead in many other areas of geopolitical concern. Whether allegations being made are correct or not, it is clear that we have lost the public relations war about the circumstances, safety, and the treatment of detainees at Gitmo.

I will close with a recommendation. With this policy backdrop and its impact on U.S. foreign policy, many have called to close Guantanamo. In fact, President Bush, Secretary Gates, and Secretary Rice have all stated their desire to close the facility, mostly based upon these policy concerns. All three current Presidential candidates support closing the facility. Five former Secretaries of State, from both parties, have called to close the facility.

The question still emerges then, what do we do with these detainees and the inevitable future detainees if we close the facility and use a different system? Different from the existing law enforcement or law of war paradigms, a third way must be entertained.

It seems logical that since we are fighting a hybrid warrior in a hybrid war, that the best means to detain and adjudicate the detainees is through the use of a hybrid court, a mix of our own Article 3 courts and the military commissions. This court will be run by the Department of Justice in a detention trial and incarceration held on military bases. As I have written elsewhere, this seems to be the right solution if properly constructed and incorporated with human rights considerations.

Obviously in creating such a court, the devil will be in the details. The key in statutorily creating these courts is that they are adjudicatory in nature and that we begin to move away from the preventative detention models advocated by some.

We need to try detainees accused of war crimes. The terrorist court, like the bankruptcy and immigration courts, will be used for this niche area of the law and ensure civilian oversight of the process. In doing so, we further distinguish the unique nature of this conflict and ensure military commissions, authorized and appropriate in traditional armed conflict, are not removed from military jurisprudence.

The terrorism courts offer a solution out of Guantanamo Bay from the concerns and ambiguities of Guantanamo Bay. I remain hopeful that policy makers begin to study this idea of a hybrid model used to try international terrorists as the best most appropriate way ahead.

I am available and happy to answer any questions.

Mr. DELAHUNT. Thank you, Mr. Sulmasy.

[The prepared statement of Mr. Sulmasy follows:]

PREPARED STATEMENT OF GLENN M. SULMASY, ESQ., NATIONAL SECURITY AND HUMAN RIGHTS FELLOW, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY

Chairman Delahunt and members of the Subcommittee: I am honored to appear before the Subcommittee today, and to address the legal ambiguities about the detention facility in the United States Naval Station at Guantanamo Bay, Cuba. I believe the issues surrounding Guantanamo Bay (Gitmo) and the military commissions are the seminal ones of our time—how we detain, adjudicate and handle detainees captured in the War on al Qaeda help to define America as to who we were, who we are, and who we will be in the future. Resolving the ambiguities of Gitmo is crucial to America's ability to continue to lead in the new world order of the 21st century. I appreciate this Subcommittee taking the time to address these concerns and, hopefully, to entertain fresh, new ideas for the “way ahead.” Up front, I must emphasize I attend the hearing in my personal capacity and my views are mine alone and do not imply endorsement by any of the entities, governmental or otherwise, that I am associated with.

Almost seven years after the attacks of 9/11, it is critical to move this debate forward. We must refrain from partisanship, constant criticism, calling one another unpatriotic, or labeling people as war criminals, and rise above the bickering and look to find real solutions. Thus far, the advocacy has essentially been divided into two paradigms: 1) those who view the conflict with al Qaeda requiring a law enforcement response and thus, the need for use of civilian courts and due process ordinarily accorded U. S. citizens; and 2) those who view the conflict as an armed conflict and desire to use the law of war paradigm to handle the detainees. Unfortunately, neither solution is working effectively. It seems as though both sides are jamming “a square peg into a round hole.” Unfortunately, if we remain on this tack, nothing will ever be resolved and U. S. foreign policy will continue to be hampered. Advocates on both sides of the debate, rather than attacking each other, should be viewed as thoughtful patriots—each viewpoint earnestly promoting what they believe to be the correct way to handle the detention and trial of the captured al Qaeda fighter. All policy makers, academics, and lawyers are trying to determine the best course to proceed. This new armed conflict of the 21st century has shattered all previous notions of traditional warfare. It offers an enemy who is not a signatory to the Geneva Conventions, does not represent a nation state, does not wear a uniform, violates the laws of war as doctrine, and as a non-state actor, has declared war on the United States. Thus, neither paradigm fits neatly—in fact, both sides (in many respects) are right and both sides are wrong in applying their analyses to the current threat. The armed conflict we are fighting is truly a mix of law enforcement and warfare and the al Qaeda fighter is a mix of international criminal and traditional warrior. Viewing the conflict in this fashion, as a hybrid, makes both of the prevailing paradigms ineffective as a framework for detention and prosecution. Having asserted this, I will briefly analyze the Gitmo situation from three perspectives: 1) legal perspective; 2) a policy perspective; 3) and then offer a new solution or “third way” to move the debate forward.

Law: Different from others on the panel, I believe the military commissions are lawful as a matter of history, statute and Supreme Court precedent. They have evolved and will continue to evolve and morph in the future. Contrary to some assertions, the administration did not make up the idea of using military commissions as the proper venue to try illegal belligerents in time of war. In fact they have been used throughout history; the most famous early commission being employed by General Washington against Major Andre during the American Revolution. Field Commanders and Presidents throughout American history have made use of the commission for handling illegal belligerents with virtually little, if any input from the Congress. Generals Washington and Jackson, Presidents Lincoln and Franklin D. Roosevelt all made use of military commissions during periods of armed conflict. The Uniform Code of Military Justice, enacted by Congress in 1950, provides in at least two sections of legislative authority to use such tribunals or commissions. And in *Ex Parte Quirin*, the case most relied upon by the Bush administration; the Supreme Court unanimously upheld the use of commissions. The President's order of November 13, 2001 and the choice of initially choosing Gitmo as a location for many of the detainees during a period of attack (or at the minimum, armed conflict) was a reasonable, legally supportable decision to make in the atmosphere of the post 9/11 environment. Intelligence reports and the “chatter” being intercepted revealed imminent attacks were operational and the American citizenry, as well as the government, all anticipated additional attacks. As ongoing combat was taking place in Afghanistan, a decision had to be made as to the best way to detain and adjudicate the war crimes being committed by the illegal belligerents, or enemy combatants.

Thus, the President and his staff appropriately relied on the historical use of military commissions during a period of armed conflict by warfare commanders and Presidents, the statutory authority embodied in the UCMJ (although ambiguous), as well as Supreme Court precedent.

The original Order of November 13, 2001, however, did not remain stagnant for long. It began to mature into appropriate 21st century military law jurisprudence. It was, in fact, modified and “updated” over the next few years—some of which was *sua sponte* and some at the prompting of the Congress, academics and the bar. Just six months after the original order, in the Spring of 2002, the Department of Defense made modifications to provide more process to the detainees. Again, in March of 2003, when promulgating the orders for the Military Commissions, the DoD adopted further updates to the specific orders to ensure a more progressive, justice oriented process was being used. After several cases came before the Supreme Court (*Hamdi* and *Rasul*) creating minor adjustments, the Court in the *Hamdan* case declared the existing military commissions unlawful as constructed. Congress reacted, and in bi-partisan fashion, enacted the Military Commissions Act (MCA) in October of 2006—just four months after the decision by the Supreme Court in *Hamdan*. The MCA addressed the two major concerns expressed by the Court: 1) Congress must approve the commissions and 2) that Common Article 3 of the Geneva Conventions must apply. It is under this legislation (the MCA) the commissions currently operate. Contrary to many reports about the lack of process afforded detainees, the fact remains that many of the detainees have greater rights than they would receive in their home countries. Additionally, the detainees at Gitmo now enjoy greater rights than would a Prisoner of War (POW) under the Geneva Conventions who would never have access to U. S. courts to challenge their detention. Objectively, the detainees now enjoy a laundry list of process rights, to include:

- right to a full and fair trial
- right to know the charges against him as soon as practicable
- presumption of innocence
- right to counsel, government-provided defense counsel, and civilian counsel (at own expense)
- opportunity to obtain witnesses, and other evidence, including government evidence
- obligation on the government to disclose exculpatory evidence to the defense
- right to cross-examine witnesses
- right to not testify against himself
- limitations on the admission of hearsay evidence, focusing on its probity and the danger of unfair prejudice
- ban on statements obtained by torture
- limitations on statements obtained through coercion, focusing on their reliability and probity
- assurance that no undue influence or coercion of a Commission itself or members of a Commission can be exercised
- assurance that Commission proceedings will be open, unless extraordinary circumstances are present
- right to, at a minimum, two appeals, one through the military justice system, and the other through the civilian justice system, beginning with the D.C. Circuit
- assurance against double jeopardy—accused cannot be tried twice for the same offense.

It seems the commissions have morphed, adapted and changed since 2001 with input from the Executive branch, the military, the judiciary and, most recently, the Congress. In a new war in a new century, we have watched our republic deal with the detainees in uncomfortable fashion. The process is evolving and morphing before our eyes. As currently constructed, the military commissions appear lawful.

Policy: However, beyond the legality of the detention center, policy issues must be measured. Critics of the commissions and Gitmo itself have increased dramatically over the past three years. We have not had a single prosecution in the seven years since the order of 2001. Allegations that Gitmo is the “gulag of our time” by Amnesty International in 2005 had a major impact on how the commissions were viewed internationally. Allegations of torture by the detainees—particularly after the Abu Grahیب incident—added to concerns both domestically and internationally. Greater focus was placed on the operations at Gitmo by non-governmental organiza-

tions, the media and the U. S. government. Some of these allegations may have been accurate, while others were hyperbolic or exaggerated. Indeed, several of these allegations have been used as propaganda tools by al Qaeda. An example of hyperbole was Newsweek's (later retracted) article about soldiers flushing Koran's down the toilet. This story fueled suspicion of our actions by many within the international community about our intentions in our "war on terror." Regardless of merit or exaggeration, however, the impression by most, both domestically and internationally, is that Gitmo has been tainted. Affirming some of these suspicions or criticisms is the glaring fact that some 275 persons remain at Gitmo without a single trial completed—and the likelihood for any successful, fair prosecutions diminishing daily. Many question the United States commitment to human rights and to our role as a world power. Gitmo, regardless of blame or fault, has hurt the United States in its ability to prosecute the War on al Qaeda and lead in many other areas of geo-political concern. Whether allegations being made are correct or not, it is clear that we have lost the public relations war about the circumstances, safety, and the treatment of detainees at Gitmo.

Recommendation—With this policy backdrop and its impact on U. S. foreign policy, many have called to close Gitmo. In fact, President Bush, Secretary Gates, and Secretary Rice have all stated their desire to close the facility—mostly based upon policy concerns. All three current Presidential candidates support closing the facility. Five former Secretaries of State (from both parties) have called to close the facility. The question still emerges then, what do we do with these detainees and the inevitable future detainees if we close the facility and use a different system? Different from the existing law enforcement or law of war paradigms, a "third way" must be entertained. It seems logical that since we are fighting a hybrid warrior—in a hybrid war—that the best means to detain and adjudicate the detainees is through the use of a hybrid court—a mix of our Article III Courts and the military commissions. This court would be run by the Department of Justice and the detention, trial and incarceration held on military bases. As I have written elsewhere, this seems to be the right solution if properly constructed and incorporated with human rights considerations. Obviously, in creating such a court the devil will be in the details. The key in statutorily creating these courts is that they are adjudicatory in nature and that we begin to move away from preventative detention models advocated by some. We need to try the detainees accused of war crimes. The terrorist court, like the bankruptcy and immigration courts, would be used for this niche area of the law and ensure civilian oversight of the process. In doing so, we further distinguish the unique nature of the conflict, and ensure military commissions (authorized and appropriate in traditional armed conflict) are not removed from military jurisprudence. The Terrorism courts offer a solution out of the Guantanamo Bay concerns and ambiguities. I remain hopeful that policy makers begin to study this idea of a hybrid model, used to try international terrorists, as the best, most appropriate "way ahead."

I am available and happy to answer any questions from members of the subcommittee.

Mr. DELAHUNT. I understand that we are close to re-engaging with Bremen. I don't know what your schedule is like. I hope you can stay with us. I am just going to go to Mr. Willett as soon as I see our trans-Atlantic witness. I am going to suspend and we will proceed with Mr. Kurnaz. But why don't you go ahead, Mr. Willett.

I am going to ask all the witnesses if you can make a good effort to be succinct and concise. If you can summarize your testimony it would be most welcome.

STATEMENT OF P. SABIN WILLETT, ESQ., PARTNER, BINGHAM MCCUTCHEN

Mr. WILLETT. Thank you, Mr. Chairman and Ranking Member Rohrabacher for convening this hearing. It has been a privilege of mine as a civilian lawyer to meet so many military lawyers who, it turns out, are on our side of this debate. You would be surprised as I was when I got involved. My friend has spoken of military commissions. As far as I understand, only 15 human beings have ever been referred for military commission. So why don't we focus

on the 255 who will never be charged with any crime, who for the last 7 years and 4 months at all times could have been court martialed under the Uniform Code of Military Justice but were not and who never will be.

And in particular, I want to talk about my client, so that you can understand what all of this policy turns into in human terms. Now, this subcommittee has already heard about the Uighur dissidents from Communist China who were caught up in the so-called war on terror. This spring you read the reports from China's news agency about how the Dalai Lama was a terrorist. That is the same word that the Communists have used for the Uighurs ever since 9/11. One of my clients, Huzaifa Parhat, is a Uighur. He has never been accused by the military of being a captured al-Qaeda fighter or any other kind of fighter. He never will be. In fact, he has been cleared for release 4 years. Two weeks ago, he began his 7th year at Guantanamo Bay. He believes in things like freedom of worship. He denounces state-enforced abortion. He doesn't care much for communism. In China, beliefs like Huzaifa's are called "intellectual terrorism." Uighurs are regularly tortured and jailed for them. One of them is with us this afternoon, Rebia Kadeer, the lady seated to your right in the white suit, after developing a business in China, spent 6 years in a prison there for the crime of intellectual terrorism. She sent a newspaper to her husband living abroad.

I can remember when we Americans admired people who stood up for these kinds of beliefs. Now Huzaifa is offered—what they do they call it—a single occupancy cell in Camp 6. Interrogators said in 2003 that his capture was a mistake. The Department of State has been trying to find a place to send him ever since. But the allies have all read the same shrill rhetoric about Guantanamo that you have, and they have all noticed that America isn't taking any of these people. So nobody wants Huzaifa.

Now he lives in a place called Camp 6. My information dates from March, at which point, all of the Uighurs but one were kept there. The men call it the "dungeon above the ground." Each lives alone in an isolation cell. There is no natural light or air. There is no way to tell whether it is day or night. Outside your cell is a kind of noisy bedlam of banging doors and the murmurs of men shouting at door cracks. Inside, there is nothing.

Mr. Chairman, can you remember the last time you were alone, I mean really alone? No one to talk to, nothing to read, no phone, no computer, no iPod, no television, no radio, no activity, no companion.

The psychiatrists say that if you try this, you shouldn't try it longer than a day. That has been most of Huzaifa's life since December 2006. For 2 hours in 24 the MPs lead him to what they call, without a trace of irony, the "rec area." This is a two-story chimney about 4 meters square. It is your only chance to talk to a human being or see the sun. But the rec time might be at night. It might be after midnight. Weeks go by during which you never see the sun at all.

Mr. Chairman, you try talking to a man whose last hope in life is to see the sun. You will never forget the experience. And did I mention this man was cleared for release years ago? In the cell, he can crouch at his door. He can yell through the crack at the bot-

tom. The guy in the next cell might actually hear him if he is not curled and facing the wall in a fetal position. Another Uighur told us of the voices in his head. The voices were getting the better of him, he said. His foot was tapping on the floor as he said this to me. I don't know what has happened to him. He doesn't come out of the cell to see us anymore. Huzaifa believes he will die in Guantanamo. He told us to tell his wife to consider that he has died and remarry.

Mr. Chairman, the Uighurs are not the enemy. Under Article 1 of our Constitution, you in Congress and you in Congress alone say who the enemy is. The President is our chief general and admiral. But you are the deciders. It is your job to say who the enemy is and it is his job to carry out the mission. And you never declared war on Uighurs or, for that matter, on radical Islam. There is no legal war on terror.

But suppose for a moment that the Uighurs were the enemy. Would you leave them in isolation in Camp 6? Not if you have read the Service Field Manuals, you wouldn't. My friend mentioned General Washington. Well, that is not how General Washington treated the most feared enemy combatants of the day when he captured them in Christmas 1776 at Trenton. The Hessians, you will read about them in history books. He directed that they be treated with honor.

And yet, this afternoon at Camp 6 in Guantanamo, we are using the same isolation techniques that the North Koreans used on our downed airmen in 1952. The cells are shinier, the paint is fresher, but the cruel and blithe destruction of the human soul is the same.

In 1952, our Ambassador went to the floor of the United Nations to denounce this as a step back to the jungle. How quaint of him.

Now perhaps the camp commandant would say that Huzaifa has misbehaved in some way. They haven't told me. In the grinding endless heat of Guantanamo, tensions simmer. MPs who want any post but that one, guards who were 12 years old when my client was brought there, mishandle a Koran or gawk at a prisoner on a toilet, or so someone thinks. After 6 years, it hardly matters anymore. The tensions boil over.

Have the Uighurs boiled over 5 years after being told that they would be released? Would I boil over? Would you? In the Service Field Manuals, you will find the remedy for boiling over and the maximum isolation period permitted is 2 weeks.

I would like to tell you very briefly about one other detainee during wartime held at Fort McKay near where I go to work every morning in Boston. He had served a Fascist tyrant who was in league with the most dangerous mad man in the history of Europe. He had shot to kill Americans on the battlefield during a desperate war in which we thought our civilization as we know it might end forever. And still, the commandant did not throw the Italian prisoner of war into a Camp 6. He lived communally.

And when hostilities with Italy ended in 1944, we couldn't send him back to the Italian peninsula. It was in flames. We did the next best thing in Boston. Leave was given to visit the North End. The prisoner went to mass. He played bocce on the Esplanade. He had a job and earned pay. Young girls passed notes through the fence at Carson's Beach. There were no proposals of torture and

not a few of marriage. Do the Uighurs in 2008 frighten us more than the Axis forces frightened Navy captain Errol Willett in 1944? Or are we just a smaller people than our grandparents were?

I won't dwell on the Detainee Treatment Act that you enacted 3 years ago. I have litigated the lead case. It is a train wreck. Hundreds of cases are nowhere. You establish a new court, new rules; we will spend 3 more years figuring it out. And the Uighurs, those who will still see me at all, nod politely when I tell them about our courts. But they long ago concluded that our courts are just a debating society if they exist at all.

Mr. Chairman, what will you do about Guantanamo? A sign there says "honor bound to defend freedom" and you have 50 or 60 stateless people who are cleared for release; that is to say, cleared for freedom. Are we Americans honor bound to defend that value? Or are we just talking? Will you make that happen? Even Mr. Casey has acknowledged that after 6 years, some should be paroled to the United States. Now, taking them here is going to take some gumption.

The administration's propaganda is effective. Most of your constituents believe that anything associated with Guantanamo is associated with terrorism. But our flag asks a little gumption of us from time to time. And this is such a time, because outside, the world is turning. My client's wife has remarried. Inside the wire, nothing changes. Huzaifa Parhat has been a prisoner at Guantanamo from the day the Arizona was attacked at Pearl Harbor straight through to the surrender aboard the *U.S.S. Missouri* in Tokyo Bay and almost back again. He is in his cell this afternoon in Camp 6. Thank you, Mr. Chairman.

Mr. DELAHUNT. Thank you, Mr. Willett.

[The prepared statement of Mr. Willett follows:]

PREPARED STATEMENT OF P. SABIN WILLETT, ESQ., PARTNER, BINGHAM MCCUTCHEN

Good Afternoon, Chairman Delahunt, and members of the subcommittee. Thank you for holding this hearing.

I am a lawyer from Boston. At Bingham McCutchen LLP, most of our clients are America's corporate mainstream: banks, bondholders and businesses. But we also represent Uighur prisoners at Guantanamo. I do this work for a simple reason. When I go to see my clients in the Guantanamo prison, I have to walk beneath my flag. I'm not happy about it being there. I want it back.

This subcommittee has already heard about the Uighur dissidents from Communist China who were caught up in the so-called War on Terror. This Spring you read reports from China's state news agency describing Tibetan monks as "terrorists." That is the word the Communists have used for the Uighurs too. Ever since 9/11.

One of my clients is Huzaifa Parhat. He's never been charged with anything. He never will be. In fact, he's been cleared for release for years. Two weeks ago he began his seventh year at Guantanamo.

He believes in freedom of worship and denounces state-enforced abortion. He doesn't care for communism. In China, beliefs like Huzaifa's are called "intellectual terrorism." Uighurs are regularly tortured for it. Some are put to death. I can remember when we Americans admired people who stood up for such beliefs in the face of tyranny. Now we offer them—what do they call it?—a "single occupancy" cell in Camp Six.

Interrogators advised in 2003 that his capture was a mistake. State has been trying to find a country to which to send him. But our allies read the same shrill rhetoric about Guantanamo that you have read. And the shadow of the communists falls over all the capitals of Europe. Nobody else wants Huzaifa. I used to think of us Americans, Mr. Chairman, as broad-shouldered, able to admit mistakes and put them right, but my government thinks we are a small people, so panicked by real enemies that we lock up imaginary ones. Forever.

When did we become such a small people?

Huzaifa lives in a place called Camp Six. My information, which dates from March, is that all the Uighurs but one are kept there. The men call it the dungeon above the ground. Each lives alone in an isolation cell. There is no natural light or air. There is no way to tell whether it is day or night. Outside the cell is a noisy bedlam of banging doors and the indistinct shouts of desperate men crouching at door cracks. A mad-house. Inside the cell, nothing.

Mr. Chairman, can you remember the last time you were alone—I mean *really* alone? Nothing to read, no phone, music, computer, television, radio, activity; no companion, no one to talk to. That's been Huzaifa's life for most of the time since December, 2006.

For two hours in twenty four, the MPs shackle and lead Huzaifa to the rec area. This is a two-story chimney, about four meters square. It is his only chance to talk to another human being, or see the sun. But his rec time might be night; it might be after midnight. Weeks go by during which he never sees the sun at all. Mr. Chairman, you try talking to a man who only wants to see the sun. You will never forget the experience.

In the cell he can crouch at the door, and yell through the crack at the bottom. The fellow in the next cell may respond, or he might be curled in the fetal position, staring at the wall. Another Uighur told us of the voices in his head. The voices were getting the better of him. His foot was tapping on the floor. I don't know what's happened to him: he doesn't come out of the cell to see us any more.

A letter from a third was released last December. He wondered, did someone need to commit suicide before anyone notices? A friend has a client who used to be thought of by the command as a model prisoner, well grounded, level headed. Now he has lost hope; he has lost control; he seethes with anger. His mind is wrecked by isolation.

Huzaifa believes he will die in Guantanamo. Last year he asked us to pass a message to his wife that she should remarry.

The Uighurs are not the enemy. Under Article I of our Constitution, Mr. Chairman, you in Congress, and you in Congress alone, have the power to name the enemy. The President is the chief general and admiral, but you are the "deciders." It is your job to say who the enemy is; his to snap a salute. And you never declared war on the Uighurs. Nor on "terror," for that matter.

But suppose, for a moment, that the Uighurs *were* the enemy. Would you leave them in Camp Six? In a prison? In isolation? Not if you've read the service Field Manuals. Not if you were Generals Ridgway, Westmoreland, Schwartzkopf or Powell, you wouldn't. Yet this afternoon in Camp Six, we Americans are applying the same isolation techniques that North Korea used on our own airmen in 1952. The cells are shinier, and the paint fresher, but the cruel destruction of the human soul is the same. In 1952, our ambassador went to the General Assembly of the United Nations to denounce this kind of thing as barbaric. How quaint of him.

The worst prison in America, holding the absolute worst, convicted, violent criminals, does not treat them this way. Even the Unabomber has more human contact.

Perhaps the camp commandant would say Huzaifa has misbehaved in some way. The command hasn't told me. In the grinding, endless heat of Guantanamo, tensions simmer. MPs wanting any post but GTMO—guards who were twelve years old when Huzaifa was brought there—handle, or mishandle a Koran, or gawk at a prisoner on the toilet, who, caged like an animal, behaves like one. Or someone thinks so. After six years, it hardly matters. The tensions boil over.

Have the Uighurs boiled over, in their seventh year? Five years after being told they were innocent and would be released? Would I boil over? Would you? In the service Field Manuals you will find provisions for disciplining those who disobey camp rules. The maximum period for solitary is two weeks.

I'd like to tell you about another detainee during wartime. In 1944, he was held at Fort Mackay, near where I go to work in Boston. He had served a Fascist tyrant in league with the most dangerous madman in this history of Europe; he had shot to kill Americans during a desperate world war we feared might change our civilization forever.

Still, the commandant did not throw the Italian prisoner away in a camp six. He lived communally. When hostilities with Italy ended in 1944, he couldn't be repatriated—Italy was still in flames—so we Americans did the next best thing. Leave was given to visit the North End. He went to Mass. He played bocci along the Esplanade. He was given a job, and earned pay. At Carson's beach, girls passed him notes through the fence. There were no proposals of torture, and not a few of marriage.

Do Uighurs in 2008 frighten us more than the Axis forces frightened Navy Captain Errol Willett in 1944, or are we just a smaller people than our grandparents were?

When Congress stripped the Uighurs' habeas rights in 2005, my clients filed under the new Detainee Treatment Act. I know something about that Act, having litigated one of the lead cases. It is a train wreck. It took us a year and three rounds of briefing just to establish what the record is, and the government has filed another appeal. So we are nowhere. Another DTA case, Paracha, is two and a half years old. The courts haven't done a thing with it. One court waits for a second to decide the habeas appeal; the government runs to the second to say, let's wait and see how the first court plays out the DTA.

The Uighurs—those who will still see me—nod politely when I tell them about the courts. But they long ago concluded that American courts are merely a debating society. Nothing ever comes of them. A sign at Guantanamo says, "Honor Bound to Defend Freedom." It would take a better advocate than me to persuade the Uighurs we Americans are serious about that.

Mr. Chairman, what will you do about Guantanamo? You have fifty or sixty stateless people there cleared for release. That is, for freedom. Are we Americans honor bound to defend that value, or are we just talking? The rest of the world won't take them unless we take some too. Will you make that happen? Even Mr. Casey has acknowledged that after six years, some should be paroled to the United States. The Uighurs are one place to start.

That will take some gumption. The administration's propaganda is effective, and most of your constituents think that anyone at Guantanamo must be a terrorist. But our flag asks a little gumption of us sometimes. Generally where the Congress shows the courage of leadership, the people come around. This seems like the right time for it.

Because outside, the world is turning. My client's wife has remarried. Inside the wire, nothing every changes. Huzaifa Parhat has been a prisoner at Guantanamo from the attack on the Arizona at Pearl Harbor, straight through to the signing of the surrender aboard the U.S.S. Missouri in Tokyo Bay, and almost back again. He's in his cell in Camp Six this afternoon.

Thank you.

Mr. DELAHUNT. And I understand now we are capable technologically of taking the testimony from Mr. Kurnaz. Mr. Kurnaz, if you hear me and I hope you do, would you please proceed and give us your statement.

**STATEMENT OF MR. MURAT KURNAZ (FORMER DETAINEE,
NAVAL BASE, GUANTANAMO)**

Mr. KURNAZ. Mr. Chairman, my name is Murat Kurnaz. I am a 26-year-old Turkish citizen who was born and raised in Bremen, Germany. I could only live here in Bremen with my mother, father, and two younger brothers. I would like to thank you for inviting me to address this committee and to the American people of all the injustice of the prison camp in Guantanamo Bay, Cuba. However, I have committed no crime, have never harmed anyone or associated with terrorists. I spent 5 years of life in American detention in Kandahar, Afghanistan and then in Guantanamo under terrible conditions that no one should suffer.

I have much to say to the committee about my experience, but I will try to keep my comments short because of the limited time.

I understand that my American lawyer, Baher Azmy, has submitted documents to you demonstrating my innocence and the unfair legal process in Guantanamo which I hope you will also read.

Mr. DELAHUNT. Let me interrupt for 1 minute, Mr. Kurnaz. And he has submitted those documents. And we will make them a part of the committee's record. You can be assured that we will review those. And now please proceed and if you can speak just a little more slowly and into the microphone it would be of great assistance.

[The information referred to follows:]

Exhibit A



AMHERST COLLEGE

Department of Religion

PROFESSOR JAMAL J. ELIAS

December 13, 2004

Baher Azmy, Esquire
 Seton Hall School of Law
 833 McCarter Highway
 Newark, NJ 07102

Dear Professor Azmy:

At your request, I am writing to provide an expert opinion on the philosophy and activities of the Tablighi Jama'at movement, in connection with an administrative military proceeding your client faces as part of his detention in Guantanamo Bay, Cuba. I hold the position of Professor of Religion at Amherst College, with a specialization in Islamic thought. One of my books on Islam has been translated into five languages and I have written quite extensively on religion in contemporary Pakistan. My most recent research trip to the country was in December 2003 and was focused in large part on the Tablighi Jama'at, their emphasis on travel and their attitudes toward international and domestic Pakistani politics.

In this letter, I will attempt to describe the general philosophy and history of the Tablighis (the common term for the members of the Tablighi Jama'at movement), which should be highly relevant to understanding the circumstances of your client's travel to and within Pakistan. I will also attempt to explain why it is extremely implausible that the Tablighis support terrorism or are in any way affiliated with any terrorist or "jihadi" movements such as the Taliban or Al Qaeda, or even with extremist movements operating in Pakistan.

The formal beginnings of the organization date from the mid-1930s when the Tablighi Jama'at first emerged as a movement aimed at reforming Muslims through greater adherence to ritual, particularly to prayer. Since that time, their fundamental beliefs have consisted of Six Principles (*Chhe Usul*): (i) the Islamic creedal formula (There is no god but Allah, and Muhammad is the messenger of Allah) is an individual covenant with God which has to be understood in its true meaning and with all its implications; (ii) prayer is the most important ritual obligation of a Muslim and should be performed in a congregation whenever possible; (iii) religious knowledge (*ilm*) and remembrance of God (*zikr*) are obligatory for every Muslim, and both derive from the study of the Qur'an; (iv) respect for all Muslims is imperative (kind treatment of all non-Muslims is actively encouraged but it is not an explicit principle); (v) sincerity of purpose (*ikhlas-e niyyat*) is obligatory, in the sense that all acts must have appropriate intentions since, in the absence of such intention, even good acts will not be rewarded by God; and (vi) members must donate time (*tafrigh-e waqt*) to the movement to engage in missionary activity.

The last principle refers to the obligation of members of the Tablighi Jama'at to take time from their regular lives to travel and actively engage in spreading the message of the movement in the Muslim community. The sixth principle is also referred to as

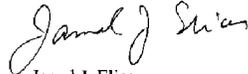
tabligh, emphasizing its centrality as a doctrine. Depending on the interpretation, a follower of the movement is required to spend between one day and four months a year traveling to call people to the movement (other teachings state that this obligation can be met by traveling as a missionary for four months cumulatively during the course of one's lifetime). Local, regional and international travel as *tabligh* has come to fulfill the Muslim obligation to 'strive in the path of God' (*jihad fi sabil Allah*) in Tablighi understanding.

I must emphasize this last point, that the Tablighis formally and actively believe that traveling to engage in missionary activity fully discharges any religious obligation to engage in Jihad. This is fully in keeping with others of the Six Principles which take a spiritual interpretation of rituals such as prayer and emphasize an almost mystical (Sufi) understanding of the nature of religious knowledge and remembrance of God. Followers of the Tablighi Jama'at are forbidden from actively participating in politics or extremist movements, a stand that has frequently put them in conflict with religious political parties in Pakistan.

Personal reform through prayer is one of the most identifiable features of the Tablighi Jama'at movement. At the same time, travel (including international travel) has become an essential characteristic of the movement through which followers not only call others to the 'true faith' (i.e. engage in *da'wa*), but also a means for self-improvement. As such, there is absolutely nothing out of the ordinary for a young man in Germany to associate with the Tablighi Jama'at movement in a personal spiritual attempt to discover (or rediscover) his faith. If he were to do so, it would be completely expected that he would end up traveling with a group of Tablighi men as a necessary requirement of their faith. Given that Pakistan forms the practical international center of this movement, it would be logical that his early travels would take him there where he would not only meet with other members of the movement but would be expected to travel from city to city as part of the sixth formal principle of their movement. I would also posit that it would be especially important to members of the movement to take new European converts around with them when they were traveling in Pakistan because it would help with missionary activity: "prize" converts – people from exotic or more economically developed backgrounds – are used by many religious movements the world over to show off the attractiveness or dynamism of their message, its "truth" as it were. It is a major part of the public rhetoric of the Tablighi Jama'at that their movement contains people from all over the world and that their annual gatherings at Raiwind in Pakistan and Tongi in Bangladesh have a wide international attendance. There is some circumstantial evidence to suggest that extremist groups have been trying to infiltrate the Tablighi Jama'at's annual gathering at Raiwind either to make trouble or else to win converts from the million-strong crowd that congregates there. However, it is important to note that these extremist groups are not condoned by the structure, leadership or teachings of the Tablighi Jama'at, that they would be using a very large crowd as cover as opposed to infiltrating the rank and file of the movement, and that they would be there to win converts AWAY from the Tablighis, not to share with them in any ideological or political sense. Furthermore, I gather that your client is not accused of attending the annual gathering at Raiwind; it is therefore highly unlikely that he would have had contact with any extremist or "jihadi" groups through his travels with the Tablighis.

In conclusion, I would like to state that, in light of the formal emphasis the Tablighi Jama'at places on encouraging personal spiritual reform through prayer and studying the Qur'an, it would be very natural for a young Muslim in Europe to get involved with them in order to become more religious. Given the importance placed on group travel for purposes of missionary activity and self-improvement in the teachings of the movement, it would follow that he would then join with other Tablighi men and journey to Pakistan, the functional center of their movement. While there, he would be expected to go from town to town with these and other members of the movement in order to fulfill his religious obligations and increase his sense of fellowship. There is absolutely nothing in these activities to suggest that he either started out with any desire to join a political or extremist group or that he would have had contact with them in Pakistan. On the contrary, affiliation with the Tablighi Jama'at would normally mean that one had made the conscious decision to distance oneself from politics and armed conflict.

Sincerely,



Jamal J. Elias
Professor of Religion
Amherst College
Amherst, MA 01002-5000

Baher Azmy, Esq.
 Associate Professor
 Seton Hall School of Law
 833 McCarter Highway
 Newark, NJ 07102

Dear Professor Azmy:

At your request, I am writing to provide an expert opinion on the philosophy and activities of the Tablighi Jamaat/Jamaat al Tablighi, in connection with an administrative military proceeding your client faces as part of his detention in Guantanamo Bay, Cuba. I am currently a Professor of History and Director of the Center for South Asian Studies at the University of Michigan and have been specifically studying the Tablighi Jamaat movement for about 15 years. I have written extensively on the group and a list of my publications is attached as part of my C.V. In this letter, I will attempt to describe the general philosophy and history of the Tablighis, which should be highly relevant to understanding the circumstances of your client's travel to and within Pakistan. I will also attempt to explain why it is implausible to believe that the Tablighis support terrorism or are in any way affiliated with other terrorist or "jihadi" movements such as the Taliban or Al Qaeda.

I might begin by noting that this movement originated in India in the 1920s but its participants now are found throughout the world. A collection of articles, *Travellers in Faith: Studies of the Tablighi Jamaat as a Transnational Islamic Movement for Faith Renewal* ed. Muhammad Khalid Masud (2000) would give you a good sense of the extent and characteristics of participants in what they themselves sometimes simply call "a faith movement." (I am among the contributors to that volume.)

Five brief points:

* There is no "organization" as such, in the sense of paid staff or formal hierarchy. There is no membership. Any Muslim, man or woman, who seeks to be a better Muslim can participate as a way of honing one's own faith through encouraging others to participate. Thus to speak of the Jamaat as a "front for" or "allied with" another organization does not make sense.

* The modus operandi of the movement is for males to join in small groups, 10-12, who travel together, perhaps in their own city, throughout a country, or internationally, ideally staying in a mosque, paying their own way, and gathering groups of Muslims (e.g. after prayers) to encourage them to correct performance of the prayer, fast, tithing, etc. In France, for example, critics refer to Tablighis as "praying machines." Women are

expected to operate within homes or joining public meetings in mosques or halls in a women's section (I, for example, have been to gatherings of women in homes in Pakistan and a huge hall in Toronto, where a women's section was curtained off from the men and loudspeakers conveyed the preaching.) For traveling men, the presence of the group is key because it is the experience of common correct practice and exhortation, taking them out of everyday activities, that teaches them the faith. Moving from city to city in a group should be understood as standard practice, not as something suspicious.

* Ideally a group includes both more experienced participants and novices. Since many European or Turkish muslims don't know Islam well, participation might be attractive to someone very serious about learning the religion.

* Tablighis are active in Europe and North America. The volume above, for example, includes articles on France, Germany, and Belgium, and Canada.

* Participants are scrupulously a-political. Their mission is transformation of individual lives, starting with their own. More practically, they need to be seen as wholly neutral because they need the benign support of government officials so that they can conduct their travels and their meetings. Tablighis periodically gather in large meetings, annually, for example, in Dewsbury, Raiwind, Bhopal, and Dhaka, when they need permits, water trucks, special buses, etc.

Barbara D. Metcalf
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Alice Freeman Palmer Professor of History
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University of Michigan, Ann Arbor MI 48109-1003
(734) 647-5414; FAX (734) 647-4881
metcalf@umich.edu

Exhibit B

~~SECRET~~

From: [REDACTED]
Sent: [REDACTED]
To: [REDACTED]
Subject: Additional Release Memos
Classification: ~~SECRET~~
Caveats: NONE

Sir:

I completed and printed out release memos to be signed for the following detainees:

[REDACTED]

PK [REDACTED] CITF has no definite link/evidence of detainee having an association with al Qaida or making any specific threat toward the U.S. (See notes on CITF memo.)

[REDACTED]

061: The Germans confirmed that this detainee has no connection to an al Qaida cell in Germany. ID of detainee was confirmed: [REDACTED]

[REDACTED]

VR

[REDACTED]

Classification: ~~SECRET~~
Caveats: NONE

~~SECRET~~

[REDACTED]
[REDACTED] THIS SOURCE MAY ACTUALLY HAVE NO AL-QAIDA OR TALIBAN
ASSOCIATION [REDACTED]

6. (U) POC THIS MEMORANDUM IS THE UNDERSIGNED AT DSN [REDACTED]

[REDACTED]
CW3, USA
CHIEF, INTERROGATION TEAM 2

700066

~~SECRET//NOFORN~~

CITF-CDR

SUBJECT: (S) Assessment UP Implementation Guidance for Release or Transfer of Detainees under U.S. Department of Defense (DoD) Control to Foreign Government Control/Detainee Murat Kurnaz, [REDACTED] 061 [REDACTED]

checkpoint. [REDACTED] detained Kurnaz and turned him over to U.S. forces on [REDACTED].

Kurnaz's version of events raises several questions that remain unanswered. [REDACTED] brother told investigators that Kurnaz left Germany to fight against the U.S. Kurnaz left for Pakistan after 11 September 2001, and he has made contradictory statements regarding his knowledge of the attacks. Further contact with German authorities is needed to complete interviews of potential witnesses in Germany. Kurnaz's statement regarding his time in Pakistan needs to be clarified regarding his association with JT. There is no indication that Kurnaz was in direct contact with a Taliban recruiter; however, he regularly associated with individuals connected to JT throughout his travels in Pakistan.

JTF 170 interviews: [REDACTED]

CITF interviews/recommendations: [REDACTED]

KB: [REDACTED]

Polygraph Consideration: None offered.

JTF 170/GTMO release recommendations: [REDACTED]

3. ~~(S//NF)~~ Military Commission Jurisdiction Assessment: Based on the information available at this time, it appears [REDACTED] that Kurnaz will be determined to be an individual subject to the President's Military Order of 13 November 2001.
 - a. Kurnaz is not a United States citizen. He appears to be a citizen of Turkey.
 - b. CITF is not aware of evidence that Kurnaz was or is a member of al-Qaida.
 - c. CITF is aware of indicators that Kurnaz may have aided or abetted, or conspired to commit acts of terrorism against the U.S., its citizens or interests.
 - d. CITF is not aware of any evidence that Kurnaz has knowingly harbored any individual who was a member of al-Qaida or who has engaged in, aided or abetted, or conspired to commit acts of terrorism against the U.S., its citizens or interests.
4. ~~(S//NF)~~ Law Enforcement Value Assessment:
 - a. Continued Investigation: CITF believes that further investigation of Kurnaz may produce new information relevant to this recommendation. CITF is awaiting

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The content of this document was prepared by an employee of the federal government for internal Executive Branch use, is predecisional and contains deliberative process material, and therefore is exempt from disclosure pursuant to Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. section 552(b)(5).

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bases for his detention, came to much the same conclusion that we had respectfully urged upon you in our February 1, 2005 submission: that the evidence against Mr. Kurnaz does not provide a strong basis to conclude he is an enemy combatant. Therefore, we think her judicial opinion is relevant to your consideration of whether Mr. Kurnaz should continue to be regarded as "dangerous to the United States, its interests or its allies."

Focusing on Mr. Kurnaz's case, Judge Green first concludes that the unclassified evidence supporting his detention provides an extremely attenuated – and constitutionally insufficient – basis for a conclusion that Mr. Kurnaz supports or is associated with terrorism. See Memorandum Opinion at 62 ("the unclassified evidence upon which the CSRT relied upon in determining Murat Kurnaz's "enemy combatant" status consisted of findings that he was "associated" with an Islamic missionary group named Jama'at-Al-Tabligh, 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.") (citing Kurnaz Factual Return, Enclosure (1) at 1). Specifically, she states:

Nowhere does any unclassified evidence reveal that the detainee even had knowledge of his associate's planned suicide bombing,² let alone establish that the detainee assisted in the bombing in any way....In addition, although the detainee admits to briefly studying with JT, there is no unclassified evidence to establish that his studies involved anything other than the Koran.³

Memorandum Opinion at 62-63.

Regarding the classified basis for his detention, which she reviews in detail, Judge Green finds it similarly thin. Consistent with our February 1 submission to the ARB, Judge Green points out the numerous exculpatory statements of U.S. officials which demonstrate their belief that he has no connections to the Taliban, or Al Qaeda. See Memorandum Opinion at 50-51 ("the 'detainee may actually have no Al-Qaida or Taliban association'") (citing Exhibit R-16 at 1-2); ("CITF has no definite link/evidence of detainee having an association with al-Qaida or making any specific threat toward the U.S." and that the "[t]he Germans confirmed that this detainee has no connection to an al-Qaida cell in Germany") (citing Exhibit R-17) (emphasis added); ("There is no indication that Kurnaz was in direct contact with a Taliban recruiter," ... "CITF is not aware of evidence that Kurnaz was or is a member of al-Qaida" and that "CITF is not aware of any evidence that Kurnaz has knowingly harbored any individual who was a member of al-Qaida or who has engaged in, aided or abetted, or conspired to commit acts of terrorism against the U.S., its citizens or interests") (citing Exhibit R-18) (emphasis added).

² Judge Green was not aware of information we have provided to the ARB (see Exhibits 7 and 8), that Mr. Bilgin is alive, has never been under any suspicion by German authorities regarding a suicide bombing, and has been cleared by German authorities of suspicions related to terrorism.

³ As we described in detail in pages 11-16 of our letter to the ARB and accompanying expert letters, Jama'at al Tabligh is an enormous group that is both avowedly peaceful and anti-political and could not, for reasons related to structure, ideology and practice, support or be affiliated with terrorist groups in any significant way.

UNCLASSIFIED

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~~FOUO//LES~~

Memorandum



To : Date
 Department of Defense 05/31/2006
 Office for the Administrative Review
 of the Detention of Enemy Combatants
 Frank Sweigart, Director

From : Federal Bureau of Investigation
 Counterterrorism Division
 [REDACTED]

Subject: Administrative Review of Enemy Combatant
 [REDACTED] 061 [REDACTED]

Administrative

In accordance with the Administrative Review Board assessment dated 08/24/2005, from the Federal Bureau of Investigation (FBI), Counterterrorism Division, to the Department of Defense (DOD), Office for the Administrative Review of the Detention of Enemy Combatants, MURAT KARNAZ, Internment Serial Number (ISN) [REDACTED] 061 [REDACTED], was assessed to pose a threat to the national security of the United States and its allies. ←
ARB
decision

The below summary is based solely on information derived from FBI investigations in response to a DoD request (Cycle 2, Round 23) dated 05/01/2006.

Investigative Summary

MURAT KARNAZ, ISN [REDACTED] 061 [REDACTED], is a Turkish national currently detained at the U.S. Naval Base, Guantanamo Bay, Cuba.

KARNAZ was born in Turkey but was raised in Germany. KARNAZ has denied membership in the Jama'at al-Tabligh (JT) but admitted to attending a JT mosque in Germany, associating with JT members, and traveling to Pakistan to study at a JT controlled mosque.

KARNAZ was never in the military and never received military training. While in Pakistan, KARNAZ stayed in guest houses in Karachi and Islamabad. KARNAZ was detained by Pakistani authorities and turned over to U.S. forces.

Intelligence Value

KARNAZ has [REDACTED] intelligence value regarding recruiting, personnel, and operations of the Jama'at al-Tabligh in Germany and Pakistan.

DMO Exhibit 8

PAGE 1 OF 2

~~FOUO//LES~~

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~~FOUO//LCS~~

Memorandum from FBI to DoD
Re: Administrative Review of Enemy Combatant, 05/31/2006

FBI Interest

A review of FBI records conducted to date leads to the conclusion the FBI has no investigative interest in this detainee, MURAT KARNAZ, ISN ~~XXXXXXXXXXXX~~061~~XXXX~~.

Threat Assessment

There is no information that KARNAZ received any military training or is associated with the Taliban or al-Qa'ida. Although he has denied being a member of the Jama'at al-Tabligh, his associates, travel and religious studies contradict this denial. For these reasons, KARNAZ is believed to pose a ~~XXXXXXXXXX~~ ~~XXXXXXXXXX~~ to the national security of the United States and its allies if released.

~~FOUO//LCS~~

Exhibit C

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document, however, was never provided to the detainee, and had he received it, he would have had the opportunity to challenge its credibility and significance. Not only is the document rife with hearsay and lacking in detailed support for its conclusions, but it is also in direct conflict with classified exculpatory documents also not disclosed to the detainee.

Exhibit R19 is a June 25, 2004 memorandum signed by Brigadier General David B. Laquetant and addressed to the Secretary of Defense. Among other comments, the

memorandum charges that [REDACTED]

[REDACTED] Kurnaz Factual Report, Exhibit R19 at 2. The only support for this assertion are vague references to [REDACTED]

[REDACTED]

[REDACTED] Id. While these allegations may very well be true, due process requires that the detainee have some ability to inquire as to the sources of the [REDACTED] and to have the opportunity to address whether he ever traveled to [REDACTED] and whether he even knows, let alone had contact with [REDACTED]. The importance of such an opportunity is highlighted by the fact that Exhibit R19 is contradicted by other classified information ignored or discounted by the CSRT without even a hint of an explanation.

For example, an earlier memorandum dated February 24, 2002 revealed that no evidence existed, at least at that time, to indicate that the detainee [REDACTED]

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[REDACTED]

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presumably the requirements to be deemed an "enemy combatant" -- and that the detainee "may actually have no Al-Qaida or Taliban association." Kumaz Factual Return, Exhibit R16 at 1-2. In addition, a September 30, 2002 memorandum from Major [REDACTED] to Lieutenant Colonel [REDACTED] revealed that "CITF (Criminal Investigative Task Force) has no definite link/evidence of detainee having an association with al Qaeda or making any specific threat toward the U.S.," and that "The Germans confirmed that this detainee has no connection to an al Qaeda cell in Germany." Kumaz Factual Return, Exhibit R17. Yet another document the detainee was not permitted to examine and use to contest his "enemy combatant" designation is a May 19, 2003 memorandum from Commanding General Britain P. Mallow to the General Counsel of the Department of Defense. Among other exculpatory statements, the memorandum discloses that "There is no indication that Kumaz was in direct contact with a Taliban recruiter," that "CITF is not aware of evidence that Kumaz was or is a member of al-Qaida," and that "CITF is not aware of any evidence that Kumaz has knowingly harbored any individual who was a member of al-Qaida or who has engaged in, aided or abetted, or conspired to commit acts of terrorism against the U.S., its citizens or interests." Kumaz Factual Return, Exhibit R18.

These three classified documents 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 what specific information could have been discovered between the May 19, 2003 memorandum stating that there was no evidence either that the detainee was a member of al Qaeda or was in direct contact with any Taliban recruiter, and the

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June 15, 2004 memorandum concluding that the detainee [REDACTED] [REDACTED] Certainly, the CSRT record lacks sufficient explanation or identification of the [REDACTED] sources for the new evidence, and had the detainee received information regarding the existence and content of the exculpatory documents, he could have challenged the tribunal to investigate these matters more carefully than it did. 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 its rejection of conflicting exculpatory evidence in at least three separate documents supports the petitioners' allegation that the "CSRTs do not involve an impartial decisionmaker." *Af Odah* Petitioners' Reply to the Government's "Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss," filed in *Af Odah v. United States*, 02-CV-0828 (CKK), on October 20, 2004, at 23-24. But however the record in *Kumaz* is interpreted, it defaultively 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 ¶ 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

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CLASSIFIED INFORMATION

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), ¶ 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 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 illustrated by the record of Kumaz. Despite the existence of three ~~exempt~~ ~~exempt~~ classified documents, the Personal Representative made no request for further inquiry regarding the undisclosed sources of information contained in the only classified document relied upon by the CSRT, and did not make even a single comment highlighting the existence of contradictory classified evidence. Kumaz Factual Report, 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 CSRT 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

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Enclosure (3) at 1. In addition, although the detainee admits to briefly studying with JT, there is no unclassified evidence to establish that his studies involved anything other than the Koran.³⁵

The dearth of evidence establishing actual activities undertaken by the detainee in furtherance of terrorism is illustrated by classified Exhibit R23 attached to the factual return. In that document,

dated March 15, 2002, an anonymous

[REDACTED]

that the detainee had no connection to al Qaeda. *Id.*, Exhibit R17. Absent other evidence,³⁶ it

³⁵ In fact, classified evidence reviewed by the CSRT indicates that the petitioner was actually denied admission to the JT school in Lahore, Pakistan. *Id.*, Exhibit R18 at 1.

³⁶ It is true that Exhibit R19 to the Kurnaz Factual Return does assert that the detainee [REDACTED] and the respondents urge this Court to 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 2551, 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 fails to provide any significant details to support its conclusory allegations, does not reveal the sources for its information, and is contradicted by other evidence in the record, the Court cannot at this stage of the litigation give the document the weight the CSRT afforded it.



Exhibit D

COMMITTEE ON FOREIGN AFFAIRS
Subcommittee on International Organizations, Human Rights, and Oversight

Statement of Baher Azmy, U.S. Counsel to Former Detainee Murat Kuruaz
Rayburn House Office Building, Room 2172
May 20, 2008

My name is Baher Azmy. I am a Professor at Seton Hall Law School. I served as counsel to Murat Kurnaz during the last year and a half of his detention in Guantanamo Bay. I am grateful to Chairman Delahunt and Subcommittee Members for holding this hearing and for inviting me to submit testimony regarding Murat Kurnaz's case.

Murat's case, along with the analysis of my colleague, Mark Denbeaux,¹ and the testimony of Stephen Abraham, and legion accounts of former detainees and habeas lawyers, lays to shameful waste two of the central claims animating the Bush administration's defense of Guantanamo: that the camp holds only hardened terrorists or the "worst of the worst," and that the detainees, at least since the 2004 *Rasul v. Bush* decision, have received adequate legal process to differentiate the guilty from the innocent. Indeed, not only is Murat Kurnaz innocent of any terrorist-related acts or associations, it is now clear that the U.S. government knew this as early as 2002, despite continuing to formally label him an "enemy combatant." His case thus, like so many others, demonstrates the vital need for habeas corpus to ensure a fair process and to release those, like Murat, who spent years of their lives for nothing more than being in the wrong place at the wrong time.

Because Murat has already testified to the Committee about the factual circumstances leading to his arrest and detention, and his treatment, I will limit my remarks to the legal absurdities of his particular case.

A. Arrest in Pakistan and Transfer to Guantanamo

As Murat described in his testimony, he decided to go on a pilgrimage to Pakistan to learn more about Islam before his new, and more religiously-educated wife, would join him and his family in Germany. He had set on this plan following soon after his marriage in the Summer of 2001 and decided to go through with it, even after the events of September 11th. As he has told me many times, and described to you and the Combatant Status Review Tribunal committee, he was horrified by the September 11th attacks. He condemns terrorism in the strongest terms and believes all who engage in such senseless violence should be severely punished. He also strongly believes that such acts, and the killing of woman, children and one's self, are absolutely prohibited by the Koran and that Osama Bin Laden has perverted Islam.

Many people ask him, and me, why he went to Pakistan in October 2001, at a time of increasing tension in the region? Skeptics also ask, why isn't his travel there proof of a desire to

¹ See, e.g. Mark Denbeaux et al., *Report on Guantanamo Detainees: Profile of 517 Detainees Through Analysis of Dep't Defense Data*, Feb. 8, 2006, http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf; Mark Denbeaux et al., *No Hearing Hearings*, http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

join Al Qaeda or the Taliban? As for the first question, the answer for Murat was simple at the time (but concededly unwise in retrospect): no war had started yet and he believed that Pakistan had nothing to do with whatever force the U.S. planned to use. He was 19 years old, not politically sophisticated or informed enough to imagine the war would have spill-over effects into Pakistan. As for the second question, it is abundantly clear now from even the U.S. government, that Murat never intended to or actually traveled to Afghanistan, associated with individuals engaged in any terrorism or received any military or weapons training of any kind.

All that Murat did was travel for weeks with a Muslim missionary group which calls itself Jama'at al Tablighi.² It is an avowedly peaceful group regularly likened to America's Jehovah's Witnesses, which has been so successful in spreading a spiritual version of Islam in Pakistan, India and Bangladesh, precisely because it stays away from politics. The government denominated Murat and numerous other Guantanamo detainees as "enemy combatants" merely because the formed some kind of "association with" this multi-million member group. This is a seriously uninformed and even disingenuous assessment.

As the most renowned American expert on Jama'at al Tablighi, University of Michigan Professor Barbara Metcalf, explained in a letter we obtained from her and submitted to the military in connection with Kurnaz's 2005 Administrative Review Board proceeding, it is "implausible to believe that the Tablighis support terrorism or are in any way affiliated with other terrorist or 'jihadi' movements such as the Taliban or Al Qaeda." Jamal K. Elias, Professor of Religion at Amherst College also stated in a letter we submitted for the military's consideration, "it is highly unlikely that [Kurnaz] would have had contact with any extremist or 'jihadi' groups through his travels with the Tablighis." (These letters are attached as Exhibit A).

In early November 2001, Murat was on a local bus filled with civilian Pakistanis, making his way to the airport for a return trip home. That bus was stopped at a routine checkpoint. Murat, likely because of his European appearance, was pulled off for questioning. The police had no evidence or suspicion of any crime; they detained him it seems merely because he was a foreigner in Pakistan at a time the Pakistani government felt enormous pressure to assist the Americans. They soon turned him over to American military, for what Murat was told by an American interrogator was an amount of \$3000.³

I have little to add to Murat's detailed account of his treatment in Afghanistan and Guantanamo – it is richly detailed in his book, *Five Years of My Life*. I would only say that virtually every thing he has described was either a part of official U.S. interrogation policy or

² See, e.g. Richard Bernstein, *One Muslim's Odyssey to Guantanamo*, N.Y. Times, June 5, 2005, <http://www.nytimes.com/2005/06/05/international/europe/05prisoner.html>.

³ It is well-known that flyers offering bounties of "wealth beyond your dreams," were dropped all over Afghanistan to encourage locals to turn over suspected Taliban or al Qaeda members to perverse and grossly inaccurate effect. Relatedly, Pervez Musharraf explained in his book, *In the Line of Fire*, that he felt that he would endure a military "onslaught" from the U.S. if he did not appear to be fully cooperating with the war on terror, and that he specifically turned over 329 persons to the U.S. in exchange for millions of dollars of bounty money.

was well-known to have been inflicted upon other detainees.⁴ In addition, he previously reported to me in meetings in January 2005 in Guantanamo, about all of these forms of abuse.⁵

B. The “Legal Process” Provided to Murat

Murat, like most of the detainees in Guantanamo, was denominated an “enemy combatant” by the Department of Defense. That designation is quite remarkable, since documents from both U.S. and German intelligence agencies make clear that he was innocent of any terrorist connections. Indeed, in light of all the exculpatory evidence in his file, it appears that the DoD simply made up accusations against him as part of his Combatant Status Review Tribunal Process. His case thus demonstrates, like many others, the shocking inadequacy of the CSRT process and the obvious need for a rational system for adjudicating enemy combatant status that only habeas corpus could provide.

1. CSRT Allegations Against Him

At his CSRT hearing, Murat was presented with two conclusions made by the DoD that rendered him an “enemy combatant.” Consistent with the Kafkaesque CSRT process in place in Guantanamo, he was asked to prove himself innocent of those charges without benefit of counsel or witnesses.

First, the CSRT asserted that Murat’s friend, Selcuk Bilgin, “engaged in a suicide bombing” and suggested he might have perpetrated a suicide bombing in Istanbul in November 2003 – two years *after* Kurnaz was already in U.S. custody. As an initial matter, it is worth contemplating the fantastical legal proposition established here by the CSRT: that one could be indefinitely detained as an “enemy combatant” for the acts committed by someone else, even if one did not participate in or even know of those alleged acts.⁶

Equally problematic, this charge was factually absurd. As a five-minute call with relevant German officials would have revealed, Bilgin was alive and well in Bremen and under no suspicion of any such acts. In light of the absence of any other evidence against Murat, and the conclusions of U.S. and German officials that Murat had no terrorist connections, it appears

⁴ See, e.g. Tim Golden, *In U.S. Report, Brutal Details of Two Afghan Inmates’ Deaths*, N.Y. Times, May 20, 2005, at <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html> (documenting practice of suspending prisoners by their hands in Afghanistan prison camps at precisely the same time Murat was suffering similar treatment).

⁵ See Carol Leonnig, *Ex-Afghanistan Detainee Alleges Torture*, Washington Post, Mar. 29, 2008.

⁶ United States District Judge Joyce Hens Green, who issued a ruling on consolidated habeas petitions in *In re Guantanamo Bay Detainee Cases*, which is currently on appeal to the U.S. Supreme Court in the case captioned *Boumediene v. Bush*, focused on the attenuated allegations against Kurnaz and concluded any detention based on such allegations would be unlawful. Specifically, she explained that, even if it is true that Selcuk Bilgin was a “suicide bomber,” there is no evidence that Murat “had knowledge of his associate’s planned suicide bombing, let alone establish that [Kurnaz] assisted the bombing in any way. In fact, [Kurnaz] expressly denied knowledge of a bombing plan when he was informed of it by the American authorities.” She continued to explain that there was no evidence that Murat “planned to be a suicide bomber himself, took up arms against the United States or otherwise intended to attack American interests.”

the suicide bomber charge was simply made up out of whole cloth to justify his detention. But, Murat did not have access to counsel during the CSRT and was thousands of miles from home – as incredible as the allegation sounded to him, he could do nothing to meet his imposed obligation to rebut it.

This allegation also demonstrates why the new process afforded to detainees under the Detainee Treatment Act and Military Commissions Act (“DTA Review”) is a profoundly inadequate substitute for habeas corpus. DTA Review process requires the court hearing a detainee petition to *accept* all of the factual findings of a CSRT panel *as true* and prohibits counsel from introducing any new evidence. Thus, under this procedure, Selcuk Bilgin would still be presumed to be an enemy combatant, even though the Bilgin charge is objectively false. Under DTA Review, Murat’s counsel could not submit an affidavit from Bilgin or German authorities disproving the CSRT conclusion.

The second basis for his enemy combatant designation by the DoD and CSRT, was that he “associated with” and “received food and lodging” from the peaceful missionary group, Jama’at al Tablighi. The U.S. government apparently believes that some members of this twenty-million member group have, at some point, engaged in hostile acts against the United States. But, there was no evidence or even accusation that Murat participated in or even knew of any such hostile acts.⁷ Thus, according to the U.S. government’s theory, it has the power to seize any one of the Tablighi’s twenty-million members and hold them in Guantanamo as enemy combatants.

The government has admitted as much. The administration’s definition of an “enemy combatant” is expansive beyond all bounds, purportedly justifying the detention of anyone who “supports” individuals or organizations “hostile to the United States.” As the government has fully conceded in litigation over the legality of the CSRTs, this standard includes no knowledge requirement, no intent requirement and no materiality requirement. Thus, the government readily conceded in the *In re Guantanamo Bay Detainee Cases* before United States District Judge Joyce Hens Green, that its overly broad definition of enemy combatant that would encompass even “[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.” Murat Kurnaz, like many other Guantanamo detainees still imprisoned, is legally, if not physically, equivalent to this “little old lady” from Switzerland.

2. Evidence of Murat’s Innocence

As part of the habeas corpus proceedings that followed the Supreme Court’s decision in *Rasul v. Bush* – and before these proceedings were hopelessly delayed, stayed and obviated by government actions and the suspension of habeas corpus twice enacted by the U.S. Congress –

⁷ Regarding this allegation, Judge Green explained that, “although [Mr. Kurnaz] admits to briefly studying with JT, there is no unclassified evidence to establish that his studies involved anything other than the Koran.” Thus, she concluded that, the U.S. government was attempting to hold Murat “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.... This would violate due process.”

the government also filed with the court, additional classified evidence against the detainees. The evidence was not available to the public, but habeas counsel and Judge Green were able to view it in secure environment.

I reviewed that evidence soon after it was made available and learned that most of this classified evidence in the Kurnaz file actually exonerated him. Judge Green also identified the numerous exculpatory statements in his file and demonstrated that the CSRT panel obviously refused to consider such evidence in coming to the (pre-ordained) conclusion that Murat was an enemy combatant. She concluded that the failure to consider multiple exculpatory statements calls into question the impartiality of the Tribunal making enemy combatant determinations.

The Defense Department insisted that these exculpatory documents and portions of Judge Green's opinion even referencing their existence be classified. However, pursuant to a 2007 Freedom of Information Act litigation in New York, those documents and Judge Green's opinion referencing them have been declassified. The now unclassified statements include:

- A September 30, 2002 Memorandum from military officials states that "CITF [Command Information Task Force] has no definite link/evidence of detainee having an association with al-Qaida or making any specific threat against the U.S." It also states that "The Germans confirmed that this detainee has no connection to an al-Qaida cell in Germany."
- A May 2003, Memorandum from General Brittain P. Mallow to the General Counsel of the Department of Defense reported that "CITF is not aware of evidence that Kurnaz is or was a member of Al Qaida." It also reported that "CITF is not aware of any evidence that Kurnaz has knowingly harbored any individual who was a member of Al Qaeda or who has engaged in, aided or abetted or conspired to commit acts of terrorism against the United States, its citizens or interests."
- A September 2002 declassified memorandum from a German intelligence officer to the German Chancellor's office states, "USA considers Kurnaz's innocence to be proven."⁸

(The relevant portions of the documents – Bate-stamped by the government pursuant to a FOIA document production – are attached as Exhibit B. The relevant, declassified portions of Judge Green's opinion referencing and analyzing those opinions are attached as Exhibit C.)

C. Murat's Eventual Release

In August 2006, Murat was finally released to his family in Germany, after nearly five years in U.S. custody. He never did anything wrong, nor did he ever have the opportunity to demonstrate this essential reality to an impartial tribunal. But, Guantanamo is an arbitrary and often irrational system. It is wholly unconcerned with guilt or innocence, punishment or

⁸ See also Carol Leonnig, *Evidence of Innocence Rejected at Guantanamo*, Wash. Post, Dec. 5, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/12/04/AR2007120402307_pf.html.

remediation and release determinations are typically without rhyme or reason.⁹ Had there been a legal process in place, the false charges against him could have been disproven and his innocence recognized by a neutral tribunal.

What finally happened is that the new Merkel government reversed Germany's earlier position and decided to attempt to negotiate for his release. The prior German administration had argued that Murat was solely the responsibility of the Turkish government for negotiation and repatriation purposes. Meanwhile, the Turkish government did not take an interest in pursuing his release because Murat had no strong connections to the country. So, without any legal process in place, Murat was in a diplomatic limbo, at the mercy of political actors in two different countries. Of course, the U.S. could also have just released him to Turkey and we do not yet know why it chose not to.

Finally, my German co-counsel and I were able to bring to public light in Germany the evidence of Murat's innocence and the abuse he suffered, which finally motivated enough outrage in Germany to pressure the Merkel administration to begin negotiating for his release. But, even in negotiating for his release, and despite the evidence of his innocence, the U.S. government insisted that the German government engage in forms of detention and monitoring that would be illegal under German law. Because of the German refusal to accept these conditions, an otherwise simple transfer negotiation took eight months to complete. It is one bitter irony that here the German government stood up to the Americans about the importance of adhering to law.

Indeed, upon his release from Guantanamo, the U.S. military tried to force Murat, to sign a statement admitting he was a member of Al Qaeda – which he refused to do. And, in a final shameless indignity, Murat was flown from Guantanamo to his freedom in Germany drugged, hooded and shackled – exactly as he had arrived to that horrible camp, nearly five years earlier.

Thank you very much.

⁹ Even Murat's Administrative Review Board (ARB) hearing was non-sensical. The military instituted annual ARB hearings to determine if detainees "continue" to pose a danger to the U.S. or its allies. In January 2006, the ARB determined that Murat was still a threat and therefore not eligible for release. Evidence of his dangerousness included allegations (unveiled as part of the FOIA) that he "prayed loudly during the playing of the national anthem," that "possibly to estimate the height of the fences... [Kumaz] asked how high the basketball rim was;" and that he asked a guard to "report that he ate his whole meal when he only ate his apple." Only six months later, another ARB was convened which authorized his release. It is hard to imagine what could have made him materially less "dangerous" in the intervening few months.

Mr. KURNAZ. My parents are work immigrants from Turkey. They came to Germany over 30 years ago. They are Muslims. But like many Turkish people in Germany they are not very religious. In 2000, when I was about 18 years old, I became more and more interested in Islam, but not in any political sense. In the summer of 2001, I married a woman who lived in Turkey. My family made arrangements for her to come to live with us in Germany, starting in December 2001.

In the meantime, I wanted to prepare myself to live the correct life with her under Islam. I wanted to learn to read the Koran in Arabic and to pray, which are very important to faithful Muslims. I decide this period of time will be the last chance to travel and study Islam before living with my wife together in Bremen, Germany. I made contact in Bremen with the Muslim missionary group called Jama'at al Tablighi. My impression was that this was a peaceful and not political group which spread the message of Islam in a peaceful way. They do charity work, teach people important values about family and prayer, and completely reject terrorism.

My American lawyer has submitted materials to the committee about this group which demonstrates that it has nothing to do with terrorism. They suggested that I go to Pakistan. It is cheap and they have many of their schools and their teachers there. I decided to go with a friend from Bremen who also wanted to learn to read the Koran. His name is Selcuk Bilgin.

When the terrorists attacked New York City on 9/11, I was horrified by their actions. I believe those who helped commit those acts should all be punished harshly. I condemn all of terrorism and think the Koran instructs me that it is never permissible to kill yourself or to kill women and children. I believe strongly that Osama bin Laden is perverting Islam by killing people in the name of Islam. I blame Osama bin Laden for having lost 5 years of my life. I already made a similar statement to my Combatant Status Review Tribunal, CSRT, in 2004. The CSRT still falsely labeled me an enemy combatant.

Despite the terrorist attack of 9/11, I was not worried about traveling to Pakistan in October 2001. Pakistan is not Afghanistan. The war had not yet started, and I had no idea the possible war could spread over the border to Pakistan.

In Pakistan, I traveled with some of the Tablighis and visited several cities as a religious tourist. I never went to Afghanistan and I never met with anyone from al-Qaeda or the Taliban. I also never came in touch with any weapons and I never committed any crime.

I had a return ticket to Germany to rejoin my family and live there. On my way back to Germany, I was arrested by Pakistani police. I was traveling on a bus with many other civilian passengers. The police stopped the bus and removed me. They had no suspicion other than the fact that I was a foreigner with a Turkish passport and German residency. After few days, I was handed over to the border to U.S. forces. I was soon transferred to the United States Military base in Kandahar, Afghanistan and then later to Guantanamo. I was later told by a U.S. interrogator that the U.S. paid \$3,000 bond for me. In the American prison camp in

Kandahar, I was shocked by the awful treatment prisoners received. I had very high impression of Americans all my life. So I couldn't believe Americans will do these kinds of things. It was wintertime and freezing cold. And I had just shorts and no blanket. I was beaten repeatedly. During interrogations my head was dunked under water to simulate drowning, and electroshocks were sent through my feet. At one point, I was chained and hung by my hands for a long time. During the time I hung in the air, a doctor sometimes checked if I was okay. Then I would be hung up again.

The guards accused me of being affiliated with Mohammed Atta. They thought that because we are both from Germany and Muslims, we must have worked with him. This was ridiculous and without any basis in reality. But the hanging was punishment for not admitting this and coercion to try to force me to admit it. The pain from mistreatment was beyond belief. I know that others died from this kind of treatment.

From Kandahar, I was transferred to Guantanamo and from Guantanamo the conditions and the treatment were barely fit for animals and certainly not for human beings. I was deprived of sleep and food for a long time, for long intervals. I was forced to being in solitary confinement for long periods of time for no reason and subjected to extreme cold and heat. I was subjected to religious and sexual humiliation. I was beaten multiple times. The guards forced me to accept medication that I did not want.

I was interrogated over and over again but always with the same questions. I told my story over and over. My name over and over, and details about my family over and over. I quickly got the impression that the interrogators were useless and pointless and not interested in the truth. Twice I was visited by German interrogators.

The first time I saw my American lawyer was in October 2004. At first I did not believe he was a lawyer. There was no law in Guantanamo and interrogators always lied to us. But he brought a handwritten note from my mother, and so I came to trust him. He told me there was a legal case that my family brought to get me released. I had no idea about this. From 2002 until my lawyer visited in 2004 in Guantanamo, I had no idea anyone even knew Guantanamo existed or that I was alive.

In September 2004, I had CSRT proceeding. I did not have a lawyer in this proceeding. At the CSRT, they said I was an enemy combatant because my friend, Selcuk Bilgin, had committed a suicide bombing. I couldn't believe this. I did not think Selcuk was crazy. Though we all now know the charge was false. I couldn't prove this to the CSRT. I was all alone in Guantanamo and without access to any information about the outside world.

There was no legal process at Guantanamo that would allow me to really challenge my detention. Going forward with the CSRT, I know that they were just trying to say that it was okay to detain me. They were not looking for the truth. They were not looking for the truth.

I also now know that both the United States Government and the German Government knew I was innocent as early as 2002. My American lawyer has submitted these documents proving this to the committee, and I urge you to review them. Even though I was

innocent, and even though both governments knew I was innocent, I spent almost 5 years in American prison camps.

As my story demonstrates, it is not the existence of a security threat that keeps someone in Guantanamo because there was no law in Guantanamo. In order to be released, I needed to have a country that will fight for my release. For too long, there was no country that will do that. The German Government for years refused to claim me because they considered me a Turkish citizen. The German Government even tried to revoke my German residency while I was in Guantanamo. Also I did not have a strong connection to the Turkish Government since I lived my whole life in Germany. I was not a refugee and couldn't have returned to either of these countries. Instead, I was left behind waiting for politicians to do the right thing for me.

I think I was eventually released because of the work of my lawyer, in the United States and in Germany, to prove to the German public that I was innocent and to pressure the new German Government to my negotiate for my release. If there had been any law in Guantanamo, I would obviously have been released much earlier.

I believe my story, with some variations, is true for many in Guantanamo today. Often people are released because their countries demanded it. Others remain because the countries do not demand their return, or because they are afraid of being returned.

My imprisonment in Kandahar and Guantanamo was a nightmare. I did nothing wrong and was treated like a monster. There was no law in place or judge to consider my story. How could this happen in the 21st century?

I grew up in Germany learning about the crimes of European countries and how the Americans had to teach the Germans about the rule of law after World War II. I might expect something like Guantanamo to be developed by a poor, tyrannical, or ignorant country. I never could have imagined this place be created by the United States of America.

Since my release, I have spoken about my ordeal with many people in different countries: Germany, Belgium, France, U.K., Ireland, Sweden. My impression is that they all were deeply disappointed that this has been done by Americans and angry at America for not living up to its own standards. They all supported the U.S. after 9/11, but now they criticize the U.S. because of its hypocrisy and for ignoring the law.

I worry about some of those other detainees who are in their seventh year at Guantanamo. No human being can endure this treatment and isolation. I know that what was done to me cannot be undone. But I also know that there are steps that the U.S. should take to find a solution for those who are still in prison there. Thank you very much.

Mr. DELAHUNT. Thank you very much, Mr. Kurnaz.
[The prepared statement of Mr. Kurnaz follows:]

COMMITTEE ON FOREIGN AFFAIRS
Subcommittee on International Organizations, Human Rights, and Oversight
Testimony of Murat Kurnaz
Rayburn House Office Building, Room 2172
May 20, 2008

My name is Murat Kurnaz. I am a twenty-six year old Turkish citizen, who was born and raised in Bremen, Germany. I currently live here in Bremen with my mother, father and two younger brothers. I would like to thank you for inviting me to address this Committee and the American people about the injustices of the prison camp in Guantanamo Bay, Cuba.

Although I have committed no crime and have never harmed anyone or associated with terrorists, I spent five years of my life in American detention in Kandahar, Afghanistan and then Guantanamo under terrible conditions that no one should suffer.

I have much to say to the Committee about my experiences, but I will try to keep my comments short because of limited time. I understand that my American lawyer, Baher Azmy, has submitted documents to you demonstrating my innocence and the unfair legal process in Guantanamo, which I hope you will also read.

1. My Personal Background

My parents are work-immigrants from Turkey. They came to Germany over 30 years ago. They are Muslims, but like many Turkish people in Germany, they are not very religious. In 2000, when I was about eighteen years old, I became more and more interested in Islam but not in any political sense. In the summer of 2001, I married a woman who lived in Turkey. My family made arrangements for her to come to live with us in Germany in starting in December 2001. In the meantime, I wanted to prepare myself to live a correct life with her under Islam. I wanted to learn to read the Koran in Arabic and to pray, which are very important to faithful Muslims. I decided this period of time would be the last chance to travel and study Islam before living with my wife together in Bremen, Germany.

I made contact in Bremen with a Muslim missionary group called Jama'at al Tablighi. My impression was that this was a peaceful, and not political, group which spreads the message of Islam in a peaceful way. They do charity work, teach people important values about family and prayer, and completely reject terrorism. (My American lawyer has submitted materials to the Committee about this group, which demonstrates that it has nothing to do with terrorism.) They suggested that I go to Pakistan: it is cheap and they have many of their schools and teachers there. I decided to go with a friend from Bremen who also wanted to learn to read the Koran. His name is Selcuk Bilgin.

When the terrorists attacked New York City on 9/11, I was horrified by their actions. I believe those who helped commit those acts should all be punished harshly. I condemn all forms of terrorism and the Koran instructs me that it is never permissible to kill yourself, or to kill women and children. I believe strongly that Osama bin Laden is perverting Islam by killing people in the name of Islam. I blame Osama bin Laden for having lost five years of my life. I already made similar statements to my Combatant Status Review Tribunal (CSRT) in 2004; this CSRT still falsely labeled me an enemy combatant.

Despite the terrorist attack of 9/11, I was not worried about traveling to Pakistan in October 2001. Pakistan is not Afghanistan, the war had not yet started and I had no idea a possible war could spread over the border to Pakistan.

2. My Time in Pakistan

In Pakistan I travelled with some of the Tablighis and visited several cities as a religious tourist. I never went to Afghanistan and I never met with anyone from Al Qaeda or the Taliban. I also never came in touch with any weapons and I never committed any crime.

I had a return ticket to Germany – to rejoin my family and life there. On my way back to Germany, I was arrested by Pakistani police. I was traveling on a bus with many other civilian passengers. The police stopped the bus and removed me. They had no suspicion other than the fact that I was a foreigner with a Turkish passport and German residency.

After a few days I was handed over the border to U.S. forces. I was soon transferred to a U.S. military base in Kandahar, Afghanistan, and then later to Guantánamo.

I was later told by a U.S. interrogator that the U.S. paid \$3000 bounty for me.

3. My Treatment in Afghanistan and Guantánamo

In the American prison camp in Kandahar I was shocked by the awful treatment prisoners received. I had a very high impression of Americans all my life, so I couldn't believe Americans would do these kinds of things.

It was wintertime and freezing cold and I had just shorts and no blankets. I was beaten repeatedly. During interrogations, my head was dunked under water to simulate drowning and electroshocks were sent through my feet. At one point, I was chained and hung by hands for a long time. During the time I hung in the air, a doctor sometimes checked if I was okay; then I would be hung up again.

The guards accused me of being affiliated with Mohammed Atta. They thought that because we are both from Germany and Muslims, I must have worked with him. This was ridiculous, and without any basis in reality. But the hanging was punishment for not admitting this, and coercion to try to force me to admit it. The pain from this treatment was beyond belief. I know that others died from this kind of treatment.

From Kandahar, I was transferred to Guantánamo. In Guantánamo, the conditions and the treatment were barely fit for animals, and certainly not for human beings. I was deprived of sleep and food for long intervals. I was forced to be in solitary confinement for long periods of time for no reason and subjected to extreme cold and heat. I was subjected to religious and sexual humiliation. I was beaten multiple times. The guards forced me to accept medication that I did not want.

I was interrogated over and over again, but always with the same questions. I told my story over and over, my name over and over, and details about my family over and over. I quickly got

the impression that the interrogations were useless and pointless and not interested in the truth. Twice I was visited by German interrogators.

4. The Legal Process

The first time I saw my American lawyer was in October 2004. At first, I did not believe he was a lawyer -- there was no law in Guantanamo and interrogators always lied to us. But, he brought a hand-written note from my mother, and so I came to trust him. He told me there was a legal case that my family brought to get me released. I had no idea about this. From 2002 until my lawyer visit in 2004, in Guantanamo, I had no idea anyone even knew Guantanamo existed or that I was alive.

In September 2004, I had a CSRT proceeding. I did not have a lawyer in this proceeding. At the CSRT, they said I was an enemy combatant because my friend Selcuk Bilgin had committed a suicide bombing. I couldn't believe this -- I did not think Selcuk was crazy. Though we all now know the charge was false, I couldn't prove this to the CSRT -- I was all alone in Guantanamo and without access to any information about the outside world.

There was no legal process at Guantanamo that would allow me really challenge my detention. Going through the CSRT, I know that they were just trying to say that it was okay to detain me; they were not looking for the truth.

5. My Prolonged Imprisonment

I also now know that both the U.S. government and the German government knew I was innocent as early as 2002. My American lawyer has submitted these documents proving this to the committee and I urge you to review them. Even though I was innocent, and even though both governments knew I was innocent, I spent almost five years in American prison camps.

As my story demonstrates, it is not the existence of a security threat that keeps someone in Guantanamo. Because there was no law in Guantanamo, in order to be released, I needed to have a country that would fight for my release. For too long, there was no country that would do that: the German government for years refused to claim me because they considered me a Turkish citizen. The German government even tried to revoke my German residency while I was in Guantanamo. Also, I did not have a strong connection to the Turkish government, since I lived my whole life in Germany. I was not a refugee and could have returned to either of these countries. Instead, I was left behind waiting for politicians to do the right thing for me.

I think that I was eventually released because of the work of my lawyers in the U.S. and in Germany, to prove to the German public that I was innocent and to pressure the new German government to negotiate for my release. If there had been any law in Guantanamo, I would obviously have been released much earlier.

I believe my story, with some variations, is true for many in Guantánamo today. Often, people were released because their countries demanded it. Others remain because their countries do not demand their return, or because they are afraid of being returned.

Conclusion

My imprisonment in Kandahar and Guantanamo was a nightmare. I did nothing wrong and was treated like a monster. There was no law in place or judge to consider my story. How could this happen in the 21st century?

I grew up in Germany learning about the crimes of European countries and how the Americans helped to teach the Germans about the rule of law after World War II. I might expect a something like Guantanamo to be developed by a poor, tyrannical or ignorant country. I never could have imagined this place would be created by the United States of America.

Since my release, I have spoken about my ordeal with many people in different countries – Germany, Belgium, France, UK, Ireland, Sweden. My impression is that they all were deeply disappointed that this is being done by Americans and angry at America for not living up to its own standards. They all supported the US after 9/11, but now they criticize the U.S. for its hypocrisy and for ignoring the law.

I worry about some of the other detainees who are in their seventh year at Guantanamo. No human being can endure this treatment and isolation. I know that what was done to me cannot be undone. But I also know that there are steps that the U.S. should take to and find a solution for those who are still in prison there.

Thank you very much.

Mr. DELAHUNT. We are going to, the members of the committee, and I should note that we are now joined by a member of the committee, Congresswoman Sheila Jackson Lee of Texas, and my friend and colleague, Congressman Jerry Nadler who chairs the Constitutional Law Subcommittee of the Judiciary Committee and another friend from Arizona, the gentleman to my left, Mr. Jeff Flake.

I am going to go first to Mr. Moran for questions that he might have for Mr. Kurnaz. I am going to ask our other three witnesses to forbear, have more patience, and also, if Mr. Azmy could change seats with Mr. Sulmasy in the event that he wishes to assist in responding to questions concerning the legalities of what occurred in the case of Mr. Kurnaz. Mr. Moran.

Mr. MORAN. Thank you very much, Mr. Chairman. I find it very difficult to understand why the U.S. Government would lie, apparently, with regard to the fact that Mr. Kurnaz's friend was blown up in a suicide bombing, that apparently this was not true. But what I find more difficult to comprehend, is that the United States Government apparently knew as early as September 2002, in documents that were recently declassified, that you were innocent, Mr. Kurnaz, of any connections with terrorism, and that the German Government told the United States that. And in fact, there is a September 2002 memorandum from a military official that states that there is no definite link or evidence of the detainee having an association with al-Qaeda or making any specific threat against the U.S.

It also states the Germans confirmed that this detainee has no connection to an al-Qaeda cell in Germany and then there is a subsequent memorandum the next year from General Mallow to the general counsel of the Department of Defense reporting that the Pentagon is not aware of evidence that Kurnaz is or was a member of al-Qaeda. And again, it was corroborated by the German Intelligence Office and the German Chancellor's Office saying that the U.S.A. considers Kurnaz's innocence to be proven.

In light of these conclusions about your innocence, do you have any idea, Mr. Kurnaz, why the Combatant Status Review Tribunal still found you to be an enemy combatant? Can you shed any light on why they would have considered you to be an enemy combatant when they were told definitely and found out themselves that you were, in fact, an innocent detainee?

Can you shed any light on that?

Do you have any speculation? And if you had had any kind of a trial, what would you have told them, Mr. Kurnaz, if there was any semblance of a legitimate judicial hearing in Guantanamo?

Mr. KURNAZ. I can't say why they said I am a enemy combatant after I got cleared that I am innocent. But maybe they said because they don't want me to challenge it in court in U.S.A.

Mr. MORAN. I didn't fully understand it. Did you understand, Mr. Chairman, what was said?

Mr. DELAHUNT. No. Could you repeat that again, Mr. Kurnaz.

Mr. KURNAZ. I have really no idea why they said that I am an enemy combatant after I got cleared that I am innocent.

Mr. MORAN. Could you describe how you were treated by the United States Military when you were in Kandahar? Just very briefly.

Mr. KURNAZ. They forced me, because they didn't have anything against me, no evidence against me, they forced me to sign papers what will make me guilty.

Those papers used to say I never will fight again with al-Qaeda and because I never did, I refused to sign those papers.

Mr. MORAN. Were you asked to sign papers claiming that you were—that there was some justification for holding you at Guantanamo? When you were released, did the U.S. military try to get you to sign papers that said something that was not true?

Mr. KURNAZ. Yes, it wasn't true what was written in those papers. And because I didn't sign, they always try to make me sign by hanging on chains or by electric shocks or they told me if I will not sign, I will never leave Guantanamo and I will spend all my life, of the rest of my life in Guantanamo.

Mr. MORAN. So you had to assert that you were guilty to justify their actions in order to be released and you were tortured for not signing papers that were untrue. Thank you very much, Mr. Chairman.

Mr. DELAHUNT. Thank you, Mr. Moran. And now, go to ranking member, Mr. Rohrabacher.

Mr. ROHRABACHER. Thank you very much, Mr. Chairman. Mr. Kurnaz, in your testimony you suggest that you were waterboarded in your captivity. Is that correct?

Mr. KURNAZ. No, it is not waterboarding. It is called water treatments. There was a bucket of water.

Mr. ROHRABACHER. Was a cloth put over your face and you were put on a board. What type of—

Mr. KURNAZ. It was a bucket of water. And they stick my head into that water and at the same time they punch me into my stomach.

Mr. ROHRABACHER. We are trying to get to the bottom of that because the CIA is claiming that only three people have been waterboarded, and this may be a loophole, they are suggesting that that is not waterboarding. I just wanted to make sure you were not suggesting it was waterboarding that was your treatment. And that treatment took place in Guantanamo or Kandahar?

Mr. KURNAZ. It was in Kandahar.

Mr. ROHRABACHER. In Guantanamo, they stuck your head in the water?

Mr. KURNAZ. It was not in Guantanamo. It was in Kandahar.

Mr. ROHRABACHER. How long were you in Kandahar?

Mr. KURNAZ. Like 3 months.

Mr. ROHRABACHER. 3 months, all right. Let us note for the record, Mr. Chairman, that indeed there was an al-Qaeda group operating out of Germany at this time. And that indeed 9/11 was partially planned, if not substantially planned, and executed by that particular al-Qaeda team in Germany, and it could well be that after 9/11, after we saw these buildings go down and 3,000 of our citizens were slaughtered, that people in our Government moved forward so quickly that there could have been mistakes made and clearly there were mistakes made, there is no doubt about that.

And if this gentleman appears to be one of those, we need to determine that, and he needs to be compensated for it, if indeed that is the case, which the documents that seem to be presented seems to indicate that. Let me ask you, Mr. Kurnaz, are you a German citizen or are you a Turkish citizen?

Mr. KURNAZ. I am a Turkish citizen born and raised in Germany.

Mr. ROHRABACHER. Were you traveling on a Turkish or German passport when you went to Pakistan?

Mr. KURNAZ. A Turkish passport.

Mr. ROHRABACHER. A Turkish passport, all right. I would suggest one thing that this testimony does bring out to me is that along with the suggestions about the Uighurs is that we have received a great deal of criticism from Germany as well as our other European allies about Guantanamo, and it is beyond me, Mr. Chairman, that if they are willing to criticize the United States, why aren't they willing to take these people into their country if they have no question about it to the point that the United States has made a mistake; they should be acting in the moral way and step forward and say we are going to end this injustice right now by bringing these people into our country.

It really undercuts their argument that in some way, the United States is doing something that is evil by not taking them in or not permitting them to go free and then come to our country.

Mr. DELAHUNT. If the gentleman would yield for just a moment, I would note for the record, however, that our witness is testifying from Bremen, which is in Germany, and at the same time, I acknowledge that there is culpability to be shared, and if you remember the hearing that we had with members of the European Parliament, they issued a report that I would suggest was very critical of many of the governments in Europe regarding the rendition issue that hearing was the focus of.

And I want you to know that recently I had an opportunity to discuss these issues with particularity in terms of the Uighurs, about our European allies and friends to participate, in a very robust way, in resolving the predicament and the quandary that the Uighurs are now experiencing in Guantanamo, because it is absolutely unconscionable that these individuals, who have been cleared for release, are being kept in isolation in an American prison, wherever it may be. And I know that you and I together can work on that particular issue and hopefully working together with our allies resolve this issue as expeditiously as possible.

I thank the gentleman for yielding.

Mr. ROHRABACHER. Reclaiming my time, I would suggest that any of our allies who are willing to criticize the United States but are unwilling to take people in themselves, it is beyond hypocrisy.

Now let me just note, one explanation of what may have happened here could well be that after 9/11, in the just—rush forward to try to do something that would get some control over this situation of a terrorist network that was capable of conducting such a horrendous attack on us as we saw in 9/11, that we did make bad decisions and there are people in the United States Government, both in the intelligence and otherwise that have overstepped their bounds and many of the people, some, if not many, of the people who were taken into custody were innocent.

This man could well have been innocent, and one explanation of why our Government hasn't acted to correct the situation and let him free would be, again, perhaps an effort to cover up, on the part of our Government, misconduct of a prisoner, of a prisoner who is in custody, thus letting that prisoner go would at least, according to officials of our Government, may undermine our position.

It is my position that people should always admit their mistakes. And if we have made a mistake and if prisoners actually were mistreated, especially innocent prisoners, that it should be acknowledged. I will note that, now, let me ask Mr. Kurnaz, did you see any American elected officials while you were in Guantanamo? Did any come through that actually you saw?

Mr. KURNAZ. I don't know who was politician or not, but there was many people with civilian clothes and not from the army. But I don't, I can't really say if they were politicians or not.

Mr. ROHRABACHER. Let us note again for the record, there were about 107 U.S. Members of Congress, many of whom were Democrats, some of whom were liberal Democrats, have visited Guantanamo over these years and have not reconfirmed that it has been our policy to mistreat these people such as we have heard in the testimony here today. And I would hope that what was done, if Mr. Kurnaz is being totally frank with us, that was, that was, an aberration that happened shortly—

Mr. NADLER. Would the gentleman yield for 1 minute?

Mr. ROHRABACHER. Actually, I am just about done I will yield, certainly.

Mr. NADLER. I wanted to observe that I was one of the Members who went to Guantanamo. We spent some time there. But there is no way, there was no way in which we could know whether people were being mistreated or not. We were shown facilities. We were shown brief videotapes of the detainees being interrogated. We were shown people in their cells and so forth. But all we could do is take what we were told as face value, there is no way we would know anything about what was going on.

Mr. ROHRABACHER. You were not permitted to question any of the prisoners.

Mr. NADLER. No, we were not permitted to talk to any of the inmates.

Mr. ROHRABACHER. I think that is significant. I think obviously a policy that doesn't permit elected Members of Congress to question people who are being held in prison or kept in captivity by the United States is a bad policy. So anyway, I would like to thank the chairman again for this hearing.

Again, let us just note that it is, we are, I do believe we are at war with radical Islam. And I am sorry their declaration of war against us, is very clear, it only took turning on the television on 9/11 to see that; that was a legitimate declaration of war. And during wartime situations, mistakes are made and bad policies are followed. During the Second World War, we bombarded France right before D-Day killing thousands of French people. In Guam, we destroyed, killed many people and destroyed much property. It is up to us to admit it when mistakes are made and to compensate people. But to recognize the underlying cause of the conflict, is not some expansionist or imperialistic attitude by the United States,

but instead, these type of bad things that happen, in pursuing a noble goal, which is to prevent radical Islam from dominating huge chunks of this planet.

Mr. DELAHUNT. I thank the gentleman for yielding, and I look forward to traveling with him, and hopefully with Mr. Nadler, and hopefully with Congresswoman Sheila Jackson Lee, to the facility at Guantanamo. And I would hope that the lawyers who represent detainees down there will secure permission, consent, agreements, waivers, from their clients that would allow us to have one-on-one conversations with your clients. And I am sure that I often disagree with Mr. Rohrabacher. But I can assure you that he is an individual that is interested in seeking the truth. And that is what we are about.

With that let me yield to the gentlelady from Texas, Congressman Sheila Jackson Lee.

Ms. JACKSON LEE. Chairman Delahunt, I might offer to say that this is competing to be one of the most significant and important hearings on the Hill today. I only say that in the backdrop of an apology. I am between hearings in this room with hearings with soldiers in another room speaking to the question of being a United States soldier and being deported and being in deportation because of the broken immigration laws.

So let me thank you for this very significant hearing and apologize for having to go. But let me also say about the ranking member as well, we appreciate his interest and collaboration on this issue.

Let me make it clear that our chairman is a former prosecutor. This is no soft touch individual that would be willing to allow a wrong to not be vindicated or to be weak on what should be strong.

But I am outraged and appalled, and I believe our witness is still here. Mr. Kurnaz, are you still signaled in? Or have we lost the signal to Mr. Kurnaz? There he is. Mr. Kurnaz, thank you. Let me indicate that I am appalled. I am outraged. I think my colleague, Mr. Moran, laid out the groundwork. Let me try to be pointed in my questions.

First of all, I have been to Guantanamo Bay on several occasions and tried to pierce the veil. Mr. Nadler is absolutely right. I wish we could have found you. You were there for 5 years, which enhances my outrage, because I believe that it was clear in 2002 that you were innocent of any connections with terrorism, and the German Government told the United States that. So as we went, we were able to be briefed by lawyers dealing with the various tribunals. We walked through the facilities. In fact, I was there when there was nothing but tent facilities and it was our delegation that came back and indicated that at least air conditioned structures and other elements should be present.

Let me also lay on the record before I pose a question, that it seems as if we had a new definition, Mr. Chairman, and I hope now that we can craft legislation so that we are not, if you will, wedded to the language waterboarding. Now we have new language called "water treatment," which may bear on being torture as well. And so I understand now that, rather than get labeled by saying we are doing waterboarding and we can say, meaning those in Guantanamo Bay can say, We are not doing waterboarding. But

this gentleman just told us about water treatment. Mr. Kurnaz, can you tell us about the water treatment again, please, so I can understand that?

Mr. KURNAZ. It was happening in Kandahar. And there was a bucket of water. And they stick my head into the water and in the same time they punched me into my stomach so I had inhaled all this water.

Ms. JACKSON LEE. You had what, sir?

Mr. KURNAZ. I had to inhale the water.

Ms. JACKSON LEE. And I assume this was a serious punch, you felt this punch and you were, in essence, incapacitated?

Mr. KURNAZ. It was a strong punch, of course.

Ms. JACKSON LEE. How many times did they subject you to that treatment, sir?

Mr. KURNAZ. Well, with the water treatment, it was just once.

Ms. JACKSON LEE. Did you see or hear of other of those dealing, having the same kind of water treatment?

Mr. KURNAZ. I didn't see, but there were prisoners, they told me, that the same thing happened with them.

Ms. JACKSON LEE. Other prisoners said it was happening to them?

Mr. KURNAZ. Yes.

Ms. JACKSON LEE. Now, we know that you were found innocent, or at least it was acknowledged by the German Government as early as 2002. Were you aware, or was your lawyer letting you, making you aware, that you had been found innocent in 2002?

Did you know that someone had given the word to the U.S. that you were not a terrorist.

Mr. KURNAZ. No, in 2002, I didn't know about it.

Ms. JACKSON LEE. No one got word to you?

Mr. KURNAZ. No. No one told me that.

Ms. JACKSON LEE. Were you continually asking to have a lawyer, or to be heard, or to be in front of a tribunal to express your innocence?

Mr. KURNAZ. I even didn't know I had lawyers in the outside until I saw them for the first time, lawyer, in Guantanamo.

Ms. JACKSON LEE. So you were completely isolated, and therefore, no information was coming to you?

Mr. KURNAZ. Yes, I had no information about the outside world.

Ms. JACKSON LEE. Besides the water treatment, can you share any other treatment that you received, either in Kandahar or Guantanamo Bay by U.S. Military Forces?

Mr. KURNAZ. They hang me on ceiling. They pull me up on the ceiling even so my feet, my feet was in the air, and at the same time every day, the interrogator came and asked me if I am going to sign those papers or not.

Ms. JACKSON LEE. They held you upside down? What did they do to you?

Mr. KURNAZ. They hang me on ceiling, pulled me up on the ceiling.

It was on my hands. It was on my hands. It wasn't upside down. But even until my feet was in the air.

Ms. JACKSON LEE. Hands like over your head like this?

Mr. KURNAZ. Yes. Yes.

Ms. JACKSON LEE. And feet off the ground and they were trying to get you to sign this document?

Mr. KURNAZ. And when the interrogator came they put me back down and asked me if I am going to sign or not. If I refused, they just did continue.

Ms. JACKSON LEE. Let me conclude just by making a point that you did know Selcuk, and was that a friend of yours, Selcuk Bilgin?

Mr. KURNAZ. Selcuk Bilgin?

Ms. JACKSON LEE. Yes, Selcuk Bilgin. Yes. Was that your friend?

Mr. KURNAZ. Yes, he was my friend.

Ms. JACKSON LEE. And did he commit suicide?

Mr. KURNAZ. No, he didn't.

Ms. JACKSON LEE. What happened to him?

Mr. KURNAZ. He is in Germany and he never did something like that.

Ms. JACKSON LEE. Was there someone who blew themselves up in a suicide bombing?

Was there someone—was this incorrect? Was he accused of blowing himself up in a suicide bombing?

Mr. KURNAZ. It was just a lie. It wasn't true.

Ms. JACKSON LEE. And is the person still alive?

Mr. KURNAZ. Yes. He is alive and he is still living in Germany.

Mr. DOCKE. Let me add, he was never charged of committing any crime in Germany.

He never knew about that allegation.

Ms. JACKSON LEE. In the United States, we finger people, they call that, "you finger someone." Did his friend say that Mr. Kurnaz was a terrorist? Did his friend say that Mr. Kurnaz was a terrorist?

Mr. KURNAZ. No. Never.

Ms. JACKSON LEE. Let me just conclude, thank you, Mr. Kurnaz for answering the questions. Mr. Chairman, I just want to conclude.

Mr. DELAHUNT. If the gentlelady would yield for a moment. It is my understanding and either Mr. Kurnaz or Mr. Azmy can respond, if I am representing accurately the role that your friend played, one of the reasons that was given by the, at the CSRT for you being designated an enemy combatant, was that you were involved with Mr. Bilgin, your friend, in a suicide bombing that occurred in November 2003.

Clearly, you were incarcerated in Guantanamo, several years before November 2003. And Mr. Bilgin, as you indicated, is alive and never obviously committed an act of terrorism against anyone by blowing himself up. Is that a fair and accurate statement, Mr. Azmy?

Mr. AZMY. Yes Mr. Chairman that is an accurate statement. The allegation is that Murat simply has an association with someone—

Mr. DELAHUNT. A suicide bomber.

Mr. AZMY. Who might have later blown himself up. It was a friendship.

Mr. DELAHUNT. Who was never a suicide bomber?

Mr. AZMY. That is right.

It was factually preposterous as, any 5-minute call to any German official would have revealed, because he was alive and well at the time and under no such suspicion of no such terrorist attack.

Mr. DELAHUNT. So this is the basis for defining a, or labeling Mr. Kurnaz as an enemy combatant. This was, and I am going to let Mr. Nadler explore the second basis, but that is, I think, reflective of the process that was put in place by this administration when these individuals who are detained at Guantanamo were brought to that facility and held. And I would suggest that that particular episode reflects a total lack of due process, a process that is dignified by calling it a process. It just simply didn't exist. And we wonder why we are criticized internationally and by many in this country.

With that, let me yield.

Ms. JACKSON LEE. And I am going to conclude. Mr. Chairman, thank you very much for that very articulate, but really framing the conclusions of which I want to just adhere to.

Let me just, in conclusion, put on the record that this is a great country. Why? Because there are written constitutional provisions that acknowledge, in spite of the treatment of women and those of us who are African American, in the early stages of the Constitution, the writing of the Constitution, there certainly was a framework of due process and a framework of a trial by one's peers. I think what we have here is a skewed system, where this administration knew what they were doing when they labeled individuals enemy combatants, and therefore extinguished basic rights.

Mr. Chairman, I think you have uncovered, as we have done over the years, and I look forward to working with my friend and colleague from Judiciary, a fractured system that we now need to turn right side up, and to again, to address the question of enemy combatant and all of its failures.

I think the interesting point is, Mr. Kurnaz is in Germany and he was able to return home. And I think the Germans are not interested in having terrorists come back home or allow them to run freely. And that is what Mr. Kurnaz is, because they understand his innocence.

Mr. Chairman, I would hope that we can collectively and collaboratively, and you are on the Judiciary Committee, assess, and through this committee, a new structure for this situation at Guantanamo Bay, which many of us have already called for its closing, but to prepare for the future to reorder and possibly to eliminate, to eliminate by legislation the term "enemy combatant" and what it means if it does not allow a due process that would have allowed Mr. Kurnaz in 2002 or 3 to have been able to be heard. And we would have been able to remedy his situation if he was heard.

With that, Mr. Chairman, this is an appalling case that calls for our remedy, and I thank you for it.

Mr. DELAHUNT. I thank the gentlelady, and I now call on the chair of the Constitutional Subcommittee of the Judiciary Committee, Mr. Nadler, for questions that he might have.

Mr. NADLER. I thank the chairman, and I thank the chairman for holding this very important hearing. And I thank the witness, Mr. Kurnaz, for being willing to testify to us after he has ample reason, unfortunately, to refuse indignantly to have anything to do with

the United States, since the United States has treated him abominably, and I would think, totally against our own laws. And I hope that people in the administration will eventually be held accountable at law for what has been done here.

Let me summarize, if I can. I hope we are still in communication with Mr. —

Mr. DELAHUNT. We are.

Mr. NADLER. Let me summarize, if I can. The CSRT announced two reasons for his enemy combatant designation. First, that his friend, Mr. Bilgin, was committing a suicide bombing 2 years after Mr. Kurnaz was in incarceration, even though Mr. Bilgin obviously didn't commit a suicide bombing since he is alive and well today, and secondly that Mr. Kurnaz had enrolled to take some lessons from a Muslim missionary group called the Jama'at al Tablighi, if I am pronouncing it correctly, which allegedly has had several members who have, at some time, engaged in hostility to the United States.

Are those the two reasons why the CSRT said that Mr. Kurnaz was an enemy combatant?

Mr. AZMY. Those are the two reasons. Just to refine the second one, it was merely that he associated with this group, and specifically "received food and lodging from this group," which as you point out —

Mr. NADLER. Does Mr. Kurnaz or Mr. Azmy, do you know how many members the organization has?

Mr. AZMY. Many million members.

Mr. NADLER. It is about 40 million, right?

Mr. AZMY. That is right.

Mr. NADLER. So in other words, by the standards of the CSRT — and of the 40 million, how many have been convicted of any crimes of terrorism?

Mr. AZMY. I am not aware of any particular number, but the United States has placed them on some list because out of those 40 million you could find — you could trace a handful who have — they may have individually made connections.

Mr. NADLER. So a handful of people who are associated with essentially a religious group, missionary group, a group that characterizes itself as peaceful, and has 40 million people in it, and a handful who may not have been so peaceful, therefore anybody associated with that group in any way, this is evidence that they are terrorists?

Mr. AZMY. That is right, Mr. Nadler. And that is consistent with the administration's view? A mere association.

Mr. NADLER. A mere association not with a terrorist group, but with a huge group that may have a couple of people associated with it that are terrorists shows that you are a terrorist?

Mr. AZMY. That is right.

Mr. NADLER. Now, in no American court would this be held as evidence.

Mr. AZMY. No, it wouldn't. And in fact, in an American court, in her decision in January 2005 Judge Green, before her decision was indefinitely stayed, noticed the attenuated nature of these charges and said in an American court this would not satisfy due process for unlawful detention, but that never got to proceed, that decision.

Mr. NADLER. Why was it indefinitely stayed?

Mr. AZMY. The government appealed the decision. So it has been stayed. And the Congress passed first, the Detainee Treatment Act, and then, the Military Commissions Act. And it is this decision, under a different name, that is on appeal in the Supreme Court.

Mr. NADLER. That is the *Boumediene* case.

Mr. AZMY. *Boumediene* case, that is right.

Mr. NADLER. Now, we have evidence—we are told here that the United States Government knew definitively that Mr. Kurnaz was innocent. A September 30th memorandum from a military official states his innocence. A May 23rd memorandum from General Malloy to the General Counsel for the Department of Defense reports that CITF is not aware of evidence that Kurnaz is a terrorist. And a September 2002 declassified memo from a German intelligence officer to the Chancellor's Office states USA considers Kurnaz's innocence—innocence to be proven. So his CSRT hearing occurs in 2004. The only evidence that he is a terrorist is nonsense, that he is associated with someone who committed a suicide bombing who is alive and well.

Mr. Kurnaz or Mr. Azmy, do you know if the CSRT was made aware of this evidence, of this exculpatory evidence?

Mr. AZMY. I am not certain, Your Honor. If they were made aware of it, they did not make any effort to consider it in any way. It was simply ignored on the record as we know it.

Mr. NADLER. Did you know that evidence at—were you representing him?

Mr. AZMY. I was his lawyer, but I was not allowed to participate in the CSRT.

Mr. NADLER. A lawyer is not allowed to participate in the CSRT?

Mr. AZMY. That is right.

Mr. NADLER. Was Mr. Kurnaz aware of this evidence?

Mr. AZMY. No, he was not made aware of this evidence. He was not allowed to see it.

Mr. NADLER. He was not aware of it, so he could not bring it to the attention of the CSRT.

Mr. AZMY. That is exactly right.

Mr. NADLER. And you don't know whether they were aware of it.

Mr. AZMY. No, I don't.

Mr. NADLER. Now, under the law, was it anybody's duty in the United States Government to bring this evidence, this evidence that said the United States had concluded he was totally innocent, to the attention of the CSRT?

Mr. AZMY. Under a properly constructed version of the law.

Mr. NADLER. No, I didn't ask that. Under the law they were operating under. Obviously, under any properly civilized law this would have to be brought to the attention of a court, but I won't dignify the CSRT with the term of "court." But my question is, under the law as it was operating, was it anybody's duty to bring to the attention of this so-called court the definitive evidence that he was in fact innocent?

Mr. AZMY. There was no absolute duty, no.

Mr. NADLER. There was no duty. And we don't know whether the CSRT knew about this at the time?

Mr. AZMY. I have no information one way or the other if they were aware of it. We know they didn't consider it.

Mr. NADLER. Mr. Chairman, I would hope that we will subpoena the members of the CSRT at that time, and all people—and people who knew about this, certainly General Mallow and whoever else knew about this, and ask if they bothered, and if not, why not, to make available what they knew as definitive evidence of this person's innocence to the so-called court that was trying him. And I would ask the members of the CSRT whether they knew about it and if they made any attempt to find out about it. So I would hope we would subpoena these people.

I want to say—let me just ask one other thing. Now Judge Green pointed out in 2005, I think it was, that in no properly organized court would this have been—would he not have been found innocent because there was no real evidence of guilt whatsoever. The two pieces of evidence were nonsense. And we had the exculpatory information that proved his innocence which wasn't there. But he spent 5 years in Guantanamo despite having committed no wrong.

Mr. Kurnaz, has anybody from the United States Government apologized to you?

Mr. KURNAZ. No, nobody apologized for anything.

Mr. NADLER. Has anyone expressed that—when you were released, they asked you to sign documents admitting guilt?

Mr. KURNAZ. Yes. Shortly before they brought me to the plane, they brought me in a room and brought me those same papers and told me if I am going to sign I will leave that place, and if not I will stay for the rest of my life over there.

Mr. NADLER. Okay. Do you know who made that threat to you?

Mr. KURNAZ. It was officers. High rank. I don't know them real well. But they came with cameras for making films during this.

Mr. NADLER. Because I will certainly tell you that someone who tells a prisoner that if you sign the document you will be released and if you don't you will be held in jail for life is committing, I believe, a crime. They are certainly committing a crime under our law. And certainly the people who tortured you, as you described it, by hanging you from the ceiling, by putting your head in the water, and punching you while your head was being held, they were committing crimes under American law. And they ought to be held accountable. And the people who authorized that conduct ought to be held accountable. And I certainly hope that in the next few years we will hold these people criminally accountable.

There is not much else to say. Let me on behalf of the United States, express to you, sir, my regret and apologies. The United States should never engage in conduct like this. And let me say also in comment with what Mr. Rohrabacher said before, the United States was viciously and savagely attacked. The attack occurred in my district. I knew people who were killed then. That is not an excuse for behavior that was not simply mistakes. Some of the behavior that is described here was savage, highly illegal, wrong, and not simply mistakes. Mistakes happen. Nobody is perfect. But unlawful conduct, savage treatment, holding people in jail knowing they are innocent, not allowing the so-called court to see the evidence of their innocence, these aren't mistakes, these are

acts unworthy of a nation of laws. And they should not have happened and they must not be permitted to happen.

I would say one other thing. Some of us—I have introduced legislation, Mr. Delahunt I believe is a co-sponsor, some others are, we call it the Restore the Constitution Act. Among other things, it restores habeas corpus. Among other things—which would mean that you have to justify to a real court, not a kangaroo court like the CSRT, why someone is being deprived of liberty. It would specifically repeal some of the provisions of the Military Commissions Act and the Detainee Treatment Act that seek to make legal these obviously illegal and uncivilized acts. And I hope that there will arrive a day in the not too distant future when this Congress will pass this kind of legislation, and when officials of the current—and when officials who did these things will be held to account in a proper American court.

Mr. DELAHUNT. I thank the gentleman, and I am going to yield to my colleague, our colleague from Arizona, Mr. Flake.

Mr. FLAKE. I thank the chairman for yielding, and thank him for holding this hearing. This, in combination with the hearing that was held on rendition, has brought to light some very troubling things.

I would add to what the gentleman from New York said about this being savage. It also seems to be systematic. This is not a one-time occurrence that could be written off as a mistake. And so I find it very troubling, and want to join my colleagues here in offering an apology as well.

Let me ask, Mr. Kurnaz, when the—you said that you had no idea that the German Government had been working for your release. How long do you know now that the German Government was working with our Government to secure your release?

Mr. DOCKE. Excuse me, my client didn't really understand the question. Was the question how long did negotiations between Germany and the United States take place for the release?

Mr. FLAKE. Yes. Was that a period of months? Was that over a couple of years? How long did that take?

Mr. DOCKE. It started in January 2006 with a visit of Chancellor Merkel at President Bush in Washington, and it ended August 24 in 2006.

Mr. FLAKE. Those are obviously high level negotiations. Were lower level negotiations going on for a period before that?

Mr. DOCKE. After the top level in January, the negotiations took place on all different levels up to August 2006.

Mr. FLAKE. Okay. Thank you. I just thought it was important what the gentleman from New York, the line of questioning with regard to—just prior to your release that there was an attempt made again to exact some kind of confession. Had this happened on a number of occasions? Was this typical of the interrogation, where they would try at the end to get you to confess? How many times would you say that this occurred similar to the last time?

Mr. KURNAZ. I don't know how many times this happened, but it was very often. And I don't know, I really don't know how many times, but it was very often during those 5 years. It started in Kandahar, and even from my release they just tried it every time again.

Mr. FLAKE. You mentioned the bucket of water that your head was submerged in. Was that a one-time occurrence or a number of times?

Mr. KURNAZ. With the water treatment was happened just once.

Mr. FLAKE. And you mentioned being suspended upside down—or I am sorry, by your arms, I guess. Was that a one-time occurrence or many times?

Mr. KURNAZ. It was once for 5 days.

Mr. FLAKE. Over a period of time for 5 days you were—your arms were shackled.

Mr. KURNAZ. Yes. I did hang on chains for 5 days. Just when the doctor came to check if I am still okay or if I can survive or not, and then they put me back down. And if they said okay, they put me back up.

Mr. FLAKE. All right. I thank the chairman.

Mr. DELAHUNT. I am just going to ask a few questions of Mr. Azmy. And it is my understanding that the Detainee Treatment Act process requires the court hearing a detainee's position to accept all of the factual findings of the CSRT panel. Is that correct?

Mr. AZMY. That is right. You must assume—you assume that the factual findings of the CSRT are correct. And under the procedure created by the MCA and the DTA, you are only really permitted to see if the CSRT followed its own procedures.

Mr. DELAHUNT. So there is no way to challenge the facts as reported by the Combatant Status Review Panel?

Mr. AZMY. That is exactly right. So counsel in a DTA proceeding cannot present new evidence. You presume the evidence by the CSRT is correct. So in this case—

Mr. DELAHUNT. And that is as if it was an irrebuttable presumption?

Mr. AZMY. Yes, it is fixed in fact and cannot be contradicted by any objective facts to the contrary. So in this case—

Mr. DELAHUNT. Let me take advantage of the fact that there are five attorneys before me. Do any of you consider that to even, in any way, reflect due process?

Mr. DENBEAUX. No.

Mr. STAFFORD SMITH. No.

Mr. DELAHUNT. Colonel Abraham?

Colonel ABRAHAM. Sir, if I may, as a member of a CSRT panel, Panel 23—I am sorry, as a member of Tribunal Panel 23 that found the detainee that was subject to that tribunal not to be an enemy combatant, a panel that was overturned a few months later, not only do I as a lawyer not find that to comport with due process, but at the time of our hearing we did not accept those presumptions as irrebuttable, a position that was not shared in the vast majority, if not all but a few of the CSRTs.

Mr. DELAHUNT. Colonel Abraham, I am going to ask you to exercise some restraint. I really want to get to you, because you have, as the saying goes, the inside view of this process. That does not necessarily exclude consideration of a hybrid court, if you will. I see Professor Sulmasy—

Mr. SULMASY. Mr. Chairman.

Mr. DELAHUNT. Please proceed.

Mr. SULMASY. I just think this begs that answer because of what we are talking about in terms of the CSRT, you have to look at it from a law enforcement perspective, which we would look, and you, as a former Federal prosecutor and the other lawyers on the panel, or from a law of war perspective, which would be presumptively the Article 5 tribunals, which still are embodied in the Geneva Conventions, which are similar—and there is no appellate right from an Article 5 procedure for presumption of prisoner of war in combat. So I think you have this distinction. Again, this begs the need for something, because this is a unique entity and a unique conflict.

Mr. DELAHUNT. I take it, Professor, you are not an advocate necessarily for CSRT processes.

Mr. SULMASY. Correct. I think that—but the confusion with the CSRT—

Mr. DELAHUNT. But we now have 275 detainees—

Mr. SULMASY. Yes, sir.

Mr. DELAHUNT [continuing]. That are in limbo. I just want to go back to the issue of association. And if we could swap, once more, Mr. Azmy, with Mr. Sulmasy, I want to be clear if the standard is support individuals and organizations hostile to the U.S., does this incorporate the necessity to find an awareness on the part of the individual?

Mr. AZMY. No. Under the enemy combatant definition used as part of the CSRT, mere support is enough. There need not be knowledge, there need not be materiality, and there need not be intent. And you don't have to believe me, the government conceded as much in part of this litigation when they conceded that hypothetical example involving a little old lady from Switzerland.

Mr. DELAHUNT. The little old lady from Switzerland. Tell us, please, about the little old lady from Switzerland.

Mr. AZMY. Suppose she writes a check to what she believes is an Afghan charity that turns out to be a front for the Taliban or al-Qaeda. Could this person be an enemy combatant under the definition used in the CSRT? The government has said yes. Because there is no intent or knowledge requirement. Could this woman be taken to Guantanamo, Judge Green asks? The government says yes.

Mr. DELAHUNT. So it is the government that is saying yes in this case?

Mr. AZMY. Absolutely. And the answer to that question had to be yes. At the time that this hearing took place in December 2005, the United States had rounded up hundreds of people who were legally, if not physically, little old ladies from Switzerland. So necessarily—and they had justified their detention. So necessarily the answer to that question would be yes in the bizarre CSRT legal regime.

Mr. DELAHUNT. Well, I want to thank you, Mr. Azmy. I certainly want to thank Mr. Kurnaz. Let me echo the statements of all who have spoken relative to your particular situation. And I wish to convey to you, sir, that while recognizing what you have been through and the experience that you have had, please know that the American people are a good people, a moral people, and take pride in what we stand for. Sometimes there are occasions when

our rhetoric does not match our deeds. But here in our Government, under our system, we work diligently to redress the wrongs that we perpetrate. And we are not embarrassed to say that we made mistakes. That is what being an American is all about. That is what being a true patriot, an American patriot, is about. Yes, we are human. We do err. But we will do all that we can to rectify the mistakes that we have made. And I am going to excuse Mr. Kurnaz, and thank you so much for your participation today. It was very revealing.

Mr. MORAN. Mr. Chairman? Mr. Chairman, could I ask one question?

Mr. DELAHUNT. Sure.

Mr. MORAN. Is the witness aware of any recording, whether it be transcript or video recording, when he was told, for example, to sign papers that he knew were untrue under threat of further punishment and an indefinite detention? Is there any evidence that we have that there is evidence that exists that this took place, or was it all in a secret proceeding, unrecorded proceeding?

Mr. DELAHUNT. Mr. Azmy, or if you or Mr. Kurnaz could respond to Congressman Moran's question. If you are aware.

Mr. KURNAZ. I am sure there are many films about those things, but I don't know if they get destroyed after or not. But there was, in the interrogation room, there were cameras. But I don't know if those cameras worked or not, if there was—if they took filmings about it or not. But there were cameras in the room.

Mr. MORAN. So there were cameras in the room. You just don't know whether they were recording or not. Well, that is interesting, Mr. Chairman. There may be evidence available that corroborates this testimony. And obviously we have every reason to believe it, as does the German Government.

Thank you. I am sorry for the interruption, Mr. Chairman.

Mr. DELAHUNT. No, thank you, Mr. Moran. And Mr. Kurnaz, thank you once more for your participation today. And we will excuse you from this hearing, along with your outstanding attorney, Mr. Azmy. Thank you. And Mr. Docke.

And let's continue with our—the rest of our panel. Mr. Stafford Smith.

**STATEMENT OF CLIVE STAFFORD SMITH, ESQ., DIRECTOR,
REPRIEVE**

Mr. STAFFORD SMITH. Mr. Chairman, first let me say thank you very much for the invitation to this hearing. And also as an American, albeit one with a slightly strange British accent, let me say, your holding this hearing is what makes me proud to be an American. And I would like to take this opportunity, if I may, Congress Moran, to thank you personally. We haven't met, but you have been immensely helpful to my military co-counsel, Lieutenant Colonel Yvonne Bradley. And I want to thank you for doing that. Thank you, sir. A reputation is very hard to win and very often easily lost. And I do want to focus mainly here on what we can do in the future to repair the damage that we have created.

But I think really, what I bring to the table today is, mainly, the 80-odd prisoners that my office has represented down in Guantanamo Bay, where we have tried to help repair the United States

Constitution, which is, Mr. Ranking Member, I think something we could teach the Europeans. The Constitution would be a very fine idea, even in my other home country, Great Britain. But let me tell you just about three of the prisoners who are still in Guantanamo Bay who my office represents, because this is what we need to repair right now.

One is a chap called Mohammed Hussein Abdallah. He is a teacher, and he is a father of 11 people, originally a Somali refugee. He left Somalia many, many years ago to escape the early days of the conflict that we sadly know continues to this day. And the family settled in Pakistan in the early 1990s, and he was recognized as an UNHCR refugee in 1993. And for the next several years the Abdallah family lived quietly in Pakistan, minding their own business. Mr. Abdallah taught orphans in a Red Crescent school in a place called Jalozai, a refugee camp outside Peshawar, which was housing many Afghan refugees who themselves had fled from the conflict in Afghanistan. One night Pakistani soldiers burst in, grabbed him. And he is one of the many people, Mr. Chairman, you mentioned bounties, he is one of the many people who were sold to the United States for bounty.

Now look, we all recognize, everybody now recognizes that Mr. Abdallah is innocent. The United States Military has recognized it. It has been conceded by everybody. And yet he is still in Guantanamo Bay. And it has been recognized for months and months, indeed flowing into years now. And the question is why. And the question is why we are not achieving something to get him out of there. And part of the problem is that the different sides are not talking, that we, as the lawyers who could help immensely in finding locations that these people can be taken to, the State Department won't even talk to us. I have a member of my staff in Somaliland right now. Somaliland is recognized by our Government. It is stable. My staff member is talking to their government right now. They are willing to take him back. And all we want is to be able to talk to the State Department so we can get one person back.

Mr. Abdallah is a granddad. He has limited years left on this planet. And it is very urgent for him, that we get him out of Guantanamo Bay to spend those last years with his grandchildren and his family.

Second person I want to talk about is Mohammed El Gharani. And there was mention earlier on about cigarettes being stubbed out on his arm. That happened to him. And look, I have seen it. I have seen his arm. It is pretty obvious when cigarette burns have been used. And the prisoners don't have cigarettes to do it to themselves in Guantanamo Bay. He is indeed one of the prisoners who was interviewed by the FBI. And you mentioned the report that came out today. I sat in the room while the FBI questioned him about the abuse that they saw of my client. And so it is certainly not just coming from me or from Mr. El Gharani.

He was 14 years old at the time he was seized in Pakistan. He is now 21. He is still there. He spent over 6 years in U.S. custody without any trial. He is originally from Medina in Saudi Arabia, though he is a Chad national. And he is not recognized as a Saudi Arabian national. And one of the tragedies of the racism in Saudi

Arabia is, if you are not a Saudi national, and you have black skin, you don't get to go to secondary school. And the reason he ended up going to Pakistan is to learn computers and to learn English in Pakistan. He had only just got there when he was snatched up, sold for a bounty, and indeed ended up in Guantanamo Bay. And he was held—when he was held by the Pakistanis he was hung by his wrists also. And you know, one of the sad things that I have been involved in over the last few years, just as a matter of interest, is looking to see what the Spanish Inquisition called the stress positions when they used them. And maybe hanging by your wrists doesn't sound so bad until you learned that the Spanish Inquisition called that "strappado." And they did it because it dislocates your shoulders. And it is excruciatingly painful. And it is the same thing that Mr. Kurnaz was talking about a little while ago.

When I first got to see him in 2005, it reflects on some of the tragic mistakes we have made down there, that the military thought he was 10 years older than he actually is. And I made the delicate suggestion that perhaps we could figure it out by getting his birth certificate. It is not so difficult. And we got that from Saudi Arabia, confirming that he was born in November 1986, and he had indeed been 14 at the time he was seized in Pakistan. And, you know, the main allegation that has been made against him over all these years that remains to this day is that in 1998 he was a member of the London cell of al-Qaeda. Well, if that is true, he was 11 years old. And he was somehow transported there by the Starship Enterprise because he had never been out of Saudi Arabia. And I am glad to say, actually in one of his recent interrogations, that the guy who was doing it, apologized to him that he was still required to ask these silly questions about whether he was in the London cell of al-Qaeda.

This child has made repeated suicide attempts, and he has tried to slash his wrists. And you know, he still is a kid, and we should be treating him as a child rather than as—the way he has been treated in Guantanamo Bay. He is in Camp 5 right now.

I spent 25 years representing people on death row in the Deep South, and I have been to all the prisons where people are held down there, and I got to say, I have not seen any individual who was held under the same circumstances as Mohammed is in Guantanamo Bay today. And you know, I invite you, long ago when they raised this red herring that you shouldn't be allowed to talk to my clients because they have Geneva Convention rights that gives them privacy, I had my clients sign waivers because I want them to talk to you. And I want them to talk to anyone who wants to go talk to them, quite frankly. And I will give you waivers today. And I don't need to be there. You can talk to any of these three people we are talking about by yourselves. Be my guest. All I want you to do is have that opportunity.

Third person I want to talk about is the chap that Congressman Moran, you have been very helpful for us with Lieutenant Colonel Bradley. He is a British resident. He is from London. He was seized by the Pakistani immigration authorities at Karachi airport on the 10th of April, 2002, when he was trying to take a plane back to Britain. Now, he was interrogated by both the United States and by the British in Pakistan. The British said to the United States

that he was a nobody, a janitor. And indeed, he was a janitor from Kensington. Nevertheless, the U.S. came to the conclusion that he knew more than he was saying, so they rendered him.

You know, when I went to law school in New York at Columbia many, many years ago, it never occurred to me that one day I would be sitting across the table from one of my clients talking to him about how my Government took him to Morocco. And it wasn't on some Club Med vacation. And they had him tortured for 18 months, including, and excuse me for saying this in public, they took a razor blade to his penis. And talk about photographs, we know the name of the woman, the U.S. personnel, that took the pictures of his genitals when he was taken back into U.S. custody on January 21, 2004. We have done a lot of investigation on this. I would be glad to give you the names. Please issue a subpoena. I would be very grateful if you would issue a subpoena for me.

There are some things I can't talk to you about here because they are classified. I can't talk to you about, you know, if I happen hypothetically to have photographs of things that would be helpful. I wish someone would subpoena me, because I would love the opportunity for the world to see, or you guys to see, such issues that perhaps would go beyond merely taking my word for some of the things that Binyam has told me.

But you know, the problem with all of this process, all we ask for someone like Binyam Mohamed is give him a fair trial or send him back to Britain. And you are quite right, Congressman, to say the Europeans should step up to the plate. I am glad to say that, largely through bullying through my office, we have got them to take four people so far, and we are doing—we are trying to help out a little more on that.

Mr. ROHRBACHER. Just one, because you made reference, just say I think it is time for our European friends to put up or shut up. And it is very easy for them to put up. If they feel that we have done a tremendous amount of wrong here, let them take in these people. And we may well have done wrong with a number of them. We need to admit that and not to have policies where some of these things happen. But if they are as outraged as they suggest, put up or shut up. Take these people in or quit yakking as if you are morally superior to us.

Mr. STAFFORD SMITH. And I agree with that, but you know, we have to do another thing from our end, because when the British finally did take four British residents back who were not British citizens, what the Department of Defense did here was, the moment the British had done that, doing us a favor, they issued these ridiculous press releases, where I was threatening them with defamation litigation, where they wanted to say, well, we didn't make a mistake after all, so let me tell you how bad these dudes are. We cannot ask our allies to do the right thing and then stab them in the back the moment they do, do the right thing.

There was an agreement between the British Government and our own Government not to do that briefing against these people. We did it and we embarrassed them. So, you know, there are two sides to this story. But I will tell you one thing, the British Government has agreed to take Binyam Mohamed home. They are begging for him to go home right now. And we need to send him back to

Britain and let the British take responsibility for him. Because if we don't, we are embarrassing our closest ally.

I speak as a schizophrenic here, since I have got a British passport too. But we sued the British Government just 2 weeks ago, because they have got evidence that Binyam was tortured, they have got evidence that they told the United States he was a janitor in Pakistan, they have got evidence that they knew he was going to be rendered to Morocco, and they are going to have to turn it over to us. And a British court will order them to turn it over to us. And if we leave them in the position that Binyam Mohamed is being held in Guantanamo Bay, it is my job, sadly, to embarrass the British Government and force them to turn that evidence over. But it is not a nice thing for us as Americans to do, to put them in that position.

So in this context, I think Binyam Mohamed is certainly a strong example of why we need to be closing Guantanamo Bay. But let me conclude.

[The prepared statement of Mr. Stafford Smith follows:]

PREPARED STATEMENT OF CLIVE STAFFORD SMITH, ESQ., DIRECTOR, REPRIEVE
THROWING AWAY GOODWILL IN GUANTÁNAMO BAY

Good Afternoon, Chairman Delahunt, and members of the subcommittee. Thank you for holding this hearing and for inviting me.

I am an Anglo-American lawyer. I spent ten years working in Atlanta, a further eleven in New Orleans, and the past four based in London. When I was sworn in as a U.S. citizen several years ago, U.S. District Court Judge Helen G. Berrigan, who was conducting the ceremony, kindly remarked that I had for years been fulfilling my new oath of citizenship, performing civil rights work for indigent prisoners. This, she said, was what it meant to up-hold the U.S. Constitution and the American way of life.

I became involved in the litigation over Guantánamo Bay at the very beginning, in early 2002, because I believed that the evisceration of the Rule of Law was contrary to everything that I swore to up-hold as a U.S. citizen and as a member of the bar.

I believed then that Guantánamo Bay would make everyone a loser. Most of all I feared that the U.S. would itself suffer if the Rule of Law became an early victim of the 'War on Terror.' On September 12, 2001, as the victim of an unpardonable crime, the U.S. enjoyed a reservoir of goodwill unparalleled in our history. Sadly, that reservoir has long since drained away, sucked out in part by the images of Muslim men in their Guantánamo orange uniforms.

A reputation is often hard-won, but it is always easily lost. We have tarnished our reputation in the past six years, yet we can and must regain it. We need to understand our mistakes, redress them, and move forward to the future that is promised by the American ideal.

I have made at least 17 trips on behalf of my Guantánamo clients to countries in Europe, the Middle East and North Africa. Everywhere I go I meet the same question: What is the U.S. doing holding prisoners for year upon year in Guantánamo Bay, without any meaningful due process? There is a great deal of anger. There is sadness—that the U.S. has created a new word for inequity, and that word is Guantánamo.

Yet there is hope amid the darkness: Thankfully, when I explain how American lawyers are willing to help them pro bono, those who I meet—such as family members of prisoners and even the former prisoners themselves—say that they do not hate the American people; however, they are strongly opposed to what they view as the mistakes of the Bush Administration. They view Guantánamo as an aberration, an error from which the U.S. can recover.

Yet we cannot expect to recover our reputation without action. As one Guantánamo prisoner said to me: "If I receive just one act of kindness from an American I will forget the years of mistreatment." If, on the other hand, we are unwilling to admit our mistakes then the damage done to our reputation will never be repaired.

And there have been many errors. In all honestly, I never believed it possible that we would make so many. Some are explained by our policy of paying bounties—a minimum of \$5,000 per prisoner in Pakistan, for example, which is an enormous amount of money there. You essentially purchase a prisoner, apply ‘enhanced interrogation techniques’ to make him confess to the same facts that the bounty seeker gave you, and then hold him without due process in Guantánamo.

It is not my purpose to canvass every injustice that has taken place in Guantánamo Bay. Unfortunately, however, the following three examples (selected from the clients I help to represent) are reasonably typical.

Muhammad Hussein Abdallah is a teacher, a father of eleven, and a Somali refugee. He has spent the last six years held without charge by the U.S. military. Of all the tragic and senseless tales to come out of Guantánamo Bay, Mr. Abdallah’s is one of the saddest. He led his family out of Somalia years ago to protect them from escalating violence—the conflict that plagues Somalia to this day. The family settled in Pakistan in the early nineties; UNHCR granted Mr. Abdallah protected refugee status in 1993.

For the next several years, the Abdallahs lived quietly. Mr. Abdallah taught orphans at a Red Crescent school in Jalozai, a refugee camp outside Peshawar that housed thousands of displaced Afghans. Pakistani soldiers staged a night time raid on his home, took him away from his family, and sold him to American soldiers. He has been in military custody ever since. Three months later, his house was raided again by both the ISI and U.S. forces. During that raid, a soldier reportedly stormed into the room where Mr. Abdallah’s son-in-law was sleeping, unarmed. Startled, the son-in-law apparently reached for his glasses to see what was happening—and the soldier shot him. He was killed.

Mr. Abdallah’s innocence has been proved, and has been conceded by U.S. forces, yet he remains in Guantánamo Bay. He remains in Guantánamo because the U.S. has, as yet, failed to find him somewhere to go. Yet there is a refuge that would be suitable for Mr. Abdallah and the other two Somali prisoners in Guantánamo Bay: the small, stable, *de facto* independent region of northwest Somalia known as Somaliland. The government of Somaliland is closely allied with the United States. Moreover, high-ranking members of this government—the Ministers of Interior and Foreign Affairs, the Speaker of the Parliament, and the leader of the chief opposition party—have all been alerted by my office to the cases of Somali prisoners in Guantánamo Bay. It should, in principle, be relatively straightforward for the U.S. to transfer Mr. Abdallah, a UNHCR refugee who is patently innocent of any crime, to a friendly regime. For Mr. Abdallah the matter is urgent. He is an aging grandfather who never posed the slightest threat to the U.S. or its allies. It is no exaggeration to say he has little time left. His one wish now is to return to his family in Somaliland and live out his remaining years in peace with his loved ones.

Mohammed El Gharani is the second youngest prisoner in Guantánamo Bay today. He was 14 when he was seized in Pakistan. Today he is 21, having now spent six and a half years in United States custody without a trial. Mohammed was born in medina, Saudi Arabia, in November 1986. He loved playing football and earned money for his family working after school selling bottles of water or prayer beads. His family is from Africa, and he is a national of Chad. He is a very intelligent young man. He dreamed of being a doctor, but the extreme discrimination in Saudi Arabia is reminiscent of the Deep South in the 1950s. His dark skin cut off his options, and Mohammed was forced to leave school at 14. A friend suggested he go to Pakistan to study English and computers, and he followed this advice.

Mohammed states that not long after his arrival in Karachi, he went to a mosque at prayer time. Police surrounded the building and arrested everyone inside. Mohammed told the Pakistani police that he was there to study and had arrived only recently, but this did him no good. He was hung for hours by his wrists, so high that only the tips of his toes touched the ground—a torture technique called *strappado* by the Spanish Inquisition. He was beaten repeatedly.

It is a sad comment on the quality of some of the intelligence in Guantánamo that when I finally obtained access to Mohammed, the U.S. military still thought he was ten years older than his real age. Confirming his true date of birth was simple, through records from Saudi Arabia.

More than six years later, Mohammed has never been formally charged with any crime. The main allegation against him remains that he was a member of an Al Qaeda cell in London in 1998. The suggestion is ludicrous, and recently his interrogator has had the decency to apologize for the fact that the allegation has still not been dismissed: Mohammed would have been just 11 years old at the time—and had never been outside Saudi Arabia.

Today, Mohammed is kept in the maximum security Camp V. He is housed in a cell that is entirely made of steel. The neon lights are on 24 hours a day. He has

nothing to do all day. Mohamed has also faced totally unacceptable abuse. Perhaps most damaging, the racial abuse has continued throughout his incarceration.

He has been deeply depressed and has made several suicide attempts, including slashing his wrists, trying to hang himself and running head-first into the wall as hard as he could.

Saudi Arabia refuses to take responsibility for him, so Chad seems to be the only option for his release. However, until his volunteer legal representatives travelled to Chad, the Chad government reported that there had been no efforts by the U.S. to negotiate his release to the country of his nationality. He remains in Guantanamo Bay.

Finally, let me mention *Binyam Mohamed*, a British resident from London. At Karachi airport on 10 April 2002, Binyam was seized by Pakistani authorities when he was trying to take a plane home to England. He was interrogated by both American and British officials. The British confirmed to the U.S. that he was a “nobody”—a janitor from London. Nevertheless, the U.S. decided that he knew more than he was saying.

On 21 July 2002 Binyam was rendered to Morocco on a CIA plane. When I went to law school at Columbia in New York, I never thought I would sit across from a client for three days to talk about how he was tortured at the behest of my government. Some of it hardly bears repeating. For example, the Moroccans took a razor blade to his penis.

Naturally, Binyam said what his torturers wanted to hear. Sadly, the U.S. military now plans to use the bitter fruit of this abuse to prosecute him in a military commission. This is not only wrong, but it places our closest allies, particularly the British, in an intolerable position. There have been inquiries into Binyam’s rendition to torture in the Council of Europe, the British parliament and now even in Portugal.

Two weeks ago Binyam’s U.K. lawyers sued the British government to force them to provide the proof that Binyam is (a) a “nobody,” a janitor, (b) was tortured, and (c) that the UK provided evidence to the US that was used by the Moroccan torturers. We know the UK has this material, and you can imagine the political difficulties that they face when forced to disclose this in the hugely embarrassing context of a U.S. military tribunal.

The U.K. has asked that Binyam Mohamed be returned to the U.K., where he will face any legal proceedings that the U.K. chooses to initiate. The U.K. is willing to be responsible for his custody and control. The U.S. should repatriate him rather than prolong and exacerbate the damage that this case has done both to the reputation of the U.S. and to Anglo-American relations.

The opinions I express today are purely my own. Yet I hope you will join me when I say how sad it is that we have squandered so much goodwill around the world. It is important to focus on the future. However, we cannot expect to rehabilitate our own reputation unless we recognize the errors of the past, seek to make amends as best we can, and avoid similar mistakes in the future.

Thank you.

Mr. MORAN. Mr. Chairman, if I might just say, I can confirm this, his sister is an American citizen and a constituent of mine, lives in Northern Virginia. We can verify everything that Mr. Stafford Smith has said. Not that he would be questioned, but I know this to be—

Mr. DELAHUNT. I don’t want to cut anybody short, but we do have two other witnesses we want to hear from, and then we are going to request that you stay while we go to vote. But I think that—and let me implore you to stay, because this is too important a hearing not to have the benefit of an exchange with all of you. Because I believe this is the first time that many Americans will have heard this from people who know what they are talking about and are not trying to paint a picture that is so—I don’t want to use the word “false,” but I will.

But let me go to Mr. Denbeaux. And could you—we have only got—you are only going to get about 5 or 6 minutes, because I want to get to Colonel Abraham as well. And then when we come back we will have significantly more time. And everyone on the panel here of course is requested to return.

Mr. Denbeaux.

**STATEMENT OF MARK P. DENBEAUX, ESQ., PROFESSOR OF
LAW, SETON HALL UNIVERSITY SCHOOL OF LAW**

Mr. DENBEAUX. Thank you very much, Mr. Chairman. I am honored to be here in the sense that I am proud to have the American Congress looking into this. I am sad to be here because of the circumstances that drive it.

I am not here to tell you about other examples of events that are so poignant and so painful as the examples that you have just heard. Not because there aren't many more, but because there are in fact many more. I am actually here to tell you what the actual record is, based only on an evaluation of the government's own documents.

What I have done with some students of mine from the Seton Hall Law School is to review the government records. In every case we have assumed to be true everything the government ever said. We have not disputed a single proposition. And we have done a series of reports. And I would like to add, at no time has the Defense Department ever challenged the accuracy of our reports, especially, and it is significant that the chairman of the Senate Armed Services Committee, Senator Levin, directed them if they had any objections or challenges or disagreements with our report on April 26th of last year, he gave the Defense Department 30 days to respond. You can well understand a year has gone by, there has been deafening silence.

But what I really want to tell you is the picture that is painted here is not consistent with the idea that these are a few aberrations. The really poignant problem we have to face is the systemic nature of the problem, and I would simply like to begin by pointing out that if you review the evidence the government collected and presented as its justification for keeping each of these people in Guantanamo, there are several facts that are beyond dispute. I think you have mentioned some of them.

Only 8 percent of the people in Guantanamo are alleged to have been fighters for anybody.

Mr. NADLER. What percent was that?

Mr. DENBEAUX. Eight percent. Fifty-five percent of those people in Guantanamo are never accused of committing a hostile act of any sort against anyone. Sixty percent of the people in Guantanamo are there because of their association, mostly with the Taliban. Sixty percent of the people in Guantanamo are there because they are associated with the Taliban. And I would like to point out one of my students came to me and said that well, that was the Government of Afghanistan. It is like being associated with your local policeman, your local postman in the United States.

And my students went through the reports and the data on who was there, and I still remember one young man coming to me and saying I don't get it. Where are the bad guys? Where is Mr. Big? And one of the references he made was to one of the people whose CSRT charges can be read very briefly. This is the entire charge against him, which was found sufficient to incarcerate him indefinitely; I believe he is still there. He is associated with the Taliban. And the sole evidence of that, according to the government, is that

he was conscripted into the Taliban. Two, he engaged in hostilities against the United States. That makes this one of the 45 percent of the really bad people. We gave the government credit because they said he counted as one of those who they alleged had committed hostile acts. Here are the hostile acts.

Mr. ROHRABACHER. Is this gentleman an Afghan that you are talking about?

Mr. DENBEAUX. We believe so.

Mr. ROHRABACHER. You believe so?

Mr. DENBEAUX. We believe so. We only take the government documents as they are given. They don't always identify.

Mr. ROHRABACHER. I understand the people at Guantanamo are not basically Afghans. They were in Afghanistan from other countries.

Mr. DENBEAUX. Many have been returned to Afghanistan, but there are those still there who are from Afghanistan.

This person, the evidence against him is that he was a cook's assistant for Taliban forces and that he fled during the Northern Alliance and surrendered to the Northern Alliance. This person is being held in Guantanamo, as the best we can tell now, even though the only charge against him is he was conscripted into the Taliban, he served as a cook, and when the Northern Alliance attacked he surrendered.

When we listen to the incredibly painful stories of the Uighurs, or Mr. Kurnaz, or the examples that Mr. Stafford Smith has just given, nobody is speaking for this person. This person, in fact, is simply one of the 517 people. This is the evidence.

Now, when Seton Hall students made their survey we concluded that he is associated with the Taliban because they said he was. We gave the government credit. The government said he engaged in hostilities, so we put him on the side of the ledger that said he engaged in hostilities. But most American people don't believe being associated with a governing force, by being conscripted into it, would necessarily hold you responsible for everything. And most Americans don't think serving as an assistant cook and surrendering is a hostile act.

Mr. DELAHUNT. Professor, can I ask you to focus for a while on the issue of recidivism?

Mr. DENBEAUX. Yes.

Mr. DELAHUNT. When we were here last week there was a representation made through the ranking member that 30 of those who had been released had returned to the battlefield, if you will.

Mr. DENBEAUX. Yes.

Mr. DELAHUNT. And then when you conclude there, I am going to ask the good Colonel to again forebear. We want to have—we are going to return and hear from him. So if you could take the next 3 or 4 minutes then we can accommodate everybody.

Mr. DENBEAUX. In July 2007, the Defense Department published a press release saying that 30 people had returned to the battle. And it turns out that we went through and reviewed that entire press release and every single statement in it. And we evaluated who was there and who wasn't. I am sorry that Congressman Rohrabacher isn't here, because I will accept the challenge of pointing

out the errors in that report at any time that he requests it. And it is included—

Mr. DELAHUNT. I am sure he will request it.

Mr. DENBEAUX. I have actually included it in some of the materials that I submitted as part of my testimony.

But a few things in that report. One is the Defense Department inexplicably claims that it doesn't keep track of the people who it has released. It is puzzling to me that they would release people and not bother to keep track. The press release says they based their decision on various intelligence agencies' reports and news reports. So the entire premise of these 30 people is predicated on no systemic review and depends to a large extent on in fact press reports.

Now, I would like to make it clear that to get to the number of 30 they had to count as part of the 30 who were recidivists the five Uighurs who were released as has been described by Mr. Willett. That means of the 30 people who returned to the battlefield, five of them are the Uighurs that everybody agrees never were on a battlefield, and they have never returned to a battlefield, but they have engaged in propaganda activity against the United States. That seems to be as best we can determine, some sort of op-ed piece was written complaining about the circumstances. Another three are known as the "Tipton Three." Mr. Stafford Smith is well aware of them. They were released to England. And the hostile act that is part of the 30 was their making a documentary called "The Road to Guantanamo." So right off the bat, we start with 30 people, eight of whom no one would claim had returned to the battlefield.

Some of the others—they only identify seven. And I would like to make it clear that of the seven, at least two who supposedly returned to the battlefield from Guantanamo, were never in Guantanamo. And we have given the benefit of the doubt to them, as to two others, because even though their names aren't there and aren't listed as being in Guantanamo, there would be some circumstantial evidence that might mean they have been in Guantanamo. But in fact, it is certainly possible, and under the government's own records, four of the names alleged to have returned to the fight from Guantanamo, were never in Guantanamo. Two absolutely were not. Of the remaining three, two of those, in fact, have never returned to the fight, in the sense they have never been captured on a battlefield, they have never been killed. One person seems to have committed suicide. And one person was shot in Russia in an apartment complex at some point. And he is listed as having returned to the battlefield.

And if I may end, there is this incredibly painful event involving what we call "ISN 220." And that was the one referenced by Mr. Rohrabacher. This is the man who supposedly, and I presume it is true, carried out a suicide bombing in Iraq. Now, I would like to make one thing clear: That man was released in 2005, not as the result of any lawyer's activity, and not even with the permission or approval of the military. The military at both his CSRT proceeding and his ARB proceeding found him to be exceedingly dangerous. Indeed, the military concluded that this person if let go would go kill Americans.

Mr. DELAHUNT. Why was he released?

Mr. DENBEAUX. You know, my central point I was thinking of making, but I am not clever enough to do it, is simply to ask this question: Who released this person and why? I would love to have someone in the United States explain what it was that caused ISN 220 to be released, and why after the military said he will kill. This is somebody who—West Point did an evaluation of some of our work, and they ranked people in terms of dangerousness. And the highest level of dangerousness they associated, they had four criteria. The person that the government released after the military gave its reasons for why they shouldn't, that person met three of the four criteria that the West Point study said makes him the maximum dangerous person in the United States. In fact, if you look at the criteria that we have, there are only four people in Guantanamo who were both fighters for the Taliban, had committed hostile acts, and ever been in Tora Bora. This person that is released was one of those four. He is in the four—

Mr. DELAHUNT. I think that is a very good question. And I am going to ask you, Professor, to deal with my staff. And we will pose the question as to the rationale and the reason for the release of this individual, who I think we agree is a danger. To me, what it says is there is no thoughtful process. There is no rhyme or reason. And this is a predicament that impinges on our moral authority as well as protecting our national security.

Mr. DENBEAUX. And if I may close, I think this goes to the whole defects in the CSRT process. Everybody is found to be an enemy combatant. And they are held in Guantanamo unless the government decides to let them go. And the reasons they let them go seem to confess the error of their intelligence. One of my students said to me, how could you have a press release bragging about making mistakes in who you released? And then another student said it is worse than that. They are bragging about 30 mistakes, and most of them weren't mistakes. They actually felt as if our Defense Department is claiming they have made 30 mistakes in a press release, when in fact the best they could claim is two. And then of course claiming that the release of 220 somehow proves something other than incompetence that threatens our national security is hard to imagine.

[The prepared statement of Mr. Denbeaux follows:]

**GUANTANAMO: THE COST OF REPLACING LEGAL
PROCESS WITH POLITICS- INCOMPETENCE AND
INJUSTICE AND THE THREAT TO NATIONAL SECURITY**

By
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Summary

The creation of a bureaucratic tribunal as a substitute for habeas corpus has failed to determine who to retain **and** who to release. The replacement of lawyers and judges with an *ex parte* administrative non-procedure threatens national security.

The absence of a formal judicial process is problematic. The Combat Status Review Tribunal procedures cannot substitute for the Courts or habeas corpus. Government records reveal that a detainee who 'wins' his Combat Status Review Tribunal - in other words, has a result that concludes he is not an enemy combatant after all - does not necessarily get released.

Likewise, a detainee - for whom the government claimed that upon release he promised to kill as many Americans as he could - was voluntarily released by the government. That is the story of Abdallah Saleh Ali Al Ajmi, known as detainee ISN 220. He 'lost' his Combat Status Review Tribunal and the government claimed that he threatened to kill Americans when released. Then, the government released him. Following his release, ISN 220 was involved in a suicide attack in Iraq.

The story of the detention and release of ISN 220 demonstrates the same administrative incompetence as is demonstrated by the refusal to release known innocents at Guantanamo Bay, Murat Kumaz and Uighurs.

The government has argued in the past that United States District Courts cannot process these matters because the information relevant to such determination is classified. However, the government had total control over the classified information about every detainee. Yet it did not affect the decision to release ISN 220, nor the decision to continue detention of 55% of the detainees which were never accused of committing any hostile acts against the government or its allies.

In July of 2007 the Department of Defense claimed that it had, without the benefit of any oversight or process of any kind, released 30 detainees who had returned to the fight. According to the Department of Defense, this proved that the prisoners at Guantanamo deserved no process. However, the release of 30 alleged recidivists speaks to the failure of the Department of Defense's process of reviewing detainees.

In reporting the number of alleged recidivists, the Department of Defense failed by reporting misleading if not inaccurate information. Most of the detainees alleged to have returned to the battlefield either 1) were never in Guantanamo or 2) never returned to the battlefield or, in some cases, 3) were never on a battlefield, whether before or after Guantanamo - if they had ever been in Guantanamo at all.

Every fact points to the dramatic failure of the administrative process that detained the wrong people and released ISN 220. Whatever classified fact caused the government to release ISN 220 may not have persuaded the judicial branch of the government. A habeas corpus review at the outset of his confinement might have remedied all the ills of this process.

The secrecy of the Department of Defense's decision to release Al Ajmi, and to refuse to release other detainees who should not have been there in the first instance, is just one further

problem that a legitimate judicial determination would avoid. If habeas litigation were available to detainees, then the Department of Defense would be accountable for flawed decisions to release or continue to detain those in Guantanamo.

1. Background

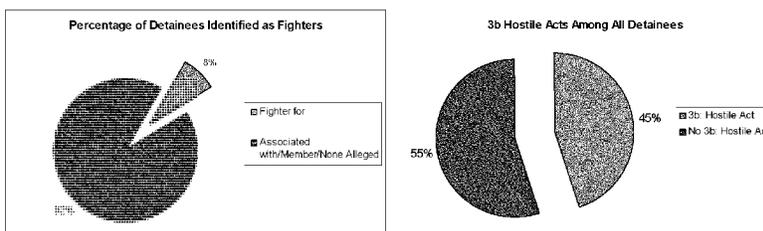
As is the standard procedure, The Seton Hall Center for Policy and Research accepted as truth everything that the government said about any of the detainees at Guantanamo. So, for example, if the government identified a detainee as a “fighter for” the Taliban, then it is accepted, for the purpose of the report, that the detainee was a fighter for the Taliban.

Who has been detained in Guantanamo?

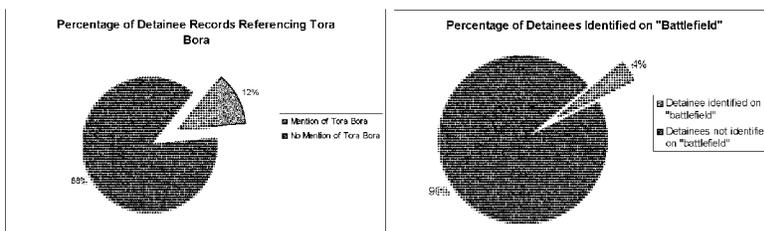
A review of all of the unclassified Combat Status Review Tribunal summaries of the classified evidence¹ against all of those detained in Guantanamo as of the beginning of the CSRT process produced a profile. These summaries of evidence comprise the government’s summaries of its classified information pertaining to each detainee.

That profile, which has never been disputed by the Department of Defense, revealed that:

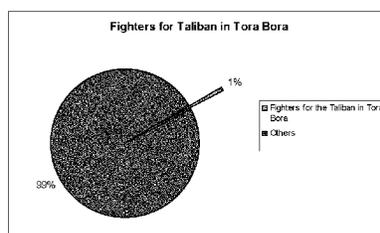
1. Ninety two percent of the detainees at Guantanamo were specifically *not* accused of being “fighters for” anyone.
2. Fifty five percent were not accused of having committed any hostile acts against United States or coalition forces.
3. Ninety five percent were not captured by United States forces;
4. Twelve percent were alleged to have been present in the Tora Bora region of Afghanistan.
5. Four percent were accused of having been on a battlefield.
6. Only one (1) detainee was captured by United States force on any battlefield.



¹ First report



Exactly four detainees were Taliban fighters who were fighting in the Tora Bora fight. Detainee ISN 220 was one of them. What happened to the other three is shrouded in Department of Defense secrecy.



The administrative tribunals, operating entirely on secret 'evidence,' found every single detainee – every one – to have been an enemy combatant, even though some detainees were very clearly not so.

No Hearing Hearings: The CSRT

In the wake of the Supreme Court's decision that the United States Government must provide adequate procedures to assess the appropriateness of continued detention of individuals held by the Government at Guantánamo Bay, Cuba, the Department of Defense established the Combatant Status Review Tribunals ("CSRT") to perform this mission. Seton Hall conducted a comprehensive analysis of the CSRT proceedings. Like prior reports, it is based exclusively upon Defense Department documents. Most of these documents were released as a result of legal compulsion, either because of an Associated Press Freedom of Information request or in compliance with orders issued by the United States District Court in habeas corpus proceedings brought on behalf of detainees. Like prior reports, "No Hearing Hearings" is limited by the information available.

The Report documents the following:

- 1) The Government did not produce any witnesses in any hearing and did not present any documentary evidence to the detainee prior to the hearing in 96% of the cases.

- 2) The only document that the detainee is always presented with is the summary of classified evidence, but the Tribunal characterized this summary before it as “conclusory” and not persuasive.
- 3) The detainee’s only knowledge of the reasons the Government considered him to be an enemy combatant was the summary of the evidence.
- 4) The Government’s classified evidence was always presumed to be reliable and valid.
- 5) In 48% of the cases, the Government also relied on unclassified evidence, but, like the classified evidence, this unclassified evidence was almost always withheld from the detainee.
- 6) At least 55% of the detainees sought either to inspect the classified evidence or to present exculpatory evidence in the form of witnesses and/or documents.
 - a. All requests by detainees to inspect the classified evidence were denied.
 - b. All requests by detainees for witnesses not already detained in Guantánamo were denied.
 - c. Requests by detainees for witnesses detained in Guantánamo were denied in 74% of the cases. In the remaining 26% of the cases, 22% of the detainees were permitted to call some witnesses and 4% were permitted to call all of the witnesses that they requested.
 - d. Among detainees that participated, requests by detainees to produce documentary evidence were denied in 60% of the cases. In 25% of the hearings, the detainees were permitted to produce all of their requested documentary evidence; and in 15% of the hearings, the detainees were permitted to produce some of their documentary evidence.
- 7) The only documentary evidence that the detainees were allowed to produce was from family and friends.
- 8) Detainees did not always participate in their hearings. When considering all the hearings, 89% of the time no evidence was presented on behalf of the detainee.
- 9) The Tribunal’s decision was made on the same day as the hearing in 81% of the cases.
- 10) The CSRT procedures recommended that the Government have an attorney present at the hearing; the same procedures deny the detainees any right to a lawyer.
- 11) Instead of a lawyer, the detainee was assigned a “personal representative,” whose role, both in theory and practice, was minimal.
- 12) With respect to preparation for the hearing, in most cases, the personal representative met with the detainee only once (78%) for no more than 90 minutes (80%) only a week before the hearing (79%).

- 13) At the end of the hearing, the personal representative failed to exercise his right to comment on the decision in 98% of the cases,
- a. During the hearing, the personal representative said nothing 12% of the time.
 - b. During the hearing, the personal representative did not make any substantive statements in 36% of the cases; and
 - c. In the 52% of the cases where the personal representative did make substantive comments, those comments sometimes advocated for the Government.
- 14) In three of the 102 CSRT returns reviewed, the Tribunal found the detainee to be not/no-longer an enemy combatant. In each case, the Defense Department ordered a new Tribunal convened, and the detainee was then found to be an enemy combatant. In one instance, a detainee was found to no longer be an enemy combatant by two Tribunals, before a third Tribunal was convened which then found the detainee to be an enemy combatant.
- 15) When a detainee was initially found not/no-longer to be an enemy combatant:
- a. The detainee was not told of his favorable decision;
 - b. There is no indication that the detainee was informed of or participated in the second (or third) hearings;
 - c. The record of the decision finding the detainee not/no-longer to be an enemy combatant is incomplete.

The Combat Status Review Tribunal process was designed to find all detainees to have been enemy combatants even though many were not and never had been.

The Seton Hall Center for Policy and Research's first study revealed that the government's own data showed that a majority of the detainees did not meet the standards of the infamous "worst of the worst" threshold, first coined by then-Secretary of Defense Donald Rumsfeld. Furthermore, the Seton Hall study undercut the claim that every detainee was properly detained in the first instance.

The first study neither contended that everyone at Guantanamo Bay was innocent nor that, following a fair trial, there would be no detainees who would be declared criminals and appropriately sentenced. The Seton Hall Center for Policy and Research, rather, pointed out the government's justification for denying *any* detainee any hearing before any Article III judge was entirely unsupportable.

The Department of Defense has long relied upon the premise of "battlefield capture" to justify the indefinite detention of so-called "enemy combatants" at Guantánamo Bay, even though the vast majority of the detainees were never on a battlefield – according to Department of Defense documents. The "battlefield capture" proposition—although proven false in almost all cases—has been an important proposition for the Department of Defense, which has used it to frame detainee status as a military question as to which the Department of Defense should be granted considerable deference.

Government officials have also repeatedly claimed that ex-detainees have “*returned* to the battlefield,” where they have been re-captured or killed. Implicit in the Government’s claim that detainees have “returned to the battlefield” is the notion that those detainees had been on a battlefield *prior* to their detention in Guantánamo.

Revealed by the Department of Defense data, however, is that:

- only twenty-one (21)—or four percent (4%)—of 516 Combatant Status Review Tribunal unclassified summaries of the evidence alleged that a detainee had ever been on any battlefield;
- only twenty-four (24)—or five percent (5%)—of unclassified summaries alleged that a detainee had been captured by United States forces; and
- exactly one (1) of 516 unclassified summaries alleged that a detainee was captured by United States forces on a battlefield.

The Government’s claim that the detainees “were picked up on the battlefield, fighting American forces, trying to kill American forces,” fails to comport with the Department of Defense’s own data, with the possible exception of detainee ISN 220. Neither does its claim that former detainees have “returned to the fight.” The Department of Defense has publicly insisted that “just short of thirty” former Guantánamo detainees have “returned” to the battlefield, where they have been re-captured or killed. However, the Department of Defense’s most recent press release described at most fifteen (15) possible recidivists, and has identified only seven (7) of these individuals by name.

On July 12, 2007, the Department of Defense issued a press release indicating that detainees who had been released from Guantanamo had returned to fight American forces. The July 2007 news release contains a preamble followed by brief descriptions of the Government’s bases for asserting that each of seven identified “recidivists” has “returned to the fight.” The preamble, in relevant part, reads as follows:

Former Guantánamo Detainees who have returned to the fight:

Our reports indicate that at least 30 former GTMO detainees have taken part in anti-coalition militant activities after leaving U.S. detention. Some have subsequently been killed in combat in Afghanistan.

...Although the US Government does not generally track ex-GTMO detainees after repatriation or resettlement, we are aware of dozens of cases where they have returned to militant activities, participated in anti-US propaganda or other activities through intelligence gathering and media reports. (Examples: Mehsud suicide bombing in Pakistan; Tipton Three and the Road to Guantánamo; Uighurs in Albania).

The following seven former detainees are a few examples of the 30; each returned to combat against the US and its allies after being released from Guantánamo.

With this preamble, interestingly, the Department of Defense abandons its oft-repeated allegation that at least thirty (30) former detainees have “returned to the battlefield” in favor of the far less sensational allegation that “at least 30 former GTMO detainees have taken part in *anti-coalition militant activities* after leaving U.S. detention.”²

“Returned to the battlefield” is unambiguous, and describes—clearly and without qualification—an act of aggression or war against the United States, or at least against its interests. In contrast, it is not clear on its face whether the use of the phrase “anti-coalition militant activities” is intended to embrace only overt, military, hostile action taken by the former detainee, or rather to extend to include activities that are political in nature. Further review of the preamble and the news release as a whole reveals that it is this latter meaning that prevails—and thus the shift from “return to the battlefield,” to “return to militant activities” reflects a wholesale retreat from the claim that thirty (30) ex-detainees have taken up arms against the United States or its coalition partners.

The Department of Defense’s retreat from “return to the battlefield” is signaled, in particular, by the Department’s assertion that it is “aware of dozens of cases where they have *returned to militant activities, participated in anti-US propaganda or other activities*[.]”³

Although the “anti-US propaganda” to which the news release refers is not militant by even the most extended meaning of the term, the Department of Defense apparently designates it as such, and is consequently able to sweep distinctly non-combatant activity under its new definition of “militant activities.”

According to the data provided by the Department of Defense:

- at least eight (8) of the fifteen (15) individuals alleged by the Government to have “returned to the fight” are accused of nothing more than speaking critically of the Government’s detention policies;
- ten (10) of the individuals have neither been re-captured nor killed by anyone;
- and of the five (5) individuals who are alleged to have been re-captured or killed, the names of two (2) do *not* appear on the list of individuals who have at any time been detained at Guantánamo, and the remaining three (3) include one (1) individual who was killed in an apartment complex in Russia by local authorities and one (1) who is not listed among former Guantánamo detainees but who, after his death, has been alleged to have been detained under a different name. Thus, the data provided by the Department of Defense indicates that every public statement made by Department of Defense officials regarding the number of detainees who have been released and thereafter killed or re-captured on the battlefield was *false*.

As a result, the Uighurs in Albania and “The Tipton Three,”—who, upon release from Guantánamo, have publicly criticized the way they were treated at the hands of the United States—are deemed to have participated in “anti-coalition militant activities” despite having neither “returned to a battlefield” nor committed any hostile acts whatsoever. “The Tipton Three” have been living in their native England since their release. The Uighurs remained in an

² Emphasis added.

³ Emphasis added.

Albanian refugee camp until relatively recently; they now have been resettled in apartments in Tirana—except for one, who lives with his sister in Sweden and has applied for permanent refugee status. Despite having been neither re-captured nor killed, these eight (8) individuals are swept under the banner of former Guantánamo detainees who have “returned to the fight.”

Even as the Department of Defense attempts to qualify its public statements that thirty former Guantánamo detainees have “returned to the fight,” and to widen its lens far beyond the battlefield, it still reaches at most fifteen (15) individuals—only half its stated total of Guantánamo recidivists.

The Department of Defense disclaims their competence by boasting of their failures. “Although the US Government does not generally track ex-GTMO detainees after repatriation or resettlement ...” This is a remarkable statement that goes directly to the question of competence and to our national security, if the government is correct that any one from Guantanamo actually did return to the fight.

The case of ISN 220 is the ultimate failure to protect national security. The government records of ISN 220’s CSRT and ARB claimed that he specifically identified himself as a terrorist and even warned the government that he would kill Americans as soon as he was released. As a result, The CSRT evaluated ISN 220 as a threat and the ARB recommended that his detention continue.

Following his ARB, the Department of Defense inexplicably released ISN 220.

2. The Failure of the Combat Status Review Tribunals

United States v. Rasul and *Hamdi v. Rumsfeld* were decided on June 28, 2004. The Department of Defense issued Establishing and Implementing Orders on July 7 and 29, 2004, respectively.⁴ Guantanamo personnel hand-delivered a letter to every detainee, advising him both of the upcoming Combatant Status Review Tribunal and of his right, independent of the CSRT, to file a habeas corpus suit in United States District Court.⁵

The entire CSRT procedures were promulgated in only 32 days. As the CSRT’s were being convened in Guantánamo, the Department of Defense was responding to habeas proceeding in federal court. The government implemented, beginning in August 2004, the CSRT in an attempt to provide the hearing that detainees were entitled to under *Rasul*. In October of 2004 the Defense Department advised the Court that the CSRT’s were being processed and described the process that each detainee was being provided. The goal was to demonstrate that, since a sufficient hearing had been held for each detainee, no habeas hearing by a federal court was required.

⁴ Paul Wolfowitz, *Order Establishing Combatant Status Review Tribunal* (Jul. 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

⁵ While the right to proceed in federal court may have been extinguished by the Military Commissions Act of 2006, Pub. L. No. 109-366, the meaning and constitutionality of that statute is not addressed by the present Report.

According to the CSRT procedures established in the July 29, 2001 inemo, prior to the commencement of any CSRT proceeding, the classified evidence relevant to that detainee had to be reviewed, a “summary of evidence” prepared, a personal representative appointed for the detainee, the personal representative had to meet with the detainee, and a Tribunal impaneled. One of the earliest, and possibly the first hearing, according to Department of Defense records, was that of ISN 220 which was held on August 2, 2004.⁶ For that first hearing, the personal representative met with the detainee on July 31, 2004, two days after the CSRT procedures were promulgated. This was the only meeting between this detainee and his personal representative and it lasted only 10 minutes, including translation time. On Monday, August 2, 2004, two days after the meeting between the personal representative and the detainee, the CSRT Tribunal was empanelled, the hearing held, the classified evidence evaluated and the decision issued. This detainee did not participate in his CSRT hearing.

The remainder of the habeas detainees whose CSRT returns were in the 102 considered in this report was processed rapidly: 49% of the hearings were held and decisions reached by September 30, 70% by October 31, and fully 96% were completed by the end of November 2004. This haste can be seen not only in the scheduling of the hearing but in the speed with which the Tribunals declared a verdict. Among the 102, in 81% of the cases, the decision was reached the same day as the hearing.

Merely *two days* after the Department of Defense promulgated the CSRT procedures, the Combat Status Review Tribunal declared ISN 220 to be an enemy combatant. The Tribunal held that he was a **fighter** for the Taliban who engaged in **hostilities against** either the United States or any of its coalition partners. The Tribunal based its first finding that ISN 220 was a Taliban fighter on two incidents – first, he went AWOL from the Kuwaiti military so that he could travel to Afghanistan to participate in the Jihad and second, the Taliban’s issuance to ISN 220 of an **AK-47, ammunition, and hand grenades**. As for the latter finding, the Tribunal considered allegations of five events to conclude that ISN 220 engaged in **hostilities**—he admitted that he fought with the Taliban in the Bagram area of Afghanistan; the Taliban placed him in a defensive position to block the Northern alliance; he spent eight months on the front line at the Aiubi Center in Afghanistan; he participated in two or three fire fights against the Northern Alliance; and he retreated to the **Tora Bora region**, and was later captured while attempting to escape to Pakistan.

Less than a year later, May 11, 2005, the Administrative Review Board of the Department of Defense affirmed the CSRT assessments and decided that ISN 220 should be further detained. Even with the extraordinary redaction of the Review Board’s report, it appears clear that ample evidence existed for these assessments and the recommendation for continued detention.⁷ Specifically, a government memorandum prepared for the Administrative Review Board, identified three factors that favored continued detention for ISN 220--1) he is a Taliban Fighter; 2) he participated in military operations against the coalition; and 3) he is committed to

⁶ Mr. Abdullah Saleh Ati Ai Ajmi, ISN #220, is represented by counsel in habeas litigation. He represents one of the 35 detainees who refused to participate in the CSRT process but whose Full CSRT Return was obtained by his attorney under court order in the *habeas* litigation.

⁷ “The preponderance of the information presented to the ARB supports [REDACTED]...” ISN 220.

Jihad.⁸ Moreover, the ARB primarily relied upon two factual bases for its conclusion that ISN 220 was committed to Jihad:

1. “[ISN 220] went AWOL [from the Kuwaiti military] because he wanted to participate in the jihad in Afghanistan but could not get leave from the military.”⁹
2. “In Aug 2004, [ISN 220] wanted to make sure that when the case goes before the Tribunal, they know that he is a Jihadist, an enemy combatant, **and that he will kill as many Americans as he possibly can.**” (Emphasis added).¹⁰

Furthermore, the ARB found ISN 220’s behavior while detained as “**aggressive and non-compliant.**”¹¹ This conduct resulted in ISN 220 being held in Guantanamo’s disciplinary block throughout his entire stay. Consequently, the ARB concluded that he should continue to be detained at Guantanamo.

3. West Point’s Conclusions of the ISN 220 Report Found ISN 220 to be in the Highest Level of Dangerousness

In 2007, the Pentagon commissioned West Point to produce a report responsive to The Seton Hall Center for Policy and Research’s first report. The West Point report, issued under the aegis of its Combating Terrorism Center (CTC), was designed to address what the CTC authors believed to be the most problematic portion of the Seton Hall Center for Policy and Research report -- that portion which, relying upon the government’s own data, stated that 55% of the detainees had not been accused of engaging in a single hostile act against the United States or allied forces. The CTC report created four levels of dangerousness based upon several factors identified by the authors. The CTC dangerousness categories were intended to aid the Department of Defense in evaluating the detainees. Employing its elaborate categorization scheme, the CTC concluded that all of the detainees but six (1.16%) should be considered dangerous.

West Point’s highest classification of dangerousness is Level 1, where the detainee is a demonstrated threat as an enemy combatant. This assessment is grounded in detainee conduct involving participation or preparation in direct hostilities against the United States.¹² Under this rubric, ISN 220’s purported pre-detention conduct satisfied West Point’s Level 1 classification.

Under Level 1, “demonstrated threat” category, West Point proffers four variables, one of which must be attributable to a detainee to fulfill the status of this highest category. The variables are “hostilities,” “fighter,” “training camps,” and “combat weapons.” West Point

⁸ Critics have challenged the government’s use of the word Jihad in this context, noting that Jihad can mean many things, many of which are the opposite of criminal conduct. In this case, however, the government defines its use of Jihad in this circumstance.

⁹ ISN 220, CSRT 1452.

¹⁰ Jarrett Brachman, et al., Combating Terrorism Ctr., *An Assessment of 516 Combatant Status Review Tribunal (CSRT) Unclassified Summaries* (2007) (hereinafter “WP Report”).

¹¹ ISN 220, Administrative Review Board (hereinafter “ARB”) 952.

¹² West Point defines hostilities as “definitively supported or waged hostile activities against US/Coalition allies.” WP Report at 5.

enumerated a list of conduct indicating a detainee's demonstrative threat, which qualifies for Level 1:

This included evidence of participation and/or planning of direct hostile acts and supporting hostile acts; performing the role of a fighter in support of a terrorist group; participation in terrorist training camps; training and/or possession of combat weapons – in addition to or beyond small arms – such as RPG's, grenades, sniper rifles, explosives and IED's. . .¹³

ISN 220's conduct satisfied three of the four variables that constitute a "demonstrated threat" in Level 1. Specifically, the report noted that his summary of evidence indicated that he was a Taliban fighter, that he supported or engaged in hostilities, and that he had possessed hand grenades. The report also found that ISN 220's summary of evidence indicated an affiliation with the Taliban which qualified as a 'level two' factor and indicated a potential threat as an enemy combatant. Finally, ISN 220's summary of evidence indicated connections to specific members of al-Qa'ida or other extremist groups which indicated a 'level three' associated threat as an enemy combatant.

The report also concluded that summaries of evidence that contained three or more of the four factors associated with a 'level one' threat made up only 25% of all of the records. Finally, the report found, through statistical analysis, that "evidence of performing the role of a fighter was the most statistically and substantively significant predictor of committing or participating in hostilities against the United States or Coalition Allies."

4. ISN 220's Assessment as Compared to All Other Guantanamo Detainees

While ISN 220 ended up being released, other detainees, whose CSRT evaluations contained less damaging evidence and fewer instances of dangerousness than ISN 220, were not released. Take, for instance, Dawd Gul – ISN 530, who received a CSRT review on July 29, 2004. The CSRT determined Gul to be an enemy combatant. The following is the entire unclassified summary of evidence for Gul:

- a. Detainee is associated with the Taliban
 - 1) The detainee indicates that he was conscripted into the Taliban.
- b. Detainee engaged in hostilities against the US or its coalition partners.
 - 1) The detainee admits he was a cook's assistant for Taliban forces in Narim, Afghanistan under the command of Haji Mullah Baki.
 - 2) Detainee fled from Narim to Kabul during the Northern Alliance attack and surrendered to the Northern Alliance.²⁶

All declassified information supports the conclusion that this detainee remains at Guantanamo Bay, even now, three years after the release of ISN 220.

¹³ *Id.* at 10.

The Tribunal's only evidence for Dawd Gul's detainment was that he "indicate[d] that he was conscripted into the Taliban;" "admit[ted] he was a cook's assistant for Taliban forces in Narim;" and "fled from Narim to Kabul during the Northern Alliance attack and surrendered to the Northern Alliance."¹⁴ Furthermore, it is uncertain whether Dawd Gul ever had a hearing by the ARB. As of now, because of the secrecy of the Department of Defense, it is unknown whether Dawd Gul remains in detention at Guantanamo.

5. Government Intelligence

The government never publicly offered its justification for releasing ISN 220. Did the government simply ignore not only its intelligence but also its own conclusion that ISN 220 presented the highest threat level? If so, such a decision signals the possibility that the government doubted its own intelligence regarding ISN 220. If this is the case, it raises the spectre that the evidence on the many other Guantanamo detainees is also unreliable, and that the government knows it. Such an earth-shattering claim, if true, would shake the very foundations of the government's intelligence.

Or perhaps the government simply believed its evidence to be insufficient, the assigned threat level to be therefore incorrect, and continued retention of ISN 220 in Guantanamo to be wrong.

It could be that the U.S. government released ISN 220 pursuant to a "diplomatic arrangement"¹⁵ with ISN 220's host country—Kuwait. If the government was confident in the intelligence it had gathered about ISN 220, his release, if by diplomatic channels, requires a thorough reconsideration of the processes by which diplomatic releases are granted. If the government was not confident in the intelligence it had gathered about ISN 220, it raises other questions related to his CSRT and ARB determinations.

No matter what the reason for ISN 220's release, the outcome undermines any confidence in the system by which the government determines who shall be released, and who deserves apparently indefinite detention.

Conclusion

The United States is unjustly imprisoning many detainees against whom there is little if any credible evidence that they were enemy combatants, even while it releases detainees who may present real danger to its citizens. Courts and lawyers continue to be excluded from the processes the govern Guantanamo and neither the courts nor the lawyers had any role in government's decision to release ISN 220.

The Department of Defense and members of the Executive Branch have repeatedly defended Guantanamo as an essential portal for intelligence gathering and a stopgap in protecting our national security from those they claimed were unquestionably dangerous. But we know that even while the government releases people whom the government claims are intending to kill Americans, Guantanamo even now holds hundreds of people whose detention is

¹⁴ CSRT, 452, ISN 530.

¹⁵ "Ex-Guantanamo Detainee Joined Iraq Suicide Attack," *The Washington Post*, May 8, 2008.

unwarranted. The processes for evaluating Guantanamo detention fails completely with respect to both ends – intelligence gathering and protecting the United States' national interests and citizenry.

APPENDIX 1

Former Guantanamo Detainees who have returned to the fight:

Our reports indicate that at least 30 former GTMO detainees have taken part in anti-coalition militant activities after leaving U.S. detention. Some have subsequently been killed in combat in Afghanistan.

These former detainees successfully lied to US officials, sometimes for over three years. Many detainees later identified as having returned to fight against the U.S. with terrorists falsely claimed to be farmers, truck drivers, cooks, small-scale merchants, or low-level combatants.

Other common cover stories include going to Afghanistan to buy medicines, to teach the Koran, or to find a wife. Many of these stories appear so often, and are subsequently proven false that we can only conclude they are part of their terrorist training.

Although the US government does not generally track ex-GTMO detainees after repatriation or resettlement, we are aware of dozens of cases where they have returned to militant activities, participated in anti-US propaganda or other activities through intelligence gathering and media reports. (Examples: Mehsud suicide bombing in Pakistan; Tipton Three and the Road to Guantanamo; Uighurs in Albania)

The following seven former detainees are a few examples of the 30; each returned to combat against the US and its allies after being released from Guantanamo.

Mohamed Yusif Yaqub AKA Mullah Shazada:

After his release from GTMO on May 8, 2003, Shazada assumed control of Taliban operations in Southern Afghanistan. In this role, his activities reportedly included the organization and execution of a jailbreak in Kandahar, and a nearly successful capture of the border town of Spin Boldak. Shazada was killed on May 7, 2004 while fighting against US forces. At the time of his release, the US had no indication that he was a member of any terrorist organization or posed a risk to US or allied interests.

Abdullah Mehsud:

Mehsud was captured in northern Afghanistan in late 2001 and held until March of 2004. After his release he went back to the fight, becoming a militant leader within the Mehsud tribe in southern Waziristan. We have since discovered that he had been associated with the Taliban since his teen years and has been described as an al Qaida-linked facilitator. In mid-October 2004, Mehsud directed the kidnapping of two Chinese engineers in Pakistan. During rescue operations by Pakistani forces, a kidnapper shot one of the hostages. Five of the kidnappers were killed. Mehsud was not among them. In July 2007, Mehsud carried out a suicide bombing as Pakistani Police closed in on his position. Over 1,000 people are reported to have attended his funeral services.

Maulavi Abdul Ghaffar:

After being captured in early 2002 and held at GTMO for eight months, Ghaffar reportedly became the Taliban's regional commander in Uruzgan and Helmand provinces, carrying out attacks on US and Afghan forces. On September 25, 2004, while planning an attack against Afghan police, Ghaffar and two of his men were killed in a raid by Afghan security forces.

Mohammed Ismail:

Ismail was released from GTMO in 2004. During a press interview after his release, he described the Americans saying, "they gave me a good time in Cuba. They were very nice to me, giving me English lessons." He concluded his interview saying he would have to find work once he finished visiting all his relatives. He was recaptured four months later in May 2004, participating in an attack on US forces near Kandahar. At the time of his recapture, Ismail carried a letter confirming his status as a Taliban member in good standing.

Abdul Rahman Noor:

Noor was released in July of 2003, and has since participated in fighting against US forces near Kandahar. After his release, Noor was identified as the person in an October 7, 2001, video interview with al-Jazeera TV network, wherein he is identified as the "deputy defense minister of the Taliban." In this interview, he described the defensive position of the mujahideen and claimed they had recently downed an airplane.

Mohammed Nayim Farouq:

After his release from US custody in July 2003, Farouq quickly renewed his association with Taliban and al-Qaida members and has since become re-involved in anti-Coalition militant activity.

Ruslan Odizhev:

Killed by Russian forces June 2007, shot along with another man in Nalchik, the capital of the tiny North Caucasus republic of Kabardino-Balkaria. Odizhev, born in 1973, was included in a report earlier this year by the New York-based Human Rights Watch on the alleged abuse in Russia of seven former inmates of the Guantanamo Bay prison after Washington handed them back to Moscow in 2004.

As the facts surrounding the ex-GTMO detainees indicate, there is an implied future risk to US and allied interests with every detainee who is released or transferred.

APPENDIX 2

Combatant Status Review Board

TO: Personal Representative

FROM: Recorder

Subject: Summary of Evidence for Combatant Status Review Tribunal – AL AJMI, Abdallah Salih Ali

1. Under the provisions of the Department of the Navy Memorandum, dated ^{29 JUL 03 412} ~~16 July 2004~~, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base Cuba*, a Tribunal has been appointed to review the detainee's designation as an enemy combatant.

2. An enemy combatant has been defined as "an individual who was part of or supporting the Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."

3. The United States Government has previously determined that the detainee is an enemy combatant. This determination is based on information possessed by the United States that indicates that he was a fighter for the Taliban and engaged in hostilities against the United States or its coalition partners.

a. The detainee is a Taliban fighter:

1. The detainee went AWOL from the Kuwaiti military in order to travel to Afghanistan to participate in the Jihad.
2. The detainee was issued an AK-47, ammunition and hand grenades by the Taliban.

b. The detainee participated in military operations against the coalition.

1. The detainee admitted he was in Afghanistan fighting with the Taliban in the Bagram area.
 2. The detainee was placed in a defensive position by the Taliban in order to block the Northern Alliance.
 3. The detainee admitted spending eight months on the front line at the Aiubi Center, AF.
 4. The detainee admitted engaging in two or three fire fights with the Northern Alliance.
 5. The detainee retreated to the Tora Bora region of AF and was later captured as he attempted to escape to Pakistan.
4. The detainee has the opportunity to contest his determination as an enemy combatant. The Tribunal will endeavor to arrange for the presence of any reasonably available witnesses or evidence that the detainee desires to call or introduce to prove that he is not an enemy combatant. The Tribunal President will determine the reasonable availability of evidence or witnesses.

000237
EXHIBIT B1

APPENDIX 3

UNCLASSIFIED

Department of Defense
Office for the Administrative Review of the Detention of Enemy
Combatants at US Naval Base Guantanamo Bay, Cuba

From: Presiding Officer
To: AL AJMI, ABDALLAH SALIH ALI
Via: Assisting Military Officer
SUBJECT: UNCLASSIFIED SUMMARY OF EVIDENCE FOR ADMINISTRATIVE
REVIEW BOARD IN THE CASE OF AL AJMI, ABDALLAH SALIH ALI

1. An Administrative Review Board will be convened to review your case to determine if your continued detention is necessary.

2. The Administrative Review Board will conduct a comprehensive review of all reasonably available and relevant information regarding your case. At the conclusion of this review the Board will make a recommendation to: (1) release you to your home state or to a third state; (2) transfer you to your home state, or a third state, with conditions agreed upon by the United States and your home state, or the third state; or (3) continue your detention under United States control.

3. The following primary factors favor continued detention:

A. Al Ajmi is a Taliban fighter:

1. Al Ajmi went AWOL from the Kuwaiti military in order to travel to Afghanistan to participate in the Jihad.

2. Al Ajmi was issued an AK-47, ammunition and hand grenades by the Taliban.

B. Al Ajmi participated in military operations against the coalition.

1. Al Ajmi admitted he was in Afghanistan fighting with the Taliban in the Bagram area.

2. Al Ajmi was placed in a defensive position by the Taliban in order to block the Northern Alliance.

3. Al Ajmi admitted spending eight months on the front line at the Aiubi Center, Afghanistan.

4. Al Ajmi admitted engaging in two or three fire fights with the Northern Alliance. **EXHIBIT DMO- I**

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5. Al Ajmi retreated to the Tora Bora region of Afghanistan and was later captured as he attempted to escape to Pakistan.

C. Al Ajmi is committed to jihad.

1. Al Ajmi went AWOL because he wanted to participate in the jihad in Afghanistan but could not get leave from the military.

2. In Aug 2004, Al Ajmi wanted to make sure that when the case goes before the Tribunal, they know that he now is a Jihadist, an enemy combatant, and that he will kill as many Americans as he possibly can.

D. Upon arrival at GTMO, Al Ajmi has been constantly in trouble. Al Ajmi's overall behavior has been aggressive and non-compliant, and he has resided in GTMO's disciplinary blocks throughout his detention.

E. Based upon a review of recommendations from U.S. agencies and classified and unclassified documents, Al Ajmi is regarded as a continued threat to the United States and its Allies.

4. The following primary factors favor release or transfer:

No information available.

5. You will be afforded a meaningful opportunity to be heard and to present information to the Board; this includes an opportunity to be physically present at the proceeding. The Assisting Military Officer (AMO) will assist you in reviewing all relevant and reasonably available unclassified information regarding your case. The AMO is not an advocate for or against continued detention, nor may the AMO form a confidential relationship with you or represent you in any other matter.

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~~SECRET//NOFORN~~(U) CLASSIFIED RECORD OF PROCEEDINGS AND BASIS FOR ADMINISTRATIVE REVIEW BOARD DECISION FOR ISN 220**1. (U) Introduction**

(U) The Administrative Review Board (ARB) determined ISN 220 [REDACTED]. In reaching this determination, the ARB considered both classified and unclassified information. The following is an account of the proceedings and the factors the ARB used in making its determination.

2. (U) Synopsis of Proceedings

(U) The ARB was convened and began its proceedings with the Enemy Combatant (EC) present. The Designated Military Officer (DMO) presented the unclassified summary in written form followed with an oral summary of the unclassified primary factors to retain the EC and the primary factors for release. The Assisting Military Officer (AMO) presented the Enemy Combatant Notification as exhibit EC-A and the Enemy Combatant Election Form indicating the EC elected to participate, documented as exhibit EC-B. The AMO commented that the EC protested everything in the unclassified summary and wants to change all of his previous testimony. The EC addressed each item on the unclassified summary, followed by the ARB asking questions concerning the EC's testimony. This dialogue is contained in the Summary of Enemy Combatant Testimony. The unclassified portion of the proceeding was adjourned. The ARB moved to the classified portion of the session and the DMO presented the classified summary. The ARB members had no questions and the session was closed for deliberation.

3. (U) Primary Documents, Assessments, Testimony, and other Considerations by the Administrative Review Board

(U) The ARB considered all relevant information and primary factors in the exhibits presented as EC-B, DMO-1 through DMO-17, and the testimony of the EC during the ARB session.

(U) During the unclassified portion of the ARB, the EC claimed all the statements in the unclassified summary were untrue. He then attempted to offer an explanation for each item as documented in the Summary of Enemy Combatant Testimony. The ARB considers that the EC brought no substantial evidence in his testimony to refute the established documentation of various agencies; evidence he previously admitted to.

(S/NF) [REDACTED]

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ISN 220
Enclosure (4)
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~~SECRET//NOFORN~~

(U) The following assessments considered by the ARB are summarized as follows:

(S/NF) [REDACTED]

(S/NF) [REDACTED]

(FOUO/LES) [REDACTED]

4. (U) Discussion of the primary factors (including intelligence value and law enforcement value of the Enemy Combatant).

(U) The preponderance of the information presented to the ARB supports [REDACTED]. The ARB considered the following key indicators from Joint Task Force Guantanamo (JTF-GTMO), DASD-DA, CIA, FBI and other agencies in the decision to assess the EC [REDACTED] and in its recommendation [REDACTED].

a. (S/NF) [REDACTED]

b. (S/NF) [REDACTED]

c. (S/NF) [REDACTED]

d. (S/NF) [REDACTED]

e. (S/NF) [REDACTED]

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~~SECRET/NOFORN~~

f. (S/NF) [REDACTED]

g. (S/NF) [REDACTED]

5. (U) Considerations by the Administrative Review Board on Enemy Combatant's requests for witness statements and home country statements provided through the United States

(U) The EC is a citizen of Kuwait. No home country statements were provided. Statements were provided by the EC's lawyer and family members and are included as Enclosure (7).

6. (U) Consultations with the Administrative Review Board Legal Advisor

(U) There was no legal consultation prior to or during the ARB session.

7. (U) Conclusions and Recommendation of the Administrative Review Board

(U) Upon careful review of all the information presented, the ARB makes the following determination and recommendation:

(U) [REDACTED]

(U) [REDACTED]

(U) [REDACTED]

8. (U) Dissenting Board Member's report

(U) There were no dissenting members in the decision.

Respectfully submitted,

[REDACTED]

Captain, U.S. Navy
Presiding Officer

~~SECRET/NOFORN~~

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Enclosure (4)
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APPENDIX 4

UNCLASSIFIED

Combatant Status Review Board

TO: Personal Representative

FROM: Recorder

Subject: Summary of Evidence for Combatant Status Review Tribunal – Gul, Dawd

1. Under the provisions of the Department of the Navy Memorandum, dated 29 July 2004, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base Cuba, a Tribunal has been appointed to review the detainee's designation as an enemy combatant.

2. An enemy combatant has been defined as "an individual who was part of or supporting the Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."

3. The United States Government has previously determined that the detainee is an enemy combatant. This determination is based on information possessed by the United States that indicates that he associated with the Taliban and engaged in hostilities against the United States or its coalition partners.

a. Detainee is associated with the Taliban.

1. The detainee indicates that he was conscripted into the Taliban.

b. Detainee engaged in hostilities against the US or its coalition partners.

1. The detainee admits he was a cook's assistant for Taliban forces in Narim, Afghanistan under the command of Haji Mullah Baki.

2. Detainee fled from Narim to Kabul during the Northern Alliance attack and surrendered to the Northern Alliance.

4. The detainee has the opportunity to contest his designation as an enemy combatant. The Tribunal will endeavor to arrange for the presence of any reasonably available witnesses or evidence that the detainee desires to call or introduce to prove that he is not an enemy combatant. The Tribunal President will determine the reasonable availability of evidence or witnesses.

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EXHIBIT R-1

REPORT ON GUANTANAMO DETAINEES

A Profile of 517 Detainees through Analysis of Department of Defense Data

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THE GUANTANAMO DETAINEES: THE GOVERNMENT'S STORY

Professor Mark Denbeaux* and Joshua Denbeaux*

An interim report

EXECUTIVE SUMMARY

The media and public fascination with who is detained at Guantanamo and why has been fueled in large measure by the refusal of the Government, on the grounds of national security, to provide much information about the individuals and the charges against them. The information available to date has been anecdotal and erratic, drawn largely from interviews with the few detainees who have been released or from statements or court filings by their attorneys in the pending *habeas corpus* proceedings that the Government has not declared "classified."

This Report is the first effort to provide a more detailed picture of who the Guantanamo detainees are, how they ended up there, and the purported bases for their enemy combatant designation. The data in this Report is based entirely upon the United States Government's own documents.¹ This Report provides a window into the Government's success detaining only those that the President has called "the worst of the worst."

Among the data revealed by this Report:

1. Fifty-five percent (55%) of the detainees are not determined to have committed any hostile acts against the United States or its coalition allies.
2. Only 8% of the detainees were characterized as al Qaeda fighters. Of the remaining detainees, 40% have no definitive connection with al Qaeda at all and 18% have no definitive affiliation with either al Qaeda or the Taliban.
3. The Government has detained numerous persons based on mere affiliations with a large number of groups that in fact, are not on the Department of Homeland Security terrorist watchlist. Moreover, the nexus between such a detainee and such organizations varies considerably. Eight percent are detained because they are deemed "fighters for," 30% considered "members of," a large majority – 60% – are detained merely because they are "associated with" a group or groups the Government asserts are terrorist organizations. For 2% of the prisoners their nexus to any terrorist group is unidentified.
4. Only 5% of the detainees were captured by United States forces. 86% of the detainees were arrested by either Pakistan or the Northern Alliance and turned over to United States custody.

* The authors are counsel for two detainees in Guantanamo.

¹ See, Combatant Status Review Board Letters, Release date January 2005, February 2005, March 2005, April 2005 and the Final Release available at the Seton Hall Law School library, Newark, NJ.

This 86% of the detainees captured by Pakistan or the Northern Alliance were handed over to the United States at a time in which the United States offered large bounties for capture of suspected enemies.

5. Finally, the population of persons deemed not to be enemy combatants – mostly Uighers – are in fact accused of more serious allegations than a great many persons still deemed to be enemy combatants.

INTRODUCTION

The United States Government detains over 500 individuals at Guantanamo Bay as so-called "enemy combatants." In attempting to defend the necessity of the Guantanamo detention camp, the Government has routinely referred this group as "the worst of the worst" of the Government's enemies.² The Government has detained most these individuals for more than four years; only approximately 10 have been charged with any crime related to violations of the laws of war. The rest remain detained based on the Government's own conclusions, without prospect of a trial or judicial hearing. During these lengthy detentions, the Government has had sufficient time for the Government to conclude whether, in fact, these men were enemy combatants and to document its rationale.

On March 28, 2002, in a Department of Defense briefing, Secretary of Defense Donald Rumsfeld said:

As has been the case in previous wars, the country that takes prisoners generally decides that they would prefer them not to go back to the battlefield. They detain those enemy combatants for the duration of the conflict. They do so for the very simple reason, which I would have thought is obvious, namely to keep them from going right back and, in this case, killing more Americans and conducting more terrorist acts.³

The Report concludes, however, that the large majority of detainees never participated in any combat against the United States on a battlefield. Therefore, while setting aside the significant legal and constitutional issues at stake in the Guantanamo litigation presently being considered in the federal courts, this Report merely addresses the factual basis underlying the public representations regarding the status of the Guantanamo detainees.

Part I of this Report describes the sources and limitations of the data analyzed here. Part II describes the "findings" the Government has made. The "findings" in this sense, constitutes the Government's determination that the individual in question is an enemy combatant, which is in turn based on the Government's classifications of terrorist groups, the asserted connection of the individual with the purported terrorist groups, as well as the commission of "hostile acts," if any, that the Government has determined an individual has committed. Part III then examines the evidence, including sources for such evidence, upon which the Government has relied in making these findings. Part IV addresses the continued detention of individuals deemed *not* to be enemy

² The Washington Post, in an article dated October 23, 2002 quoted Secretary Rumsfeld as terming the detainees "the worst of the worst." In an article dated December 22, 2002, the Post quoted Rear Adm. John D. Stufflebeam, Deputy Director of Operations for the Joint Chiefs of Staff, "They are bad guys. They are the worst of the worst, and if let out on the street, they will go back to the proclivity of trying to kill Americans and others." Donald Rumsfeld Holds Defense Department Briefing. (2002, March 28). FDCH Political Transcripts. Retrieved January 10, 2006 from Lexis-Nexis database.

³ Threats and Responses: The Detainees, Some Guantanamo Prisoners Will Be Freed, Rumsfeld Says, (2002, October 23). The New York Times, p 14. Retrieved February 7, 2006 from Lexis-Nexis database.

combatants, comparing the Government's allegations against such persons to similar or more serious allegations against persons still deemed to be "enemy combatants."

I. THE DATA

The data in this Report are based on written determinations the Government has produced for detainees it has designated as enemy combatants.⁴ These written determinations were prepared following military hearings commenced in 2004, called Combatant Status Review Tribunals, designed to ascertain whether a detainee should continue to be classified as an "enemy combatant." The data are obviously limited.⁵ The data are framed in the Government's terms and therefore are no more precise than the Government's categories permit. Finally, the charges are anonymous in the sense that the summaries upon which this interim report relies are not identified by name or ISN for any of the prisoners. It is therefore not possible at this time to determine which summary applies to which prisoner.

Within these limitations, however, the data are very powerful because they set forth the best case for the status of the individuals the Government has processed. The data reviewed are the documents prepared by the Government containing the evidence upon which the Government relied in making its decision that these detainees were enemy combatants. The Report assumes that the information contained in the CSRT Summaries of Evidence is an accurate description of the evidence relied upon by the Government to conclude that each prisoner is an enemy combatant.

Such summaries were filed by the Government against each individual detainee's in advance of the Combatant Status Review Tribunal (CRST) hearing.

⁴The files reviewed are available at the Seton Hall Law School library, Newark, NJ.

⁵There is other data currently being compiled based on different information. Each prisoner at Guantanamo who has had summaries of evidence filed against them has had an internal administrative evaluation of the charges. The process is that a Combatant Status Review Tribunal, or CSRT, has received the charges and considered them. Some of those enemy detainees who are represented by counsel in pending habeas corpus Federal District Courts have received (when so ordered by the Federal District Court Judge) the classified and declassified portion of the CSRT proceedings. The CSRT proceedings are described as CSRT returns. The declassified portion of those CSRT returns are being reviewed and placed into a companion data base.

II. THE GOVERNMENT'S FINDINGS OF ENEMY COMBATANT STATUS

A. Structure of the Government's Findings

As to each detainee, the Government provides what it denominates as a "summary of evidence." Each summary contains the following sentence:

The United States Government has *previously determined* that the detainee is an enemy combatant. This determination is based on information possessed by the United States that indicates that the detainee is....

[Emphasis supplied]

Since the Government had "previously determined" that each detainee at Guantanamo Bay was an enemy combatant before the CSRT hearing, the "summary of evidence" released by the Government is not the Government's *allegations* against each detainee but a summary of the Government's *proofs* upon which the Government found that each detainee, in fact, an enemy combatant.

Each summary of evidence has four numbered paragraphs. The first⁶ and fourth⁷ are jurisdictional. The second⁸ paragraph states the Government's definition of "enemy combatant" for the purpose of the CSRT proceedings.

The third paragraph summarizes the evidence that satisfied the Government that each detainee is an enemy combatant. Paragraph 3(a) is the Government's determination of the detainee relationship with a "defined terrorist organization."⁹ Paragraph 3(b) is the place in which Government's finds that a detainee has or has not committed "hostile acts" against U.S. or coalition forces.

Forty five percent of the time the Government concluded that the detainee committed 3(b) hostile acts against United States or coalition forces. In those cases, there is a paragraph 3(b) ("§3(b)") in the CSRT summary so stating. Fifty five percent of the time, the Government

⁶ Paragraph 1: "Under the provisions of the Department of the Navy Memorandum, dated 29 July 2004, *Implementation of Combatant Status Review Tribunal Procedures for enemy Combatants Detained at Guantanamo Bay Naval Base Cuba*, a Tribunal has been appointed to review the detainee's designation as an enemy combatant."

⁷ Paragraph 4: "The detainee has the opportunity to contest his determination as an enemy combatant. The Tribunal will endeavor to arrange for the presence of any reasonably available witnesses or evidence that the detainee desires to call or introduce to prove that he is not an enemy combatant. The Tribunal President will determine the reasonable availability of evidence or witnesses."

⁸ Paragraph 2: "(A)n Enemy Combatant has been defined as: [A]n individual who was part of *or* supporting the Taliban *or* al Qaeda forces, *or* associated forces that are engaged in hostilities against the United States *or* its coalition partners. This includes any person who committed a belligerent act *or* has directly supported hostilities in aid of enemy forces." [Emphasis supplied]

⁹ Many of the "defined terrorist organizations" referenced in the CSRT summaries of evidence are not considered terrorist organizations by the Department of Homeland Security. See *Infra*.

concluded that the detainee did not commit such an act and omitted the entire ¶3(b) section from the CSRT summary. For these detainees whose CSRT summaries include a finding under ¶3(b), the Government listed its specific findings 'proving' hostile acts in a brief series of sub-paragraphs. Of those CSRT summaries that contain a ¶3(b) "hostile acts" determination, the mean number of sub-paragraphs is two; that is, for the 55% of detainees the Government has found committed ¶3(b) "hostile acts" the Government lists, on average two pieces of evidence. Fewer than 2% of all 517 CSRT summaries contained more than five ¶3(b) sub-paragraphs; while the vast majority contained 1, 2 or 3 such 'proofs' of hostile acts.

B. The Definition of an 'Enemy Combatant'

For the purposes of the Combatant Status Review Tribunal, an "enemy combatant" has been defined as:

[A]n individual who was part of *or* supporting the Taliban *or* al Qaeda forces, *or* associated forces that are engaged in hostilities against the United States *or* its coalition partners. This includes any person who committed a belligerent act *or* has directly supported hostilities in aid of enemy forces.¹⁰

This could be interpreted alternatively as requiring either a combatant be *both* a member of prohibited group *and* engaged in hostilities against the U.S. or coalition forces *or* only that a combatant be anyone *either* a member of prohibited group *or* engaged in hostilities to U.S. or coalition forces. Indeed, under this definition, one could be detained for an undefined level of "support of" groups considered hostile to the United States or its coalition partners.

C. Categories of Evidence Supporting Enemy Combatant Designation

¹⁰ The definition of "enemy combatants" for the purpose of the Guantanamo detainment has evolved over time. January 2002, when the first detainees were sent from Pakistan and Afghanistan to Cuba they were termed, as were the detainees in *Ex Parte Quirin*, (47 F.Supp. 431) "unlawful belligerents." In *Hamdi v. Rumsfeld*, (542 U.S. 507) the Government defined "enemy combatant" far more narrowly as someone who was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan *and* who "engaged in an armed conflict against the United States" the Later, in response to *Rasul v. Bush* (542 U.S. 466), the detainees were called "enemy combatants." (Emphasis supplied)

In February 2004, Secretary Rumsfeld, said, "The circumstances in which individuals are apprehended on the battlefield can be ambiguous, as I'm sure people here can understand. This ambiguity is not only the result of the inevitable disorder of the battlefield; it is an ambiguity created by enemies who violate the laws of war by fighting in civilian clothing, carrying multiple identification documentations, by having three, six, eight, in one case 13 different ... aliases.... Because of this ambiguity, even after enemy combatants are detained, it takes time to check stories, to resolve inconsistencies or, in some cases, even to get the detainee to provide any useful information to help resolve the circumstance."

In an August 13, 2004 News Briefing, Gordon England, Secretary of the Navy and Secretary Rumsfeld's designee for the tribunal process at Guantanamo stated that, "The definition of an enemy combatant is in the implementing order which have been passed out to everyone. But, in short, it means anyone who is part of supporting the Taliban or al Qaeda forces or associated forces engaging in hostilities against the United States or our coalition partners."

The Government divides the evidence against detainees into two sections: a ¶3(a) nexus with prohibited organizations and a ¶3(b) participation in military operations or commission of hostile acts. Paragraph 3 always begins with the allegations that each detainee met all the requirements contained in the definition of paragraph two. More often than not the Government finds that the detainees did not commit the hostile or belligerent acts.

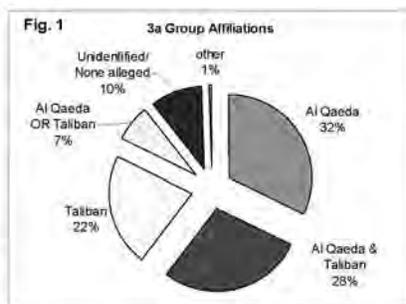
1. ¶3(a): Enemy Combatant because of Nexus with Prohibited Organization

a. Definition of Prohibited Organizations

The data reveals that the Government divides a detainee's enemy combatant status into six distinct categories that describe the terrorist organization with whom the detainee is affiliated. Figure 1 illustrates the breakdown of each group's representation by the data:

1. al Qaeda (32%)
2. al Qaeda & Taliban (28%)
3. Taliban (22%)
4. al Qaeda OR Taliban (7%)
5. Unidentified Affiliation (10%)
6. Other (1%)

The CSRT Summary of Evidence provides no way to determine the difference between "unidentified/none alleged" and "other" and no explanation for why there are separate categories for both "al Qaeda *and* Taliban" and "al Qaeda *or* Taliban."



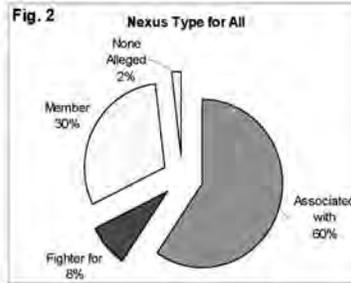
If, after four years of detention, the Government is unable to determine if a detainee is either al Qaeda or Taliban, then it is reasonable to conclude that the detainee is neither. Under this assumption, the data reveals that 40% of the detainees are not affiliated with al Qaeda and 18% percent of the detainees are not affiliated with either al Qaeda or the Taliban.

b. *Nexus with the Identified Organization*

The Government also describes each prisoner's nexus to the respective organization "fighter for," "member of," and "associated with." The data explain that there are three main degrees of connection between the detainee and the organization with which he is connected.¹¹ Detainees are either:

1. "Fighters for"
2. "Members of"
3. "Associated with"

Figure 2 illustrates that of the nexus type for all the prisoners, regardless of the group to which they are "connected," by far the greatest number of prisoners are identified only as being "associated with" one group or another. A much smaller percentage – 30% – is identified as "members of." Only 8% are classified as "fighters for."



The definition of "fighters for" would seem to be obvious, while definitions of "members of" and "associated with" are less clear and could justify a very broad level of attenuation. According to the Government's expert on al Qaeda membership, Evan Kohlman, simply being told that one had been selected as a member would qualify one as a member:

Al-Qaeda leaders could dispatch one of their own — someone who is not top tier... to recruit someone and to tell them, I have been given a mandate to do this on behalf of senior al-Qaeda leaders... even though perhaps this individual has never sworn an official oath and this person has never been to an al-Qaeda training camp, nor have they actually met, say, Osama bin Ladin.¹²

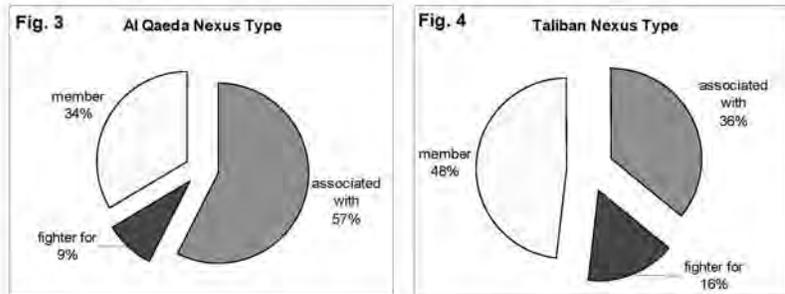
This expansive definition of membership in al Qaeda could thus be applied to anyone who the Government believed ever spoke to an al Qaeda member. Even under this broad framework, the Government concluded that a full 60% of the detainees do not have even that minimum level of contact with an al Qaeda member.

¹¹ While more than 95% of the summaries of the evidence used one of these three categories, approximately 4% used other nexus descriptions. Most notably, 2% used a "supported" descriptor which was re-categorized as "associated with." See Appendix C for a full account of re-categorizations of data.

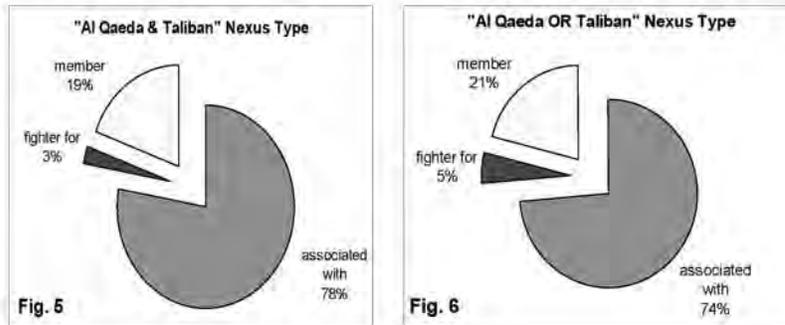
¹² *US vs. Pachir*, Dkt. No., T113.

Membership in the Taliban is different and also not clearly defined. According to the Government, one can be a conscripted (and therefore presumably unwilling) member of the Taliban and still be an enemy combatant.

Figures 3 and 4 compare the nexus between enemy combatants with Al Qaeda and the Taliban. In contrast to the "al Qaeda only" category, the "Taliban only" category shows that a significantly higher percentage of the prisoners are designated "members of" and "fighters for" with a reduced number being "associated with."



Seventy eight percent of those prisoners who are identified as being both "al Qaeda and Taliban" are merely "associated with;" 19% are "members of;" and 3% are "fighters for." (Fig. 5) When the Government cannot specifically identify a detainee as a member of one or the other, al Qaeda or the Taliban, the degree of connection attributed to such detainees appears tenuous. (Fig. 6)



The Government's summary of evidence

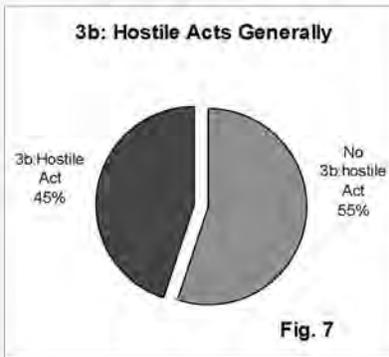
recognizes that more often than not members of the Taliban are not members of al Qaeda. The Government categorizes as stand alone al Qaeda or stand alone Taliban more than 54% of the detainees, and only 28% of the detainees as members of both.

The data provides no explanation for the explicit distinction between those persons identified as being connected to “al Qaeda *and* the Taliban” as opposed to “al Qaeda *or* the Taliban”. [Emphasis supplied]

2. ¶ 3(b): The Government’s Findings on Detainees’ 3(b) Hostile Acts against the United States or Coalition Forces

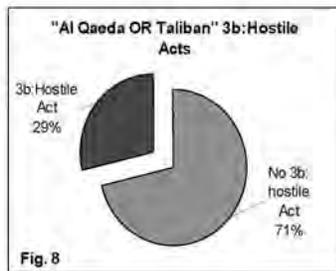
Although the Government’s public position is that these detainees are “the worst of the worst,” *see supra* note 2, the data demonstrates that the Government has already concluded that a majority of those who continue to be detained at Guantanamo have no history of any 3(b) hostile act against the United States or its allies.

According to the Government, fewer than half of the detainees engaged in 3(b) hostile acts against the United States or any members of its coalition. As figure 7 depicts, the Government has concluded that no more than 45% of the detainees have committed some 3(b) hostile act.



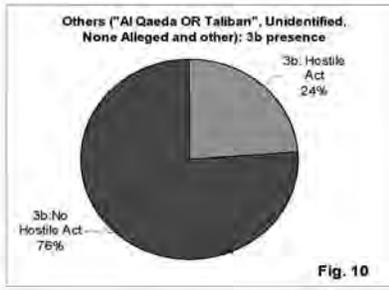
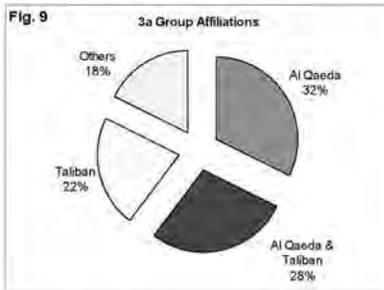
This is true even though the Government's definition of a 3(b) hostile act is not demanding. As an example, the following was the evidence that the Government determined was sufficient to constitute a 3(b) hostile act:

- The detainee participated in military operations against the United States and its coalition partners.
1. The detainee *fled*, along with others, when the United States forces bombed their camp.
 2. The detainee was captured in Pakistan, along with other Uigher fighters.¹³



Cross-analyzing the ¶3(a) and ¶3(b) data, individuals in some groups are less likely to have committed hostile acts than those in others. In the group "al Qaeda or Taliban," for example, 71% of the detainees have not been found to have committed any hostile act. (See Fig. 8)

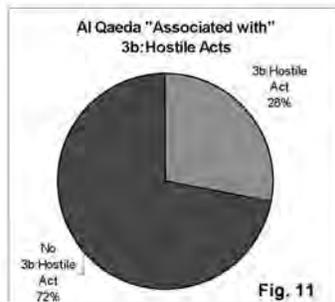
Of the "other" detainees in Figure 9, that is, the 18% whose 3(a) is either "Unidentified", "None alleged", "al Qaeda OR Taliban" or "other," only 24% have been determined to have committed a 3(b) hostile act. (See Fig 10)



¹³ See CSRT Summary of Evidence available at the Seton Hall Law School library, Newark, NJ [Emphasis supplied].

Thus, the less clear the Government's characterization of a detainee's affiliation with a prohibited group is, the less likely the detainee is to have committed a hostile act. This is notable because the percentage of detainees with whom the Government cannot clearly connect with a prohibited group is so large.¹⁴

The same pattern holds true when the degree of connection between the detainee and the affiliated group lessens. Thirty-two percent of the detainees are stand alone al Qaeda. Fifty seven percent of those detainees have a nexus to al Qaeda described as "associated with." Of those 57% whom are merely associated with al Qaeda, 72% of them have not committed 3(b) hostile acts. (See Fig. 3 and 11) Thus, the data illustrates that not only are the majority of the al Qaeda detainees merely "associated with" al Qaeda, but the Government concludes that a substantial percentage of those detainees did not commit 3(b) hostile acts.



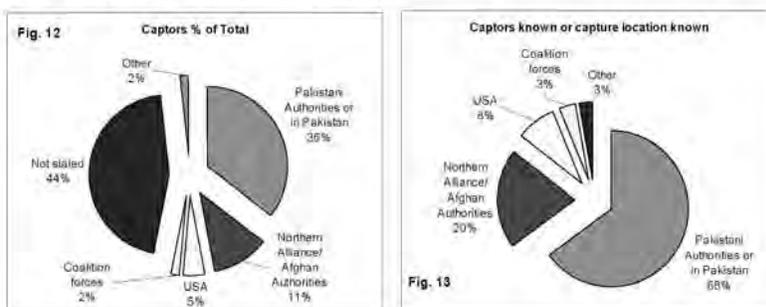
¹⁴ See Fig 1: "3(a) Group Affiliations" supra, p. 7: the sum of "al Qaeda OR Taliban" (7%); Unidentified/"None alleged" (10%); and "Other" (1%) equals 18%. This is the 18% that is represented as "Others" in Fig. 9.

III. THE GOVERNMENT'S EVIDENCE THAT THE DETAINEES ARE ENEMY COMBATANTS

The data permit at least some answers to two questions: How was the evidence of their enemy combatant status obtained? What evidence does the Government have as to the detainees commission of 3(b) violations?

A. Sources of Detainees and Reliability of the Information about Them

Figure 12 explains who captured the detainees. Pakistan was the source of at least 36% of all detainees, and the Afghanistan Northern Alliance was the source of at least 11% more. The pervasiveness of Pakistani involvement is made clear in Figure 13 which shows that of the 56% whose captor is identified, 66% of those detainees were captured by Pakistani Authorities or in Pakistan. Thus, if 66% of the unknown 44% were derived from Pakistan, the total captured in Pakistan or by Pakistani Authorities is fully 66%.



Since the Government presumably knows which detainees were captured by United States forces, it is safe to assume that those whose providence is not known were captured by some third party. The conclusion to be drawn from the Government's evidence is that 93% of the detainees were not apprehended by the United States.¹⁵ (See Fig. 12) Hopefully, in assessing the enemy combatant status of such detainees, the Government appropriately addressed the reliability of information provided by those turning over detainees although the data provides no assurances that any proper safeguards against mistaken identification existed or were followed.

¹⁵ Presuming a fixed 7% of detainees were captured by US or coalition forces, the remaining detainees whose captor is unknown can be extrapolated to 68% "Pakistani Authorities or in Pakistan", 21% "Northern Alliance/Afghan Authorities", and 4% "other."

The United States promised (and apparently paid) large sums of money for the capture of persons identified as enemy combatants in Afghanistan and Pakistan. One representative flyer, distributed in Afghanistan, states:

Get wealth and power beyond your dreams....You can receive millions of dollars helping the anti-Taliban forces catch al-Qaida and Taliban murders. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people.¹⁶

Bounty hunters or reward-seekers handed people over to American or Northern Alliance soldiers in the field, often soon after disappearing;¹⁷ as a result, there was little opportunity on the field to verify the story of an individual who presented the detainee in response to the bounty award. Where that story constitutes the sole basis for an individual's detention in Guantanamo, there would be little ability either for the Government to corroborate or a detainee to refute such an allegation.

As shall be seen in consideration of the Uighers, the Government has found detainees to be enemy combatants based upon the information provided by the bounty hunters. As to the Uighers, at least, there is no doubt that bounties were paid for the capture and detainment of individuals who were not enemy combatants.¹⁸ The Uigher have yet to be released.

The evidence satisfactory to the Government for some of the detainees is formidable. For this group, the Government's evidence portrays a detainee as a powerful, dangerous and knowledgeable man who enjoyed positions of considerable power within the prohibited organizations. The evidence against them is concrete and plausible. The evidence provided for most of the detainees, however, is far less impressive.

The summaries of evidence against a small number of detainees indicate that some of the prisoners played important roles in al Qaeda. This evidence, on its face, seems reliable. For instance, the Government found that 11% of the detainees met with Bin Laden. Other examples include:

- A detainee who is alleged to have driven a rocket launcher to combat against the Northern Alliance
- A detainee who held a high ranking position in the Taliban and who tortured,

¹⁶ See *Infra.*, Appendix A.

¹⁷ See, e.g. Mahler, Jonathan, The Bush Administration versus Salim Hamdan (2006, Jan. 8), *New York Times*, p. 44.

¹⁸ White, Josh and Robin Wright, Detainee Cleared for Release Is in Limbo at Guantanamo, (2005, December 15), *Washington Post*, p. A09.

- maimed, and murdered Afghani nationals who were being held in Taliban jails
- A detainee who was present and participated in al Qaeda meetings discussing the September 11th attacks before they occurred.
- A detainee who produced al Qaeda propaganda, including the video commemorating the USS Cole attack.
- A detainee who was a senior al Qaeda lieutenant.
- 11 detainees who swore an oath to Osama Bin Laden.

The previous examples are atypical of the CSRT summaries. There are only a very few individuals who are actively engaged in any activities for al Qaeda and for the Taliban.

The 11 detainees who swore an oath to Osama Bin Laden are only a tiny fraction of the total number of the detainees at Guantanamo.

The Taliban is a different story.

The Taliban was a religious state which demanded the most extreme compliance of all of its citizens and as such controlled all aspects of their lives through pervasive Governmental and religious operation.¹⁹ Under Mullah Omar, there were 11 governors and various ministers who dealt with such various issues as permission for journalists to travel, over-seeing the dealings between the Taliban and NGOs for UN aid projects and the like.²⁰ By 1997, all international "aid projects had to receive clearance not just from the relevant ministry, but also from the ministries of Interior, Public Health, Police, and the Department of the Promotion of Virtue and Prevention of Vice."²¹ There was a Health Minister, Governor of the State Bank, an Attorney General, an Education Minister, and an Anti-Drug Control Force.²² Each city had a mayor, chief of police, and senior administrators.²³

None of these individuals are at Guantanamo Bay.

The Taliban detainees seem to be people not responsible for actually running the country. Many of the detainees held at Guantanamo were involved with the Taliban unwillingly as conscripts or otherwise.

General conscription was the rule, not the exception, in Taliban controlled Afghanistan.²⁴ "All the warlords had used boy soldiers, some as young as 12 years old, and many were orphans with no hope of having a family, or education, or a job, except soldiering."²⁵

¹⁹ See generally Rashid, A. (2001). *Taliban*. Yale University Press.

²⁰ See *Id.*, p. 99.

²¹ See *Id.*, p. 114.

²² See generally Rashid, A. (2001). *Taliban*. Yale University Press.

²³ *Id.*

²⁴ See *Id.*, p100.

²⁵ See *Id.*, p109.

Just as strong evidence proves much, weak evidence suggests more. Examples of evidence that the Government cited as proof that the detainees were enemy combatants includes the following:

- Associations with unnamed and unidentified individuals and/or organizations;
- Associations with organizations, the members of which would be allowed into the United States by the Department of Homeland Security;
- Possession of rifles;
- Use of a guest house;
- Possession of Casio watches; and
- Wearing of olive drab clothing.

The following is an example of the entire record for a detainee who was conscripted into the Taliban:

- a. Detainee is associated with the Taliban
 - i. The detainee indicates that he was conscripted into the Taliban.
- b. Detainee engaged in hostilities against the US or its coalition partners.
 - i. The detainee admits he was a cook's assistant for Taliban forces in Narim, Afghanistan under the command of Haji Mullah Baki.
 - ii. Detainee fled from Narim to Kabul during the Northern Alliance attack and surrendered to the Northern Alliance.²⁶

All declassified information supports the conclusion that this detainee remains at Guantanamo Bay to this date.

Other detainees have been classified as enemy combatants because of their association with unnamed individuals. A typical example of such evidence is the following:

The detainee is associated with forces that are engaged in hostilities against the United States and its coalition partners:

- 1) The detainee voluntarily traveled from Saudi Arabia to Afghanistan in November 2001.
- 2) The detainee traveled and shared hotel rooms with an Afghani.
- 3) The Afghani the detainee traveled with is a member of the Taliban Government.
- 4) The detainee was captured on 10 December 2001 on the

²⁶ See CSRT Summary of Evidence available at the Seton Hall Law School library, Newark, NJ.

border of Pakistan and Afghanistan.²⁷

Some of these detainees were found to be enemy combatants based on their association with identified organizations which themselves are not proscribed by the Department of Homeland Security from entering the United States. In analyzing the charges against the detainees, the Combatant Status Review Board identified 72 organizations that are used to evidence links between the detainees and al Qaeda or the Taliban.

These 72 organizations were compared to the list of Foreign Terrorist Organizations in the Terrorist Organization Reference Guide of the U.S. Department of Homeland Security, U.S. Customs and Border Protection and the Office of Border Patrol. This Reference Guide was published in January of 2004 which was the same year in which the charges were filed against the detainees.²⁸ According to the Reference Guide, the purpose of the list is "to provide the Field with a 'Who's Who' in terrorism."²⁹ Those 74 foreign terrorist organizations are classified in two groups: 36 "designated foreign terrorist organizations," as designated by the Secretary of State, and 38 "other terrorist groups," compiled from other sources.

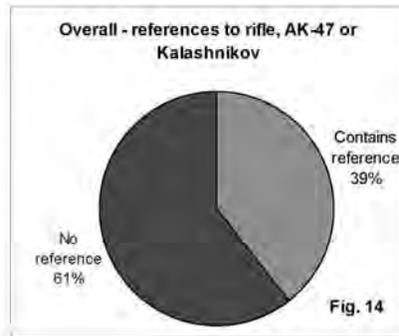
Comparing the Combatant Status Review Board's list of 72 organizations that evidence the detainee's link to al Qaeda and/or the Taliban, only 22% of those organizations are included in the Terrorist Organization Reference Guide. Further, the Reference Guide describes each organization, quantifies its strength, locations or areas of operation, and sources of external aid. Based on these descriptions of the organizations, only 11% of all organizations listed by the Combatant Status Review Board as proof of links to al Qaeda or the Taliban are identified as having any links to Qaeda or the Taliban in the Terrorist Organization Reference Guide.

Only 8% of the organizations identified by the Combatant Status Review Board even target U.S. interests abroad.

²⁷ See CSRT Summary of Evidence available at the Seton Hall Law School library, Newark, NJ.

²⁸ Terrorist Organization Reference Guide. Retrieved February 6, 2006 from <http://www.mipt.org/pdf/TerroristOrganizationReferenceGuide.pdf>

²⁹ It continues: "The main players and organizations are identified so the CBP [Customs and Border Protection] Officer and BP [Border Protection] Agent can associate what terror groups are from what countries, in order to better screen and identify potential terrorists." Unlike the many other compilations of terrorist organizations published by the Government since 9/11, including the list of the Office of Foreign Asset Control (OFAC) used to monitor or block international funds transfers to suspected and known terrorist organizations and their supporters, the Terrorist Organization Reference Guide identifies the 74 "main players and organizations" in terrorism.



The evidence against 39% of the detainees rests in part upon the possession of a Kalashnikov rifle.

Possession of a rifle in Afghanistan does not distinguish a peaceful civilian from any terrorist. The Kalashnikov culture permeates both Afghanistan and Pakistan.³⁰

Our economy has been suffering and continues to suffer because of the situation in Afghanistan. Rampant terrorism as well as the culture of drugs and guns – that we call the “Kalashnikov Culture” – tearing apart our social and political fabric – was also a direct legacy of the protracted conflict in Afghanistan.³¹

This is recognized not merely by the Pakistani Foreign minister but by American college students touring Afghanistan. “There is a big Kalashnikov-rifle culture in Afghanistan: ...I was somewhat bemused when I walked into a restaurant this afternoon to find Kalashnikovs hanging in the place of coats on the rack near the entrance.”³²

³⁰ Afghanistan is also the world's center for unaccounted weapons; thus, there is no exact count on the number of weapons in circulation. Arms experts have estimated that there are at least 10 million small arms in the country. The arms flow has included Soviet weapons funneled into the country during the 1979 invasion, arms from Pakistan supplied to the Taliban, and arms from Tajikistan that equipped the Northern Alliance. NEA's Statements on Afghanistan and the Taliban. Retrieved February 6, 2006 from <http://nealun.org/programs/schoolsafety/september11/materials/unneapos.htm>

³¹ Pakistan Mission to the United Nations, New York. Retrieved February 6, 2006 from <http://www.un.int/pakistan/12011220.html>.

³² Hall, B. (2002 Nov.-Dec.) Letters from Afghanistan. *Duke Magazine*. Retrieved February 6, 2006, from www.dukemagazine.duke.edu/dukemag/issues/111202/afghan1.html.

The Government treats the presence at a “guest house” as evidence of being an enemy combatant. The evidence against 27% of the detainees included their residences while traveling through Afghanistan and Pakistan.



Stopping at such facilities is common for all people traveling in the area. In the region, the term guest house refers simply to a form of travel accommodation.³³ Numerous travel and tourism agencies, such as Worldview Tours, South Travels, and Adventure Travel include overnight stays at local guest houses and rest houses on their tour package itineraries and lists of accommodations, which are marketed to western tourists.³⁴ Guesthouses and rest houses typically offer budget rates and breakfast. American travel agents advise American tourists to expect to stay in guest houses in either country.

In a handful of cases the detainee’s possession of a Casio watch or the wearing olive drab clothing is cited as evidence that the detainee is an enemy combatant. No basis is given to explain why such evidence makes the detainee an enemy combatant.

³³ A June 7, 2005 article in *Business Week* referenced an Afghani woman named Malboba who hopes to open a chain of women’s guest houses, gaining assistance from participation in a program sponsored by the Business Council for Peace. In an article published September 25, 2005, *New York Times* travel reporter, Paul Tough, described the guest houses that he and his girlfriend stayed in while he explored the budding tourism industry in Afghanistan. Pernan, Staci. *Aiding Afghanistan with Style*. (2005, June 7). *Business Week Online*. Retrieved January 11, 2006 from http://www.businessweek.com/smallbiz/content/jun2005/sb2005067_5111_sb013.htm. Tough, Paul. *The Reawakening*. (2005, September 25). *New York Times*.

³⁴ See, *Services Along the Silk Road: Accommodations*. Retrieved January 10, 2006, from <http://worldviewtours.com/service/accommodation.htm>; *Adventure Travel Trek and Tour Operators*. Retrieved January 10, 2006 from <http://www.adventure-touroperator.com/main.html>; *Adventure Holiday in Pakistan: Budget Hotels and Guesthouses*. Retrieved January 10, 2006, from <http://www.southtravels.com/asia/pakistan/index.html>

IV. CONTINUED DETENTION OF NON-COMBATANTS

The most well recognized group of individuals who were held to be enemy combatants and for whom summaries of evidence are available are the Uighers³⁵. These individuals are now recognized to be Chinese Muslims who fled persecution in China to neighboring countries. The detainees then fled to Pakistan when Afghanistan came under attack by the United States after September 11, 2001. The Uighers were arrested in Pakistan and turned over to the United States.

At least two dozen Uighurs found in Afghanistan and Pakistan has been detained in Guantanamo Bay, Cuba. The Government originally determined that these men were enemy combatants, just as the Government so determined for all of the other detainees. The Government has now decided that many of the Uighur detainees in Guantanamo Bay are not enemy combatants and should no longer be detained. They have not yet been released.

The Government has publicly conceded that many of the Uighers were wrongly found to be enemy combatants. The question is how many more of the detainees were wrongly found to be enemy combatants. The evidence that satisfied the Government that the Uighers were enemy combatants parallels the evidence against the other detainees --but the evidence against the Uighers is actually sometimes stronger.

The Uigher evidence parallels the evidence against the other detainees in that they were:

1. Muslims,
2. in Afghanistan,
3. associated with unidentified individuals and/or groups
4. possessed Kalishnikov rifles
5. stayed in guest houses
6. captured in Pakistan
7. by bounty hunters.

If such evidence is deemed insufficient to detain these persons as enemy combatants, the data analyzed by this Report would suggest that many other detainees should likewise not be classified as enemy combatants.

CONCLUSION

³⁵ Uighurs, a Turkic ethnic minority of 8 to 12 million people primarily located in the northwestern region of China and in some parts of Kyrgyzstan and Kazakhstan, face political and religious oppression at the hands of the Chinese Government. The Congressional Human Rights Caucus of the United States House of Representatives has received several briefings on these issues, including the information that the People's Republic of China "continues to brutally suppress any peaceful political, religious, and cultural activities of Uighurs, and enforce a birth control policy that compels minority Uighur women to undergo forced abortions and sterilizations." (United States Commission on International Religious Freedom, World Uighur Network) In response to oppression by the Chinese Government, many Uighurs flee to surrounding countries such as Afghanistan and Pakistan. Wright, Robin. Chinese Detainees are Men Without a Country. (2005, August 24) Washington Post, p. A01.

The detainees have been afforded no meaningful opportunity to test the Government's evidence against them. They remain incarcerated.



تا ۵ ملیون دالر جائزه در مقابل ارائه معلومات
موثق در باره محل بود و باش و یا دستگیری
رهبران طالبان و القاعده پرداخته میشود.

تر ۵ ملیون دالر جائزه دهغه موثق معلومات دپاره
چه د طالبان او القاعده مشرانو د نیولو او یا
استوگني ځای وشي ورکول کیزی.

Image from <http://www.psywar.org/apddetailsdb.php?detail=2002AFD029P>
AFD29p—leaflet code. This leaflet shows an unnamed Taliban leader
(<http://www.psywarrior.com/Herbafghan02.html>)

REWARD FOR INFORMATION LEADING TO THE WHEREABOUTS OR CAPTURE OF TALIBAN AND AL QAEDA
LEADERSHIP.

Translation: <http://www.psywarrior.com/afghanleaf15.html>

Afghanistan Leaflets

په هغه اندازه پانګه وکړئ چې د ناسی خوب کې هم ته وی راغلی. د طالبانو
 ضد قوا سره برسته وکړئ چې قاتلان او د اړه ناران د افغانستان څخه وځړي.



TF11-RP09-1

FRONT

"Get wealth and power beyond your dreams. Help the Anti-Taliban Forces rid Afghanistan of murderers and terrorists"

BACK

TEXT ONLY

"You can receive millions of dollars for helping the Anti-Taliban Force catch Al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people."

From <http://www.psywarrior.com/afghanleaf40.html>

APPENDIX B

Afghanistan Support Committee
al Birr Foundation
Al Haramain
Al Ighatha
Al Irata
Al Nashiri
Al Wa'ad
Al Wafa
Al-Gama'a al-Islamiyya
Algerian Armed Islamic Group
Algerian resistance group
al-Haramayn
Al-Igatha Al-Islamiya, Int'l Islamic Relief Org
Al-Islah Reform Party in Yemen
Al-Itihad al Islami (AIAI)
Ariana Airlines
Armed Islamic Group of Algeria
Bahrain Defense Organization
Chechen rebels
Dawa wa Ishad
East Turkish Islamic Movement
Egyptian Islamic Jihad (EIJ)
Extremist organization linked to Al Qaeda
Fiyadan Islam
Hamas (Islamic Resistance Front)
Harakat-e-Mulavi
HIG
Hizballah
International Islamic Relief Organization (IIRO)
Iraqi National Congress (INC)
Islamic Group Nahzat-Islami
Islamic Movement of Tajikistan
Islamic Movement of Uzbekistan
Islamic Salvation Front
Itihad Islami
JABRI, Wai Al
Jaish-e-mohammad
Jama'at al Tablighi
Jamaat ud Dawa il al Quran al Sunnat (JDQ)
Jamat al Taligh
Jamiat Al Islamiya
Jemaah Ilamiah Mquatilah
Jihadist
Karim Explosive Cell

Kuwaiti Joint Relief Committee
Lajanat Dawa Islamiya (LDI)
Lash ar-e-tayyiba
Lashkar-e-Tayyiba(LT)
LIFG
Maktab al Khidman
Mujahadin
Mujahedin Brigade in Bosnia
Mulahadin
Muslims in Sink'lang Province of China
Nahzat-Islami
Pacha Khan
Revival of Islamic Heritage Society
Salafist group for call and combat
Sami Essid Network
Sarnoud
Sanabal Charitable Committee
Sharqawi Abdu Ali al-Hajj
small mudafah in Kandahar
Takfir Seven
Takvir Ve Hijra (TVH)
Talibari
Tarik Nafaz Shariati Muhammedi Molakan Danija
Tunisian Combat Group
Tunisian terrorists
Turkish radical religious groups
Uighers
World Assembly of Muslim Youth
yemeni mujahid

APPENDIX C

"Captured by Whom" Notes

"other" includes "Bosnian Authorities", "Foreign Government", "Gambia", "Iranian Authorities", "Local Pashtun tribe", "natural elders of Andokhoy City" and "United Islamic Front for the Salvation of Afghans"

"Pakistani Authorities" includes "Pakistani Greentown"

"Where Captured" Notes

"Afghanistan" includes "Mazar-e Sharif" and "Tora Bora"

"other" includes "Bosnia", "Fleeing from Shkin firebase", "Gambia", "home of al Qaeda financier", "home of suspected HIG commander", "Iran", "Kashmir", "Libyan guesthouse", "Samoud's compound", "UK, Gambia" and "while being treated for leg wound"

"Affiliation" Notes

al Qaeda includes "al Qaeda or its network"

al Qaeda & Taliban includes "al Qaeda member taliban associate", "al Qaeda/Taliban", "member of al Qaeda & associated with Taliban", "member of Taliban and/or associated w/ al Qaeda", "Taliban and/or al Qaeda", "Taliban Fighter and al Qaeda Member" and "taliban member al Qaeda associate"

"other" includes "HIG" and "Uigher"

Unidentified includes "al Qaeda affiliated group", "enemy combatant", "forces allied with al Qaeda and Taliban", "forces engaged in hostilities against US", "organization associated w/ and supported al Qaeda", "terrorist", "terrorist organization", "terrorist organization tied to al Qaeda", "terrorist organization supported by al Qaeda" and "various NGOs with al Qaeda & Taliban connections"

"Nexus" Notes

"associated with" includes "affiliated", "material support", "supported" and "supporter"

"fighter" for includes "supported and fought for"

"member" includes "member and participated in hostile acts", "member of or associated with", "member or ally", "operative", "part of or supported" and "worked for"

NO-HEARING HEARINGS

CSRT: THE MODERN HABEAS CORPUS?

AN ANALYSIS OF THE PROCEEDINGS OF THE GOVERNMENT'S COMBATANT STATUS REVIEW TRIBUNALS AT GUANTÁNAMO

By

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NO-HEARING HEARINGS

AN ANALYSIS OF THE PROCEEDINGS OF THE GOVERNMENT'S COMBATANT STATUS REVIEW TRIBUNALS AT GUANTÁNAMO

EXECUTIVE SUMMARY

In the wake of the Supreme Court's decision that the United States Government must provide adequate procedures to assess the appropriateness of continued detention of individuals held by the Government at Guantánamo Bay, Cuba, the Department of Defense established the Combatant Status Review Tribunals ("CSRT") to perform this mission. This Report is the first comprehensive analysis of the CSRT proceedings. Like prior reports, it is based exclusively upon Defense Department documents. Most of these documents were released as a result of legal compulsion, either because of an Associated Press Freedom of Information request or in compliance with orders issued by the United States District Court in habeas corpus proceedings brought on behalf of detainees. Like prior reports, "No Hearing Hearings" is limited by the information available.

The Report documents the following:

1. The Government did not produce any witnesses in any hearing and did not present any documentary evidence to the detainee prior to the hearing in 96% of the cases.
2. The only document that the detainee is always presented with is the summary of classified evidence, but the Tribunal characterized this summary before it as "conclusory" and not persuasive.
3. The detainee's only knowledge of the reasons the Government considered him to be an enemy combatant was the summary of the evidence.
4. The Government's classified evidence was always presumed to be reliable and valid.
5. In 48% of the cases, the Government also relied on unclassified evidence, but, like the classified evidence, this unclassified evidence was almost always withheld from the detainee.
6. At least 55% of the detainees sought either to inspect the classified evidence or to present exculpatory evidence in the form of witnesses and/or documents.
 - a. All requests by detainees to inspect the classified evidence were denied.
 - b. All requests by detainees for witnesses not already detained in Guantánamo were denied.

- c. Requests by detainees for witnesses detained in Guantánamo were denied in 74% of the cases. In the remaining 26% of the cases, 22% of the detainees were permitted to call some witnesses and 4% were permitted to call all of the witnesses that they requested.
 - d. Among detainees that participated, requests by detainees to produce documentary evidence were denied in 60% of the cases. In 25% of the hearings, the detainees were permitted to produce all of their requested documentary evidence; and in 15% of the hearings, the detainees were permitted to produce some of their documentary evidence.
7. The only documentary evidence that the detainees were allowed to produce was from family and friends.
 8. Detainees did not always participate in their hearings. When considering all the hearings, 89% of the time no evidence was presented on behalf of the detainee.
 9. The Tribunal's decision was made on the same day as the hearing in 81% of the cases.
 10. The CSRT procedures recommended that the Government have an attorney present at the hearing; the same procedures deny the detainees any right to a lawyer.
 11. Instead of a lawyer, the detainee was assigned a "personal representative," whose role, both in theory and practice, was minimal.
 12. With respect to preparation for the hearing, in most cases, the personal representative met with the detainee only once (78%) for no more than 90 minutes (80%) only a week before the hearing (79%).
 13. At the end of the hearing, the personal representative failed to exercise his right to comment on the decision in 98% of the cases.
 - a. During the hearing, the personal representative said nothing 12% of the time.
 - b. During the hearing, the personal representative did not make any substantive statements in 36% of the cases; and
 - c. In the 52% of the cases where the personal representative did make substantive comments, those comments sometimes advocated for the Government.
 14. In three of the 102 CSRT returns reviewed, the Tribunal found the detainee to be not/no-longer an enemy combatant. In each case, the Defense Department ordered a new Tribunal convened, and the detainee was then found to be an enemy combatant. In one instance, a detainee was found to no longer be an enemy combatant by two Tribunals, before a third Tribunal was convened which then found the detainee to be an enemy combatant.
 15. When a detainee was initially found not/no-longer to be an enemy combatant:
 - a. The detainee was not told of his favorable decision;
 - b. There is no indication that the detainee was informed of or participated in the second (or third) hearings;
 - c. The record of the decision finding the detainee not/no-longer to be an enemy combatant is incomplete.

INTRODUCTION:

After the Supreme Court ruled on June 28, 2004 in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that the Guantánamo detainees were entitled to access to federal court through the writ of habeas corpus, the Defense Department established processes to review the status of all detainees, many of whom had been held without any proceeding for two and a half years. Within one month of *Rasul*, the Defense Department created the "Combat Status Review Tribunal" ("CSRT") and established a process for hearings before the CSRT. Each CSRT was composed of three unidentified members of the military who presided over the hearings.

As soon as most of the CSRT hearings were completed, the Government informed the District Court in which the habeas proceedings were pending that, despite the Supreme Court's ruling, no further judicial action was necessary because the detainees had been given CSRT review.

This Report analyzes the CSRT proceedings, comparing the hearing process that the detainees were promised with the process actually provided. The Report is based on the records that the United States Government has produced for 393 of the 558 detainees who had CSRT hearings.

The most important documents in this record were produced by the Government in response to orders by United States District Judges that the Department of Defense provide the entire record of the Combat Status Review Tribunal for review by counsel for at least 102 detainees. These are described as habeas-compelled "full CSRT returns." Without these documents, it would only be possible to review the process promised. With the 102 "full CSRT returns," this Report can also compare the process promised with the process provided.

The results of this review are startling. The process that was promised was modest at best. The process that was actually provided was far less than the written procedures appear to require.

The detainees were denied any right to counsel. Instead, they were assigned a "personal representative" who advised each detainee that the personal representative was neither his lawyer nor his advocate, and that anything that the detainee said could be used against him. In contrast to the absence of any legal representative for the detainee, the Tribunal was required to have at least one lawyer and the Recorder (Prosecutor) was recommended to be a lawyer.

The assigned role of the personal representative was to assist the detainee to present his case. In practice, any assistance was extraordinarily limited. The records of meetings between detainees and their personal representatives indicate that in 78% of the cases, the personal representative met with the detainee only once. The meetings were as short as 10 minutes, and this includes time for translation. Some 13% of the meetings were 20 minutes or less, and more than half of the meetings lasted no more than an hour.

During this meeting, the detainee was told the following:

- The CSRT proceeding was his opportunity to contest the Government's finding that he was an enemy combatant;
- The Government had already found the detainee to be an enemy combatant at multiple levels of review;
- The Government's finding rested upon classified evidence that the detainee would not see; and
- The Tribunal must presume that the secret classified evidence was reliable and valid.

In the majority of the CSRT hearings, the Government rested on the presumption that the classified evidence was sufficient to establish that the detainee was an enemy combatant. The Government never called any witnesses and rarely adduced unclassified evidence. In the majority of cases, the Government provided the detainee with no evidence, declassified or classified, which established that the detainee was an enemy combatant. Instead, the Government provided the detainee merely with what purported to be a summary of the classified evidence. This summary was so conclusory that it precluded a meaningful response. The Government then relied on the presumption that the secret evidence was reliable and accurate.

In the minority of cases, the Government produced declassified evidence to the Tribunal. Such declassified evidence did not bear directly on the question at issue. It consisted of letters from the detainee's family and friends asking for his release, portions of habeas corpus petitions submitted by the detainee's own lawyers on his behalf in United States District Court, and publicly available records that did not mention the detainee by name. None of the declassified evidence introduced against any detainee contained any specific information about the Government's basis for the detainee's detention as an enemy combatant.

Detainees who participated in CSRT proceedings rarely were able to confront the Government evidence. The Government never called witnesses and did not typically produce any unclassified evidence. When such evidence was presented to the Tribunal, it was not shown to the detainee 93% of the time. As for the ability of the detainees to produce evidence, only 11% of the detainees were allowed to introduce any evidence. The promised CSRT process provided that detainees could call witnesses, but no witness from outside Guantánamo ever appeared. The only witnesses the Government allowed detainees to call were other detainees. Therefore, the only witnesses that were allowed under the CSRT process were presumed enemy combatants testifying in favor of other presumed enemy combatants.

The promised CSRT process stated that detainees would be allowed to produce documentary evidence. In operation, the only documentary evidence that detainees were actually allowed to introduce were letters from family and friends. This was true even when the documentary evidence sought to be introduced was available and, in fact, even when the documents were in the Government's possession -- such as passports, hospital records, and even judicial proceedings. In these cases, the detainee insisted that the documents would prove that the charges against him could not be true, but none of the documents was permitted to be introduced.

The detainee's personal representative was totally silent in 12% of the hearings, and in only 52% of the hearings did the personal representative make substantive comments. However, sometimes the substantive comments of the personal representative advocated for the Government and against the detainee. At the end of the hearing, the personal representative had a last opportunity to make comments, but 98% of the time the personal representative explicitly chose not to do so.

In sum, while the promised procedures stated that detainees were allowed to present evidence (witnesses and documents), the only evidence that the detainees were permitted to offer in the vast majority of the cases was their own testimony. As a result, the only option available to the detainee was to make a statement attempting to rebut what he could glean from the summary of classified evidence that he could not see. In 81% of the cases reviewed, the Tribunals made their decision the same day as the hearing. Among the 102 records reviewed for this report, the ultimate decision was always unanimous, and all detainees reviewed were ultimately found to be enemy combatants. It is true that Government statements indicate that 38 of 558 detainees were ultimately found not/no longer to be enemy combatants, but no such determinations are found in the full CSRT records reviewed.

While all detainees reviewed were ultimately found to be enemy combatants, not all Tribunals found the detainee to be an enemy combatant. On a few occasions, a Tribunal initially found that the detainee was not/no longer an enemy combatant. In such cases, the detainee was never told of this decision. Instead, the Tribunal's decision was reviewed at multiple levels in the Defense Department chain of command and eventually a new Tribunal was convened. However, some detainees were still found not/no longer to be enemy combatants. At least one detainee's record indicates that after a second Tribunal found him no longer an enemy combatant, the process was repeated and sent back for a third Tribunal which found him to be an enemy combatant.

THE DATA

In response to *United States v. Rasul* and *Hamdi v. Rumsfeld*, on June 28, 2004 the Department of Defense created the Combatant Status Review Tribunal system and processed each detainee. This report analyzes the data released by the Department of Defense about the CSRT proceedings in response to Freedom of Information Act requests and through discovery during *habeas* lawsuits. Substantive data regarding individual detainees has never been voluntarily released by the Department of Defense.

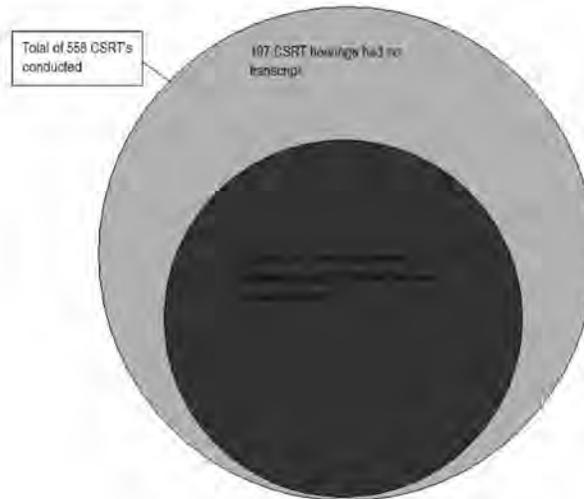
According to the available Department of Defense data, there have been 759 total detainees ever incarcerated at Guantanamo; 558 detainees at Guantanamo Bay have been reviewed by the CSRT process.¹ The Department presumably created a file for each of the 558 CSRT proceedings, which we will refer to as the full CSRT Record. Since the Government has not released these files, except under court orders entered in the various *habeas* proceedings, the 102 full CSRT returns are the only full CSRT records that can be analyzed in this Report.

Each detainee was provided the right to appear before the CSRT Tribunal. At least 361 detainees chose to participate, and a Summarized Detainee Statement was prepared from their testimony in each case. This report refers to these Summarized Detainee Statements as "transcripts," although they are not verbatim records. A transcript is provided for those Tribunals in which the detainee is physically present and for those Tribunals in which the detainee has the personal representative read a statement into the record. The Department of Defense initially refused to release any of these transcripts, but a Freedom of Information Act lawsuit brought by the Associated Press succeeded and the Department of Defense was ordered to release these documents.² This Report examines these 102 full CSRT returns and 356 transcripts, as those are the only documents that the Government has released.³ See Diagram 1.

¹ This report does not consider the recent "high value detainees" transferred to Guantanamo in September 2006. See "High Value Detainees Moved to Gitmo; Bush Proposes Detainee Legislation," (Sept. 6, 2006), <http://www.defenselink.mil/news/NewsArticle.aspx?ID=721>.

² The Department of Defense released 356 transcripts through the FOIA request, but there are 4 additional detainee transcripts available among the 102 full CSRT returns reviewed in this report.

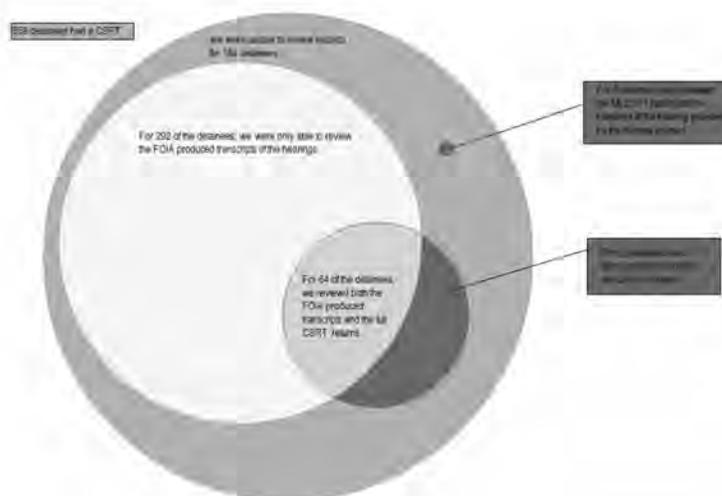
³ 5 of the 102 CSRT returns include transcripts that were not produced in conjunction with the AP FOIA request. Therefore, a total of 361 transcripts exist.

DIAGRAM I

Since only 356 transcripts were released, 202 of the 558 detainees apparently did not participate in the CSRT process; however, because 5 of the 102 full CSRT returns contain transcripts that are not present in the FOIA released 356 transcripts, these 356 transcripts do not contain the records of all detainees who participated in the CSRT.

Although the 102 full CSRT returns contain 69 returns with transcripts, in 11 of these cases the transcripts only record conversations between the personal representative and the Tribunal. Therefore 102 Full CSRT records reviewed include records of 58 detainees who appeared in the CSRT proceeding and 43 detainees who did not physically appear. See **Diagram II**.

DIAGRAM II



This results in full CSRT returns (including transcripts) for 69 detainees. The 38 full CSRT returns of detainees who do not have transcripts released in the Associated Press FOIA are for detainees about whom no other information has been released by the Department of Defense. Eleven detainees who were not physically present at their hearing are among the 69 for whom a transcript is available. The 356 FOIA transcripts combined with the 38 full CSRT returns total 394 detainee records which make up our full sample set. These 394 records reveal that 324 detainees physically appear before the Tribunal.

The data collected on these 38 detainees without a FOIA released transcript constitutes the only information available about the 202 detainees whose transcripts were not produced by the FOIA request.

In short, of the entire 558 detainees at Guantánamo who have been provided the CSRT process, there is some documentation for 394 detainees: the 356 FOIA released transcripts (64 of which also have full CSRT returns) and the 38 full CSRT returns whose transcript was not released by the FOIA.⁴

⁴ The two different data sets upon which this report is based have been compared with the profile of all of the detainees that was published February 8, 2006. Mark Denbeaux, *et al.*, REPORT ON GUANTANAMO DETAINEES: A Profile of 517 Detainee through Analysis of Department of Defense Data (2006), available at http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf. The correlation between the data

CREATION OF THE COMBATANT STATUS REVIEW TRIBUNALS

United States v. Rasul and *Hamdi v. Rumsfeld* were decided on June 28, 2004. The Department of Defense issued Establishing and Implementing Orders on July 7 and 29, 2004, respectively.⁵ Guantanamo personnel hand-delivered a letter to every detainee, advising him both of the upcoming Combatant Status Review Tribunal and of his right, independent of the CSRT, to file a habeas corpus suit in United States District Court.⁶ Therefore the entire CSRT procedures were promulgated in only 32 days.

As the CSRT's were being convened in Guantanamo, the Department of Defense was responding to habeas proceeding in Washington, D.C. The response, beginning in August 2004, justified the CSRT as providing the appropriate hearing detainees were entitled to under *Rasul*. On October 4, 2004 the Defense Department advised the Court that the CSRT's were being processed and described the process that each detainee was being provided. The goal was to demonstrate that, since a sufficient hearing had been held for each detainee, no habeas hearing by a federal court was required.

According to the CSRT procedures established in the July 29, 2001 memo, prior to the commencement of any CSRT proceeding, the classified evidence relevant to that detainee had to be reviewed, a "summary of evidence" prepared, a personal representative appointed for the detainee, the personal representative had to meet with the detainee, and a Tribunal impaneled. The first hearing, according to the records reviewed was of ISN #220⁷ and held on August 2, 2004. For that first hearing, the personal representative met with the detainee on July 31, 2004, two days after the CSRT procedures were promulgated. This was the only meeting between this detainee and his personal representative and it lasted only 10 minutes, including translation time. On Monday, August 2, 2004, two days after the meeting between the personal representative and the detainee, the CSRT Tribunal was empanelled, the hearing held, the classified evidence evaluated and the decision issued. This detainee did not participate in his CSRT hearing.

The remainder of the habeas detainees whose CSRT returns were in the 102 considered in this report were processed rapidly: 49% of the hearings were held and

previously analyzed and the data considered in this report is very strong. That correlation is presented in Appendix I.

⁵ Paul Wolfowitz, *Order Establishing Combatant Status Review Tribunal* (Jul. 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

⁶ While the right, to proceed in federal court may have been extinguished by the Military Commissions Act of 2006, Pub. L. No. 109-366, the meaning and constitutionality of that statute is not addressed by the present Report.

⁷ Mr. Abdullah Saleh Ati Ai Ajmi, ISN #220, is represented by counsel in habeas litigation. He represents one of the 35 detainees who refused to participate in the CSRT process but whose Full CSRT Return was obtained by his attorney under court order in the *habeas* litigation.

decisions reached by September 30, 70% by October 31, and fully 96% were completed by the end of November 2004. This haste can be seen not only in the scheduling of the hearing but in the speed with which the Tribunals declared a verdict. Among the 102, in 81% of the cases, the decision was reached the same day as the hearing.

The progress of the CRST hearings is reflected in Chart I, "Timeline of CSRT for 102 full CSRT returns" which displays the history of the 102 full CSRT returns by tracking four separate events for each detainee. "R-1" (dark blue line) is the declassified "Summary of Evidence" for each detainee; "1st D-A" (pink line) is the document prepared by the personal representative either during or after the first meeting between he and the detainee. "Hearing" (yellow line) is the date the CRST convenes to consider evidence and hear from the detainee. "Decision" (light blue line) is the date of the CRST decision (in most cases closely tracking the hearing date). It is apparent that the proceedings were commenced and completed in a very short period.⁸

CHART I

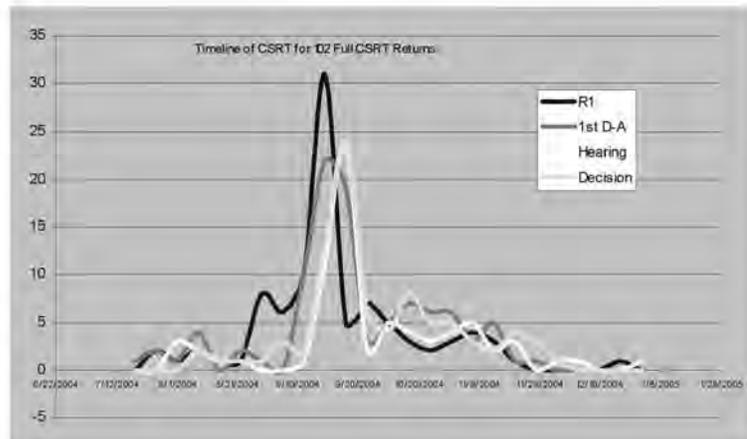
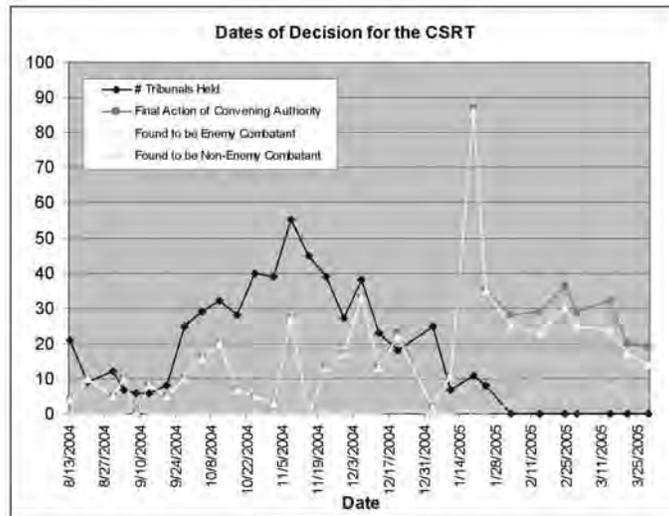


Chart I can be profitably compared with Chart II, the "Dates of Decision for the CSRT," which presents the pattern of decision making of the CSRT's for all of the detainees as published by the Department of Defense in March 29, 2005. Chart II chart

⁸ The Defense Department reported in 2005 that, to the best of their knowledge, there were only 5 personal representatives participating in the CSRT process. Affidavit on file at Seton Hall University School of Law.

shows the timing of the decisions for all of the detainees' CSRT proceedings. According to Chart II, the detainees' final administrative decisions tended to cluster at the end of the time frame, long after the decisions of the Tribunals. Almost 40% of the final decisions were made after the last Tribunal decision. During this six weeks after the Tribunals ended and the bulk of the decisions were made, 35 of the 38 detainees who were found to no longer be enemy combatants were determined.

CHART II



THE DECISION TO PARTICIPATE

Each of the 558 detainees who received a CSRT proceeding was advised on at least three occasions that he would also have a right to a habeas corpus proceeding in United States District Court in Washington D.C.

The Department of Defense Order of July 7, 2004 directed that each detainee be told within 10 days that he would have a CSRT proceeding and that each detainee was also entitled, should he so choose, to proceed with habeas litigation in United States District Court challenging their detention at Guantánamo Bay. Pursuant to this Order, each detainee was hand-delivered a formal written notice so specifying.



The English version of this Notice, prepared for and delivered to every detainee in translation in accordance with the DOD July 7, 2004 Order provided as follows:

The U.S. Government will give you an opportunity to contest your status as an enemy combatant. Your case will go before a Combatant Status Review Tribunal, composed of military officers. This is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held...

As a matter separate from these Tribunals, *United States courts have jurisdiction to consider petitions brought by enemy combatants held at this facility that challenge the legality of their detention.* You will be notified in the near future what procedures are available should you seek to challenge your detention in the U.S. courts. Whether or not you decide to do so, the Combatant

⁹ 07/13/2004 Guantánamo Bay, Cuba - The Combatant Status Review Tribunal Notice is read to a detainee. Photo by Airman Randall Damm, USN <http://www.defenselink.mil/news/Jul2004/2004071604b.jpg>. This picture was obtained from the Department of Defense and depicts the service of the formal written notice, duly translated, advising the detainee of the CSRT and his right to challenge his detention in United States District Court.

Status Review Tribunal will still review your status as an enemy combatant.¹⁰

This document, then, informs each detainee he will be accorded a CSRT, whether or not he chooses to participate. It also informs the detainee that the CSRT is only one of his legal rights, the other being petitions to “United States courts.”

THE PERSONAL REPRESENTATIVE

The CSRT procedures provide that there must be a “personal representative” for each detainee, and also require the personal representative to meet with the detainee before the CSRT hearing. The personal representative must advise the detainee of the CSRT process, and also advise the detainee, for a second time, that he has an independent right to habeas corpus.¹¹

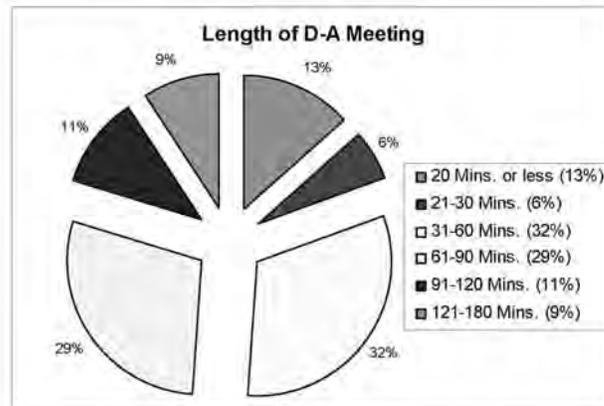
The records of meetings between detainees and their personal representatives indicate that in 78% of the 102 full CSRT returns, the detainee and the personal representative met only once. Such meetings were typically brief: 91% percent of these meetings were two hours or less, 51% were an hour or less, 19% were 30 minutes or less, 13% were 20 minutes or less, and 2% were ten minutes or less.

The time spent in the meetings includes the time spent translating and the time spent conveying specific information about the process, the personal representative’s role, and the option of going to federal court. The length of these meetings did not leave much time for detailed communication, much less meaningful consultation between the personal representative and detainee.

¹⁰ Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>. (emphasis added).

¹¹ *Id.*

DIAGRAM III



At that initial meeting with each detainee, the personal representative had several tasks, including warning the detainee that the personal representative was not the detainee's lawyer and that nothing discussed would be held in confidence:

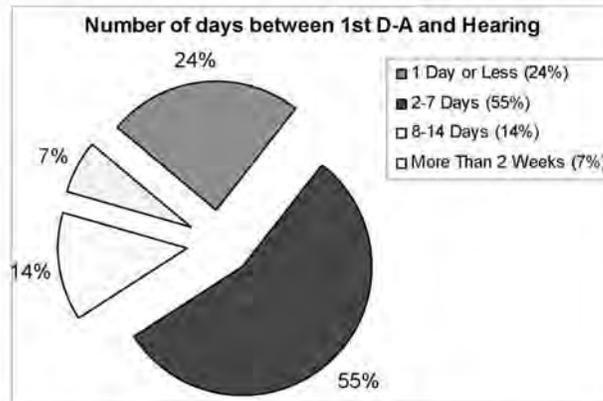
I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. *None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing.* I am available to assist you in preparing an oral or written presentation to the Tribunal should you desire to do so.¹²

This statement makes clear both that the detainee has no advocate in the process and that the detainee has the right to not participate in his process. After receiving this information, 32% of the detainees opted not to participate in the CSRT proceeding.

The meetings with the personal representative occurred very shortly before the Tribunal hearing. The records of meetings between detainees and their personal representatives indicate that for 24% of the detainees, the meeting with the personal representative was held the day of or the day before the CSRT proceeding. For 55% of the detainees, the meeting was between two days and a week before the hearing. Only 7% of the detainees met with their personal representative more than two weeks prior to the CSRT proceeding. See Diagram IV.

¹² Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>. (emphasis added).

DIAGRAM IV



In 52% of the cases, the personal representative made substantive statements to the Tribunals. However, many times they did not say a word (12 %) and other times they made only formal non-substantive comments (36%). Furthermore, in a number of cases, the personal representative advocated for the Government.

Detainees frequently expressed the view that the CSRT process was not an opportunity to "contest" their status as enemy combatants, but rather another form of interrogation. Seven percent of the detainees who *did* physically appear in their CSRT proceeding made voluntary statements on the record indicating that they understood this to be a continuation of their interrogation and not a true hearing.

The documents show that some detainees objected to the personal representative's role as an aid to the Tribunal rather than as an assistant to the detainee. In 8% all records reviewed, the detainees suggested, without being asked, that the personal representative or the Tribunal were a form of interrogation rather than a hearing. In every occasion when the detainee objected to his personal representative serving as the Government's agent against him, the detainee's objections were ignored.

Contained in the records for detainee ISN #1463 is the following exchange:

Detainee: My personal representative is supposed to be with me. Not against me. Now he is talking like he is an interrogator. How can he be an attorney? I said all of these allegations were fabricated and I told you I had nothing to do with them. It's up to

the Recorder or Reporter to respond or provide the proof. I'm afraid to say anything that you might use against me. As you know, there is no attorney here today and I don't know anything about the law. I don't know which of these statements are going to be used for me or against me. Whoever is representing the Government needs to provide evidence.

I cannot say anything that can be used against me. I am even afraid to say what my name is

Anything else I say, I am afraid is going to be used against me.

I hope that you can forgive me.¹³

Although the CSRT procedure requires the personal representative to advise the detainee of the Tribunal process and the detainee's rights under the process, the personal representative on a number of occasions neglected to do this.

ISN #45, Ali Ahmed Mohammed Al Rezehi, did not appear at his CSRT hearing. His personal representative received the "Summary of Evidence" against Mr. Al Rezehi on September 23, 2004 and met with him for 20 minutes on September 28, 2004. According to the "Conclusions of the Tribunal" section the Summary of the Basis for Tribunal Decision, Mr. Al Rezehi declined to participate in his CSRT proceeding:

The detainee understood the Tribunal Proceedings, but chose not to participate The Tribunal questioned the personal representative closely on this matter and was satisfied that the personal representative had made every effort to ensure that the detainee had made an informed decision.

The Tribunal's close questioning of the personal representative is problematic because the form the personal representative presented to the Tribunal stated that he had neither read nor left a written copy of the procedures with the detainee.

According to the CSRT record, the detainee's brother submitted a sworn affidavit on behalf of Mr. Al Rezehi. The Tribunal declined to consider the sworn affidavit, determined that the detainee had chosen not to participate in the CSRT, and found Mr. Al Rezehi to be an enemy combatant. The personal representative made no comment during the proceeding.

At least once, the personal representative did not advise the detainee of his right to appear before the Tribunal until after that hearing had already taken place and the Tribunal made its decision. The Detainee Election Form is the document that each personal representative was required to complete as soon as he finished his first meeting with each of his detainees. In the case of Musa Abed Al Wahab, ISN #58, the Combatant

¹³ Quotes taken from detainee transcripts are available on file at Seton Hall University School of Law.

Status Review Tribunal Decision Report Cover Sheet concludes that the detainee was determined to be an enemy combatant by a Tribunal, following a hearing with which he chose not to participate in, on October 20, 2004. There is nothing remarkable about this, except for the fact that the Detainee Election Form (Exhibit D-a) is dated *October 25, 2004*. It is not clear how the personal representative could have advised the Tribunal that the detainee had affirmatively declined to participate when he had yet to meet with the detainee.

BURDEN OF PROOF AND PRESUMPTION OF VALIDITY OF GOVERNMENT EVIDENCE

A. Burden of Proof

The published rules for CSRT proceedings formally place the burden of proof that the detainee is an enemy combatant upon the Government, not the detainee:

Tribunals shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant.¹⁴

That language might seem inconsistent with the notice read to each detainee in notifying them of the CSRT procedures:

The U.S. Government will give you an opportunity to contest your status as an enemy combatant. Your case will go before a Combatant Status Review Tribunal, composed of military officers. This is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held....¹⁵

The language "...an opportunity to *contest* your status as an enemy combatant" (emphasis added) might suggest that it is the detainee, and not the Government, that bears the burden of proof to demonstrate that the detainee is *not* an enemy combatant. Indeed, the July 7th Order also referred to determinations of combatant status that the military had made before the CSRT process. "Each detainee subject to this Order has been determined to be an enemy combatant *through multiple levels of review* by officers of the Department of Defense." (emphasis added)

Further, the summary of evidence provided to each detainee at the start of the first meeting with the personal representative repeats this refrain. Each summary of evidence includes the following statement:

¹⁴ Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), <http://www.defenseink.mil/news/Jul2004/d20040730comb.pdf>.

¹⁵ *Id.*

The United States Government has *previously determined* that the detainee is an enemy combatant. This determination is based on information possessed by the United States that indicates that the detainee is...
(emphasis added)

In sum, while the burden of proof was placed formally on the Government, the controlling documents clearly suggest the presumptive correctness of the detentions. A Tribunal would have to find that "multiple levels" of military review were all in error in order to find a detainee to not be an enemy combatant. In any event, the debate about who bore the burden of proof may not be worth pursuing in light of the presumption of the validity of the evidence that the procedures mandated, which is detailed below.

B. Presumption of Validity of Government Evidence

While the CSRT procedures formally place the burden of persuasion on the Government, they simultaneously mandate that the Tribunal consider the classified evidence as presumptively valid.

There is a rebuttable presumption that the Government Evidence, as defined in paragraph H (4) herein, submitted by the Recorder to support a determination that the detainee is an enemy combatant, is genuine and accurate¹⁶

The effect of this presumption of validity of classified evidence is to meet, if not lift, the Government's burden of proving by a preponderance of the evidence that the detainee was properly classified as an enemy combatant. The detainee is presumed to be an enemy combatant based upon the classified evidence. Although the detainee may in theory rebut the presumption, the requirement that he do so effectively shifts the burden of persuasion to him.

However objectionable it may be to place the burden of proof on the Government with one hand and simultaneously presume it satisfied with the other, the CSRT procedures are even more problematic in light of their concomitant command that the detainee be denied access to the evidence itself. The evidentiary presumption might in theory be rebuttable, but, since the evidence is classified and kept secret from the detainee, he is unable to challenge, explain, or simply rebut it. The rebuttable presumption of validity becomes, in practice, an irrebuttable one.

This explains why, although the burden of proof was supposedly on the Government, the Government never felt the need to present a single witness at any of the 393 CSRT hearings. Instead, it relied almost exclusively on the secret, and

¹⁶ Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

presumptively valid, classified evidence. In reality, the burden was on the detainee to prove that the classified evidence was wrong. And the detainee was denied access to the evidence that might have enabled him to do so.

THE HEARING

Each CRST took place in a small room. Armed guards brought the detainee, shackled hand and foot, to the room, seated him in a chair against the wall and chained his shackled legs to the floor. The detainee faced the Recorder (prosecutor for this proceeding), the personal representative (seated beside the Recorder), a paralegal and the interpreter. The three (3) Tribunal members, all military officers, sat to the right of the detainee behind the covered table. The scene is captured in the photograph below.¹⁷



¹⁷ 07/29/2004 Guantánamo Bay, Cuba - The facility where the Combatant Status Review Tribunals (CSRT) will take place for detained enemy combatants. U.S. Navy photo by Photographer's Mate 1st Class Christopher Mobley (RELEASED) <http://www.defenselink.mil/news/d20040805pic4.jpg>

THE EVIDENCE

Typically the Government provided the detainee only the document known as the "Unclassified Summary of the Evidence" and marked R-1 by the Recorder.¹⁸ The boilerplate Discussion of Unclassified Evidence in most records reads:

Exhibit R-1 is the Unclassified Summary of Evidence. While this summary is helpful in that it provides a broad outline of what the Tribunal can expect to see, *it is not persuasive in that it provides conclusory statements without supporting unclassified evidence.* (emphasis added)

The Unclassified Summary of Evidence often made it impossible for detainees to address its thrust. For example, the transcript of the proceeding for detainee ISN# 1463 recounts:

Detainee: That is not true. I did not help anybody and whoever is saying that I did, let them present their evidence. If I know that somebody presented any evidence, then somebody can tell me what that evidence is so that I can respond to it. If there is any evidence at all....

Detainee: That's not true. Again, whoever has any evidence to prove, let them present it. If somebody submitted any evidence, I'd like to take a look at it to find out if that evidence is true....

Detainee: It's not fair for me if you mask some of the secret information.... How can I defend myself?

The CSRT Procedures as promulgated by the July 29, 2004 memo accord a broad range of powers to the Tribunals for the production of evidence. The Tribunal has the power to order witnesses who are members of the United States military to appear, the power to request civilian witnesses to testify, and the power to order production of any document in the possession of the United States Government. For none of the 393 detainees for whom records have been released did the Government *ever* produce a single witness, military or civilian, during the unclassified portion of the record. The CSRT Procedures accord the detainee a right to question witnesses against him, but that right is academic because the Government never presented any witness.

¹⁸ Enclosure (4), Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

A. Government Unclassified Documentary Evidence

The CSRT Procedures anticipate that the Government will produce unclassified evidence at the hearing. The Procedures explicitly require that the personal representative advise the detainee of his right to see such unclassified evidence.¹⁹ According to the 102 full CSRT returns the Government did not present any witnesses and rarely presented non-testimonial evidence to the detainee prior to the hearing. A review of the 361 transcripts reveals that the Government may have shown the detainee some evidence before he began his statement in 4% of the cases. When the hearing began, 89% of the detainees had no facts to rebut, whether from witnesses or from documentary evidence. The same documents also reveal that the Tribunal showed the detainee unclassified information in 7% of the hearings. It is unclear why the Tribunal showed unclassified evidence in some cases but not in others.

As explained below, 49% of the 102 full CSRT returns contain some form of unclassified evidence presented by the Government. This number is in stark contrast to the 4% of detainees who had access to unclassified information prior to their hearings, and to the 7% of detainees who were shown unclassified information during their hearings.

Each CSRT Return includes an Unclassified Summary of the Basis for Tribunal Decision, including the unclassified evidence against the detainee. Twenty nine of the 102 full CSRT returns also contain a Recorder's Exhibit List, which cites every piece of classified and unclassified evidence that the Tribunal considers. In addition, sometimes unclassified evidence is appended to the full CSRT returns. These appended exhibits may or may not be listed in either the Recorder's Exhibit List or the Unclassified Summary of Basis. Based on these three sources, unclassified evidence against detainees appears in 48% of the 102 full CSRT returns.

Thus, for 52% of the CSRT hearings, the Government had no unclassified evidence and relied solely upon the presumptively valid classified evidence to meet its burden of proof.

1. Types of Government Unclassified Evidence Presented to the Tribunal

The Government introduced five types of unclassified evidence in the CSRT hearing:

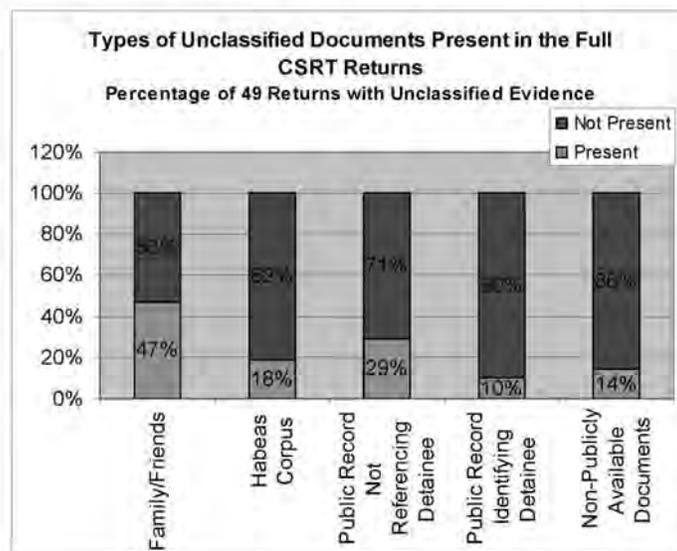
1. Documents from friends and family
2. Submissions from habeas corpus litigation
3. Publicly available documents either released by the Government or published by the press that name the detainee at issue

¹⁹ Enclosure (3) page 3, Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

4. Publicly available documents either released by the Government or published by the press that do not name the detainee
5. Non-publicly available documents that particularly concern the detainee.

These are reflected in Chart III

CHART III



For 47% of the detainees whose Tribunal consider unclassified documents, this evidence consisted of documents and letters written by friends and family of the detainees. Correspondence written by family and friends generally lacks inculpatory value.

Eighteen percent of the records contain habeas corpus pleadings. Motions taken from habeas corpus proceedings also lack inculpatory value.

Of the full CSRT returns that consider unclassified documents, 29% contain public records that do not refer to the detainee. The inculpatory value of these documents is tenuous because the documents are used to establish that certain groups are terrorist organizations while not directly accusing the detainee of any wrongdoing.

Of the full CSRT returns that reflect unclassified documents, 10% contain public records that identify the detainee by name. The inculpatory value of these documents is more apparent.

An additional 14% contain non-publicly available documents directly pertinent to the detainee. Included in this group are documents that are labeled FOUO, as discussed below, as well as a Bosnian court investigation documents and a mental health record. The inculpatory value of these documents seems more apparent -- however, there is no indication the detainees ever saw these documents.

Most unclassified documents in a detainee's full CSRT return do not allow the detainee to effectively contest his status as an enemy combatant particularly when the detainee is usually not allowed to view this unclassified evidence.

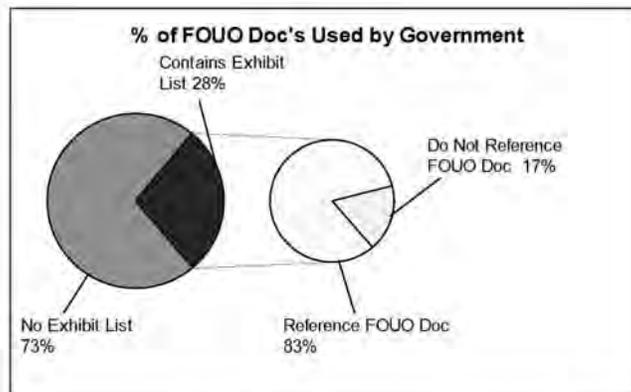
2. Unclassified FOUO Evidence Withheld from Detainee

Unclassified evidence includes, but is not limited to, documents labeled "For Official Use Only" ("FOUO"). However, the CSRT process consistently treated FOUO documents as if they are classified. For example, the record does not discuss these documents in the unclassified summary of the basis for decision. The FOUO documents primarily consist of interrogations of the detainee. Without access to these FOUO documents, the detainee is not able to clarify statements made or claim the statements were made as a result of torture.

The existence and reliance upon FOUO evidence is not revealed in any of the 356 FOIA-produced transcripts. Its existence was revealed, in most instances, in the Recorder's Exhibit List, which was produced only as part of the habeas compelled full CSRT returns. But for the habeas petitions, therefore, the Government's reliance on this variety of secret evidence would never have been revealed.

This Report was able to review the Recorder's Exhibit list for only 28% of the detainees' full CSRT returns. However, Exhibit Lists, when present, show that the Government relied upon unclassified FOUO evidence *for 83% of the detainees*. The record also shows that, when the Government relied upon unclassified FOUO evidence, it was always withheld from the detainee. See Chart IV.

CHART IV



In essence detainees were not shown any evidence against them, classified or unclassified. Not only was the FOUO evidence withheld from the detainee in violation of the CSRT procedures, but other declassified evidence was also withheld.

B. The Detainee's Opportunity to Present His Evidence

Records indicate that as many as 96% of the detainees began their presentation of their case without hearing or seeing any facts upon which the Government based its determination that the detainee was an enemy combatant other than the unclassified summary of evidence. The detainee began to present his case without knowing the facts he had to rebut. All data within this section is based upon the 102 full CSRT returns reviewed.

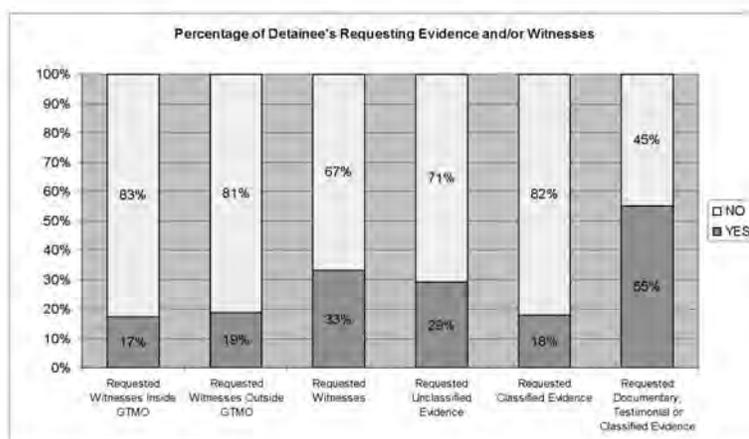
The CSRT procedures provided that each detainee would have the right to present his evidence to the Tribunal. The CSRT procedures provide that:

- (6) **The detainee may present evidence to the Tribunal**, including the testimony of witnesses who are reasonably available and whose testimony is considered by the Tribunal to be relevant. Evidence on the detainee's behalf (other than his own testimony, if

offered) may be presented in documentary form and through written statements, preferably sworn.²⁰

Of the detainees who chose to participate in their Tribunal, more than half²¹ (55%) attempted either to inspect the classified (or perhaps unclassified) evidence or to produce their own witnesses or documentary evidence. Most requests for the production of evidence at the Tribunal, however, were denied. Chart V reflects the requests made by type of evidence.

CHART V



I. Witness Requests

One third of detainees who participated requested that witnesses testify on their behalf. In some cases, requests were denied as being made too late to be considered, as during the hearing. Still other detainees refused to participate because their requests were denied.

²⁰ Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

²¹ Some detainees sought more than one kind of evidence. Some detainees sought witnesses and/or non-testimonial evidence and/or the opportunity to review classified evidence. The analysis that follows reviews the evidence requested and permitted without associating it with the total requests of any particular detainee.

Chart VI below shows that, among those records, only 26% of the detainees that requested witnesses were able to get *any* of those witnesses produced by the Tribunal. Even detainees who requested the testimony of other detainees at Guantánamo were often denied the right to call such witnesses.

CHART VI

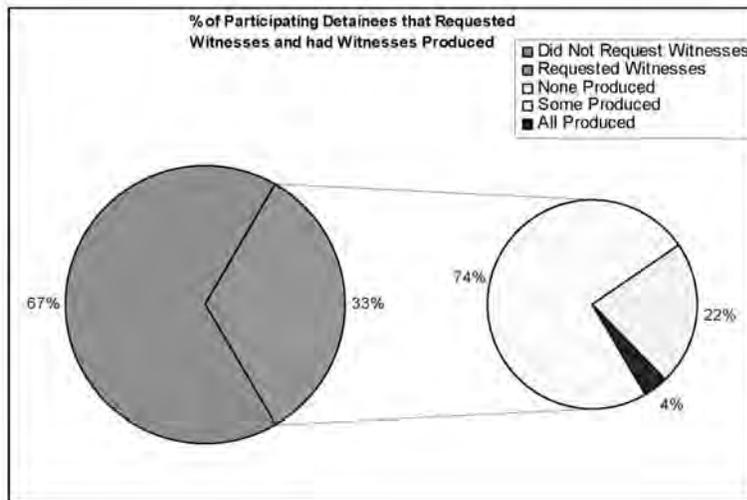
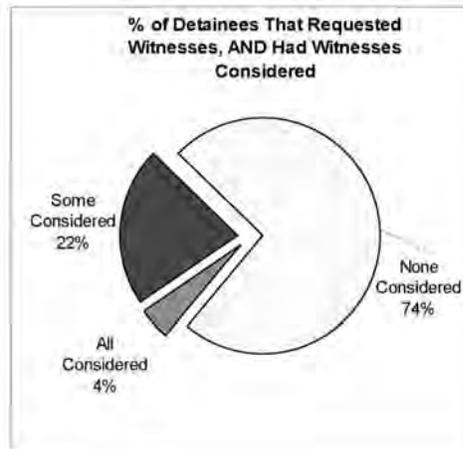


Chart VII further breaks down the data by showing that only 4% of these detainees were able to obtain *all* of their witnesses, and 22% of these detainees were able to have only *some* of their witnesses produced. Fully 74% of the detainees who requested witnesses were denied the production of all witnesses by the Tribunal. The Tribunal denied witness requests if it deemed the witnesses either "not reasonably available," "irrelevant," or at least one egregious example, because "the Tribunal would have been burdened with repetitive, cumulative testimony."²²

CHART VII



Some detainees requested witnesses located outside Guantánamo and some requested witnesses from within the Base -- always another detainee. More than half of the detainees who requested witnesses requested the testimony of witnesses who were not at Guantánamo. *All requests* for the testimony of detainees not detained at Guantánamo were denied.

The detainees who asked for witnesses from inside Guantánamo were successful in producing some witnesses only 50% of the time.

²² For example, ISN 277 requested 17 witnesses, and the Tribunal President decided that he could only have two of them, because he determined that "all of the witnesses would probably testify similarly, if not identically." No basis is given for the belief that the witnesses would testify similarly or identically, and, as ISN 277's personal representative pointed out to the Tribunal, there is no basis in the CSRT procedures for denying a witness based on redundancy.

Nineteen percent of the participating detainees requested witnesses from outside Guantánamo. However, these requests were *never successful*. Thus, as the data shows, the only witnesses that any of the detainees were able to produce to testify on their behalf were other detainees.

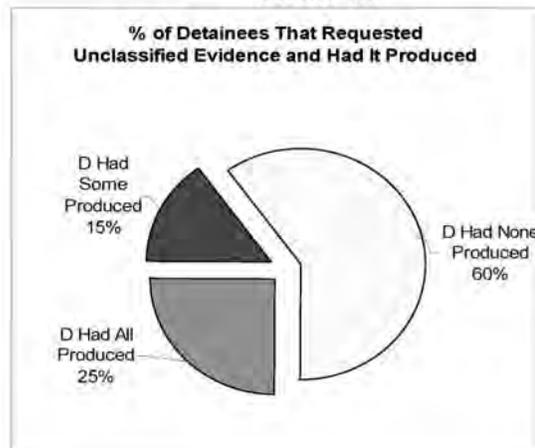
The Unclassified Summary of the Basis for Decision lists the evidence that it considered and the evidence that the Tribunal did not consider. The data shows that only 26% of the detainees who requested witnesses had witnesses whose testimony was considered by the Tribunal. Broken down further, only 4% of the detainees who requested witnesses had all of their witnesses considered by the Tribunal. All of the witnesses considered were detainees testifying for each other.

In sum, the detainees were denied the right to produce any testimonial evidence other than the testimony of some of the fellow detainees.

2. Unclassified Evidence Requests

Twenty-nine percent of the detainees requested unclassified documentary evidence prior to their hearings. Chart VIII analyzes participating detainees' unclassified evidence requests and the disposition of the requests. For the detainees who requested unclassified evidence, it was only produced 40% of the time. Twenty-five percent of the detainees who requested this evidence had all of their evidence produced, while 15% of these detainees had only some of the requested evidence produced. The documentary evidence that the Tribunal allowed the detainee to bring mostly letters from parents and friends that was accorded little weight by the Tribunal.

CHART VIII



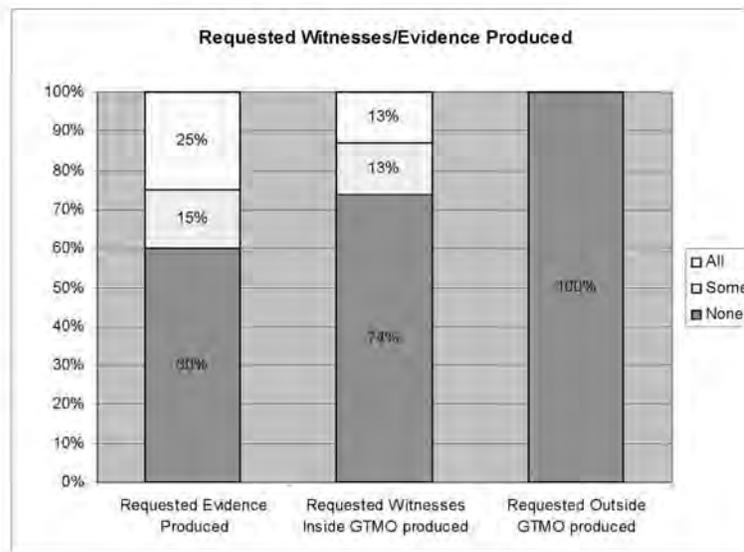
3. Requests to See Classified Evidence

During their hearing, more than 14% of the detainees requested the opportunity to view the classified evidence against them.²³ These requests were always denied.

4. Evidence Detainees were Permitted to Present

The Tribunals denied more evidence than they permitted, and denied almost all evidence that would be persuasive. Detainees' requests for witnesses not detained in Guantanamo were always rejected. Detainees requests to see any of the Government's classified evidence was always denied. Detainees' requests for testimony from other detainees were usually denied. The detainees, however, were allowed to present their documentary evidence, at least in part, 40% of the time.

CHART IX



²³ An examination of the 361 available transcripts reveals 18% made a request for classified evidence, but for purposes of this section analyzing all evidentiary requests, 14% corresponds to the 102 full CSRT returns.

The picture of what kind of evidence was permitted and rejected is bleak. However, when the number of detainees who have any evidence to present upon their behalf is considered, the picture is bleaker still. Based upon the 361 available transcripts, for as many as 89% of detainees, no evidence was presented on their behalf. The evidence the remaining 11% had was limited to testimony from other detainees and letters from friends and families. Taken as a whole, 96% of the detainees were shown no facts by the Government to support their detention as enemy combatants and 89% of the detainees had no evidence to present, and the 11% who did were allowed only unpersuasive evidence: family letters and other testimony from other detainees.

5. Reasons for Denying the Detainees' Evidence

The Procedures empower the CSRT Tribunal to:

Order U.S. military witnesses to appear and to request the appearance of civilian witnesses if, in the judgment of the Tribunal President those witnesses are *reasonably available*.²⁴

The Procedures also permit the CSRT Tribunal to:

[R]equest the production of such *reasonably available* information in the possession of the US. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings²⁵

The CSRT procedures do not define "reasonably available" and the detainee has no right to appeal a determination that certain evidence is either unavailable or "irrelevant." The reasons the Tribunals gave for the refusal to allow detainees to present evidence vary. The three most common reasons were:

1. The evidence/witness was not "reasonably available"
2. The evidence/witness was not relevant, or
3. The request for production of evidence/witness was not made to the personal representative during the D-A meeting and was thus too late.

²⁴ Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

²⁵ *Id.*

The Tribunals sometimes did not give any reason for denying evidence. The Tribunals sometimes also refused to permit the introduction even of documentary evidence in the possession of the United States Government.

Mohammad Atiq Al Harbi (ISN #333) appeared before a Tribunal and identified documents which he said would exonerate him and explain that he was not an enemy combatant:

It is important you find the notes on my visa and passport because they show I was there for 8 days and could not have been expected to go to Afghanistan and engage in hostilities against anyone.

During the proceeding for detainee ISN #680, the following exchange took place:

Questions to Recorder by Tribunal Members

Q: Are you aware if the passport is in control of the U.S. Government here in Guantánamo?

A: No, sir, I'm not aware.

Questions to Detainee by Tribunal Members

Q: If we were to see a copy of your passport, what are the dates it would say you are in Pakistan?

A: The date of my entry to Pakistan, the dates I have on my visa, they all exist there. Even in Pakistan, we were received by American investigators. We were interrogated by American interrogators in Pakistan.

Q: How long have you been here at the camp?

A: I really don't know anymore, but most likely 2 to 2 1/2 years.

The passport was neither located nor produced and the detainee was promptly found to be an enemy combatant.

For Khi Ali Gul, ISN# 928, the Tribunal President said:

[W]e will keep this matter open for a reasonable period of time; that is, if we receive back from Afghanistan this witness request, even if we close the proceedings today, with new evidence, we would be open to introducing or re-introducing any witness statements we might receive.

Khi Ali Gul's requested that his brother be produced as a witness and provided the Tribunal with his brother's telephone number and address. Instead of calling the phone number provided, which might have produced an immediate result, the Government instead sent a request to the Afghan embassy. The Afghan embassy did not respond within 30 days and the witness was not produced. The witness was then found not to be reasonably available by the Tribunal, the detainee determined to be an Enemy Combatant, and the hearing was never reopened.

In another case, an Algerian detainee requested court documents from his hearing in Bosnia at which the Bosnian courts had acquitted him of terrorist activities. The Tribunal concluded that these official Court documents were not "reasonably available" even though the Unclassified Summary of the Basis for Decision discussed another document from the same Bosnian legal proceedings. The aspects of the Bosnian proceedings which the Tribunal considered were not the records that the detainee requested. Apparently, according to the Government, some records from a formal Bosnian trial are "reasonably available" but others are not. There was no explanation in the record to explain why the Government did not obtain the requested records. This detainee, like the others, was determined to be an enemy combatant.

In the case of Allal Ab Aljallil Abd Al Rahman Abd, ISN #156, the detainee sought the production of medical records from a specified hospital.

During the hearing, the detainee requested that the Tribunal President obtain medical records from a hospital in Jordan The Tribunal president denied the request. He determined that, since the detainee failed to provide specific information about the documents when he previously met with his PR, the request was untimely and the evidence was not reasonably available.

CSRT Procedures provide for two reasons to deny requested evidence: that it is irrelevant and that it is "not reasonably available." That the detainee did not mention this request to his personal representative is not a reason to deny the evidence, at least according to the Procedures set forth in the July 29, 2004 memo.

TRIBUNAL EVALUATION OF THE EVIDENCE

Once the detainee leaves the hearing chamber, the Tribunal is supposed to review and evaluate the classified evidence for the first time. What occurred after each detainee left the hearing is never recorded, or at least no record has been released. While we have no access to the classified evidence, much of the classified evidence is apparently hearsay. The CSRT procedures permit the use of hearsay, but require the Tribunal to first determine the reliability of the hearsay:

The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it. *At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances.* (emphasis added)²⁶

²⁶ This language can be found in both the Wolfowitz and England memos at Jul. 7 2004 § G(9) and Jul. 29 2004 § G(7). Paul Wolfowitz, *Order Establishing Combatant Status Review Tribunal* (Jul. 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; Gordon England, *Implementation*

The Tribunal's Basis for its Decision describes the rationale for determining that a detainee is an enemy combatant. However, the 102 full CSRT returns reviewed, all obtained only through the habeas litigation, show that the Tribunal apparently never questioned the reliability of any hearsay.

This failure to analyze the reliability of the hearsay is all the more serious because three issues arise concerning the reliability of the hearsay. First, the source of the hearsay is usually or always anonymous; second, there is great confusion about the names of the detainees; and third, there is some evidence of the coercion of declarants.

A. Hearsay from Anonymous Sources

Each Tribunal decision was reviewed by a Legal Advisor. It is not possible to definitively analyze the quality of the hearsay evidence since it is unavailable, but the statement of the Legal Adviser reviewing the Tribunal's decision for ISN #552 demonstrates the problem.

Indeed, the evidence considered persuasive by the Tribunal is made up almost entirely of hearsay evidence recorded by unidentified individuals with no first hand knowledge of the events they describe.

Outside of the CSRT process, this type of evidence is more commonly referred to as "rumor."

In one instance, the personal representative made the following comments regarding the Record of Proceedings for ISN #32:

I do not believe the Tribunal gave full weight to the exhibits regarding ISN [redacted]'s truthfulness regarding the time frames in which he saw various other ISNs in Afghanistan. It is unfortunate that the 302 in question was so heavily redacted that the Tribunal could not see that while ISN [redacted] may have been a couple months off in his recollection of ISN [redacted]'s appearance with an AK 47, that he was six months to a year off in his recollections of other Yemeni detainees he identified. I do feel with some certainty that ISN [redacted] has lied about other detainees to receive preferable treatment and to cause them problems while in custody. Had the Tribunal taken this evidence out as unreliable, then the position we have taken is that a teacher of the Koran (to the Taliban's children) is an enemy combatant (partially because he slept under a Taliban roof).

of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

B. Possible False Identities or Misnomers

It is black letter evidence law in normal settings that, while hearsay may sometimes be admissible, the reliability of hearsay evidence always depends upon the reliability of the hearsay declarant. The problem of reliability in the case of the detainees is apparent because the Government's records of its detainees themselves misidentified the detainees more than 150 times.

On April 19, 2006 the Government published the names of the 558 detainees who have had CSRT proceedings at Guantanamo.²⁷ On May 15, 2006 the Government also published a list of 759 names which represents all those ever detained at Guantánamo.²⁸ The Government has also released transcripts and other documents related to Administrative Review Board hearings that also contain detainee names.²⁹

These three records contain more than 900 different versions of detainee names. Adding other Government documents, such as the full CSRT returns and other legal documents, the number rises to more than 1000 different names. Yet, according to the Government there only 759 detainees have passed through Guantánamo "between January 2002 and May 15, 2006."³⁰ The more 1000 different names do not mean that there were more than 1000 detainees at Guantánamo; but it does establish the difficulty of identifying individuals in these circumstances.

If, after more than four years of interrogation, the Government does not know the names of its own detainees, confusion about the identity of detainees clouds any analysis of the evidence at the CSRT hearings. In short, there should be considerable concern when a Tribunal relies upon hearsay declarants who may be talking about someone other than the detainee to whom the declaration is supposedly directed. For example, one detainee responded to the claim that his name was found "on a document." The detainee states:

There are several tribes in Saudi Arabia and one of these tribes is Al Harbi. This is part of my names and there are literally millions that share Al Harbi as part of their name. Further, my first names Mohammad and Atiq are names that are favored in that region. Just knowing someone has the name Al Harbi tells you where they came from in Saudi Arabia. Where I live, it is not uncommon to be in a group of 8-10 people and 1 or 2 of them will be named

²⁷ Available at: http://www.defenselink.mil/pubs/foi/detainees/detainee_list.pdf

²⁸ Available at: <http://www.defenselink.mil/pubs/foi/detainees/detaineesFOIArelease15May2006.pdf>

²⁹ The Procedures provide that each prisoner found an Enemy Combatant must go through an Administration Review Board process (ARB) every year following the CSRT conclusion that the detainee is an Enemy Combatant.

³⁰ This is the language used to describe the list of 759 detainee produced by the Government on May 15, 2006.

Mohammed Al Harbi. In fact, I know of 2 Mohammed Al Harbis here in Guantánamo Bay and one of them is in Camp 4. The fact that this name is recovered on a document is literally meaningless.³¹

3. *Possible Coercion*

No Tribunal apparently considered the extent to which any hearsay evidence was obtained through coercion. While the effects of torture, or coercion more generally, would obviously apply to inculpatory statements from the detainee himself, the possibility should also have been considered by a Tribunal weighing all statements and information relating to the detainee which may have been, in the words of the Detainee Treatment Act of 2005 "obtained as a result of coercion..."³² This statute was not enacted until December 2005, after the CSRT process was complete, but indications of torture or coercion by a detainee should have at least raised hearsay concerns, which the Tribunal is required to consider.³³ The record does not indicate such an inquiry by any Tribunal. Instead, the Tribunal usually makes note of allegations of torture, and refers them to the convening authority. This is less surprising than the fact that several Tribunals found a detainee to be an enemy combatant before receiving any results from such investigation. While there is no way to ascertain the extent, if any, that witness statements might have been affected by coercion, fully 18% of the detainees alleged torture; in each case, the detainee volunteered the information rather than being asked by the Tribunal or the personal representative. In each case, the panel proceeded to decide the case before any investigation was undertaken.

³¹ Mohammad Atiq Al Harbi, ISN #333, goes on to state that there are documents available to the United States that will prove that his classification as an enemy combatant is wrong. He also objects to anonymous secret evidence "It is important you find the notes on my visa and passport because they show I was there for 8 days and could not have been expected to go to Afghanistan and engage in hostilities against anyone. . . . I understand you cannot tell me who said this, but I ask that you look at this individual very closely because his story is false. If you ask this person the right question, you will see that very quickly. I am trusting you to do this for me."

³² The Detainee Treatment Act of 2005 provides in part:

b) CONSIDERATION OF STATEMENTS DERIVED WITH COERCION --

(1) ASSESSMENT.--The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative Tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess--

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

³³ Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba* (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

DECISIONS OF TRIBUNAL WHEN A DETAINEE PREVAILS

Despite all this, the detainees sometimes won, at least initially. The orders of July 29, 2004 state that:

[t]he Director, CSRT, shall review the Tribunal's decision and may approve the decision and take appropriate action, or return the record to the Tribunal for further proceedings. In cases where the Tribunal decision is approved and the case is considered final, the Director, CSRT, shall so advise the DOD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies.³⁴

If the Director of the CSRT wishes, he may send any decision back to the CSRT for further proceedings, which means that the detainee can be subjected to multiple Tribunals until the Government is satisfied with the ruling. The additional hearings are always conducted without the detainee himself, who was never notified of his "victory" in the first proceeding.

At least three detainees were initially found not to be enemy combatants and then subjected to multiple re-hearings until they were found to be enemy combatants. This fact is not formally published in any records but was discovered through a careful review of documents produced under court order in the *habeas* litigations.

Several detainees had second hearings and at least one detainee, after his first and second Tribunals unanimously determined him to not be an enemy combatant, had yet a third Tribunal — again *in absentia* — which finally found him to be properly classified as an enemy combatant. The Government's record for one detainee whose proceeding was returned for a second hearing state:

On 24 November 2004, a previous Tribunal [unanimously] determined, by a preponderance of the evidence, that Detainee #654 was not properly designated as an enemy combatant.

It continues,

On 25 January 2005, this Tribunal, upon review of all the evidence, determined that detainee #654 was properly [unanimously] designated as an enemy combatant.

A more egregious record of a detainee twice subjected to Tribunals is that of Detainee #250. The following excerpts present a vivid example of just how little is needed to determine that a detainee is not an enemy combatant. Detainee #250 elected to not appear in person before the Tribunal, but his statement was considered and he was unanimously found *not to have been properly designated as an enemy combatant*.

³⁴ *Id.*

However, that decision did not long stand. The Government's own Legal Sufficiency Review as written by Commander, United States Navy, James R. Crisfield, Jr. synthesizes the processing of Detainee #250's case.

A letter from the personal representative initially assigned to represent the detainee at Guantanamo Bay, Cuba, reflects the detainee's elections and is attached to the Tribunal Decision Report as exhibit D-b. The original Tribunal proceedings were held *in absentia* outside Guantanamo Bay with a new personal representative who was familiar with the detainee's file. This personal representative had the same access to information and evidence as the personal representative from Guantanamo Bay. The addendum proceedings were conducted with yet a third personal representative because the second personal representative had been transferred to Guantanamo Bay. This personal representative also had full access to the detainee's file and original personal representative's pass-down information. The detainee's personal representatives were given the opportunity to review the respective records of proceedings and both declined to submit post-Tribunal comments to the Tribunal.

Despite the initial finding that the detainee was not an enemy combatant and the obvious difficulties reflected in this tortured process, Commander Crisfield concluded that "The proceedings and decision of the Tribunal, as reflected in enclosure (3), are legally sufficient and no corrective action is required." He recommended approval of the decision of the subsequent Tribunal finding #250 to be an enemy combatant.

The record of the third decision for yet another detainee, ISN #556, whose proceeding was returned twice, states in the memorandum following his third Tribunal:

On 15 December 2004, the original Tribunal unanimously determined that the detainee should no longer be designated as an enemy combatant.

Following the initial Tribunal, its membership was changed. The record continues:

Due to the removal of one of the three members of the original Tribunal panel, the additional evidence, along with the original evidence and original Tribunal Decision Report, was presented to Tribunal panel #30 to reconsider the detainee's status. On 21 January 2005 that Tribunal also unanimously determined that the detainee should no longer be classified as an enemy combatant.

The Tribunal was changed again:

Once again, additional information regarding the detainee was sought, found, and presented to yet a third Tribunal. This additional information became exhibits R-23 through R-30. This time, the three members of the second Tribunal were no longer available, but the one original Tribunal member who was not available for the second Tribunal was now available for the third. That member, along with two new members, comprised Tribunal panel #34 and sat for the detainee's third Tribunal. Following their consideration of the new additional information along with the information considered by the first two Tribunals, this Tribunal determined that the detainee was properly classified as an enemy combatant.

The records of other detainees suggest additional instances of rehearings. In these proceedings, the Tribunal reconvenes and considers an issue about the quality of the evidence, but there is no record of what transpired at the first hearing or why the second hearing occurred or the effect of the issues of concern about the quality of the evidence.

BOTTOM LINE

"And again, to review, the CSRT is a one-time review to determine if a person, a detainee, is or is not an enemy combatant."³⁵

Five hundred fifty-eight detainees went through the process of a Combatant Status Review Tribunal. Thirty-eight detainees, or 7% of the total, were released from Guantánamo as a result of the CSRT process. They were labeled either "non enemy combatants" or "no longer enemy combatants." In contrast to these numbers, no detainee in the sample set was ultimately found to be a non/no longer enemy combatant as a result of the CSRT although some were initially found to be either a "non" or "no longer" enemy combatant by a first (or even a second) Tribunal.

The difference between a "non" enemy combatant and a "no longer" enemy combatant is not clear, but the label "non enemy combatant" implies that the Government was mistaken when it detained the prisoners, while "no longer enemy combatant" implies that, while the prisoner was once an enemy combatant, Guantánamo Bay served as a successful rehabilitation program. Despite these connotations, the Government appears to consider the labels interchangeable.

For example, Secretary of the Navy Gordon England used both terms when he described the CSRT process on March 29, 2005. "The Tribunals also concluded that 38 detainees were found to no longer meet the criteria to be designated as enemy combatants. So 520 enemy combatants, 38 non-enemy- combatants. It should be

³⁵ Gordon England, *Defense Department Special Briefing on Combatant Status Review Tribunals* (Mar. 29, 2005), <http://www.defenselink.mil/transcripts/2005/tr20050329-2382.html>.

emphasized that a CSRT determination that a detainee no longer meets the criteria for classification as an enemy combatant does not necessarily mean that the prior classification as EC was wrong.³⁶

CONCLUSION

This Report lays out the CSRT Process, both as it exists on paper and as it was implemented in Guantánamo. The reader may judge whether that process meets the fundamental requirements of due process. Regardless of the answer, at this point in time, more than two years after the Supreme Court's decisions in *Rasul v. Bush*, and *Hamdi v. Rumsfeld* the CSRT is the only hearing that the detainees have received. The Government is attempting to replace habeas corpus with this no hearing process.

³⁶ *Id.*

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APPENDIX I

Return & Transcript Sample Set			Original 517 Records			Return Sample Set		
	% variation			% variation			% variation	
associated with Total	58%	-2%	associated with Total	50%	-1%	associated with Total	59%	
fighter for Total	7%	-1%	fighter for Total	6%	3%	fighter for Total	11%	
member Total	32%	2%	member Total	30%	-1%	member Total	29%	
none alleged Total	3%	1%	none alleged Total	2%	-1%	none alleged Total	1%	
Grand Total	100%		Grand Total	100%		Grand Total	100%	
Return & Transcript Sample Set			Original 517 Records			Return Sample Set		
	% variation			% variation			% variation	
Al Qaeda Total	31%	-1%	Al Qaeda Total	32%	22%	Al Qaeda Total	54%	
Al Qaeda & Taliban Total	26%	-2%	Al Qaeda & Taliban Total	26%	-4%	Al Qaeda & Taliban Total	24%	
Al Qaeda OR Taliban Total	6%	-2%	Al Qaeda OR Taliban Total	7%	-4%	Al Qaeda OR Taliban Total	3%	
none alleged Total	3%	1%	none alleged Total	2%	-1%	none alleged Total	1%	
other Total	1%	0%	other Total	1%	-1%	other Total	0%	
Taliban Total	23%	1%	Taliban Total	22%	-9%	Taliban Total	13%	
Unidentified Total	11%	3%	Unidentified Total	8%	-4%	Unidentified Total	4%	
Grand Total	100%		Grand Total	100%		Grand Total	100%	
Return & Transcript Sample Set			Original 517 Records			Return Sample Set		
	% variation			% variation			% variation	
3-b Present	44%	-1%	3-b Present	45%	-3%	3-b Present	42%	
3-b Not Present	56%	1%	3-b Not Present	55%	3%	3-b Not Present	58%	
Grand Total	100%		Grand Total	100%		Grand Total	100%	

THE MEANING OF “BATTLEFIELD”

AN ANALYSIS OF THE GOVERNMENT’S REPRESENTATIONS
OF “BATTLEFIELD” CAPTURE AND “RECIDIVISM”
OF THE GUANTÁNAMO DETAINEES

By

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“The general number is around—just short of thirty, I think. It’s a combination of thirty we believe have either been captured or killed on the battlefield, so some of them have actually died on the battlefield.”

*— Daniel J. Dell’Orto,
Principal Deputy General Counsel,
Department of Defense
April 26, 2007*

EXECUTIVE SUMMARY

The Department of Defense has continually relied upon the premise of “battlefield capture” to justify the indefinite detention of so-called “enemy combatants” at Guantánamo Bay. The “battlefield capture” proposition—although proven false in almost all cases—has been an important proposition for the Government, which has used it to frame detainee status as a military question as to which the Department of Defense should be granted considerable deference. Further, just as the Government has characterized detainee’s initial captures as “on the battlefield,” Government officials have repeatedly claimed that ex-detainees have “returned to the battlefield,” where they have been re-captured or killed.

Implicit in the Government’s claim that detainees have “returned to the battlefield” is the notion that those detainees had been on a battlefield *prior* to their detention in Guantánamo. Revealed by the Department of Defense data, however, is that:

- only twenty-one (21)—or four percent (4%)—of 516 Combatant Status Review Tribunal unclassified summaries of the evidence alleged that a detainee had ever been on any battlefield,
- only twenty-four (24)—or five percent (5%)—of unclassified summaries alleged that a detainee had been captured by United States forces,
- and exactly one (1) of 516 unclassified summaries alleged that a detainee was captured by United States forces on a battlefield.

Just as the Government's claims that the Guantánamo detainees "were picked up on the battlefield, fighting American forces, trying to kill American forces," do not comport with the Department of Defense's own data, neither do its claims that former detainees have "returned to the fight." The Department of Defense has publicly insisted that "just short of thirty" former Guantánamo detainees have "returned" to the battlefield, where they have been re-captured or killed, but to date the Department has described at most fifteen (15) possible recidivists, and has identified only seven (7) of these individuals by name. According to the data provided by the Department of Defense:

- at least eight (8) of the fifteen (15) individuals alleged by the Government to have "returned to the fight" are accused of nothing more than speaking critically of the Government's detention policies;
- ten (10) of the individuals have neither been re-captured nor killed by anyone;
- and of the five (5) individuals who are alleged to have been re-captured or killed, the names of two (2) do *not* appear on the list of individuals who have at any time been detained at Guantánamo, and the remaining three (3) include one (1) individual who was killed in an apartment complex in Russia by local authorities and one (1) who is not listed among former Guantánamo detainees but who, after his death, has been alleged to have been detained under a different name.

Thus, the data provided by the Department of Defense indicates that every public statement made by Department of Defense officials regarding the number of detainees who have been released and thereafter killed or re-captured on the battlefield was *false*.

I.

The Return to the Battlefield?

Implicit in the allegation that one has returned to the battlefield is that one has been on a battlefield previously. Our earlier report, *The Empty Battlefield and the Thirteenth Criterion*—which, like this report, relied upon the Department of Defense's own data—revealed that no more than twenty-one (21) of 516 Combatant Status Review Tribunal ("CSRT") unclassified summaries¹ of the evidence alleged that a detainee had ever been on any battlefield.² Thus, only four percent (4%) of Guantánamo Bay detainees for whom a CSRT had been convened were ever alleged by the United States Government to have been on a battlefield to which they might return.³ The report further revealed that only twenty-four (24) detainees—just five percent (5%)—were alleged to have been captured by United States forces.⁴

A comparison of the two data sets reveals that *exactly one* detainee was alleged to have been captured on a battlefield by United States forces. That lone detainee is Omar Khadr (ISN⁵ 66), a Canadian citizen who was captured when he was fifteen (15) years old.⁶ In his sixth year of detention, Khadr is one of the first Guantánamo detainees to face a military tribunal.

Although the vast majority of detainees were neither captured by United States forces nor captured by anyone else on any battlefield—and eighty-six percent (86%) may have been sold to the United States for a bounty⁷—the Department of Defense and other highest level Government officials have continuously represented the detainees as having been captured on the battlefield and having returned to the battlefield upon release.⁸ The battlefield capture proposition—

¹ The purpose of the CSRT unclassified summary of the evidence, or the "R-1," is to summarize the Government's bases for detention of the individual for whom the CSRT is convened. The Government conducted 558 CSRTs, and eventually made 516 CSRT unclassified summaries public. See our first *Report on Guantánamo Detainees* (2006), available at http://law.slu.edu/news/guantanamo_report_final_2_08_06.pdf.

² Available at http://law.slu.edu/news/empty_battlefield_final.pdf.

³ This report does not consider the recent "high value detainees" transferred to Guantánamo in September 2006. See "High Value Detainees Moved to Gitmo, Bush Proposes Detainee Legislation," (Sept. 6, 2006), Retrieved November 8, 2007 at <http://www.defenselink.mil/news/NewsArticle.aspx?ID=721>.

⁴ *Supra* note 2.

⁵ "ISN" is an abbreviation for "Internment Serial Number." Each Guantánamo detainee was assigned an ISN.

⁶ The R-1 of Omar Khadr, ISN 66, appears at Appendix 4.

⁷ *Supra* note 1.

⁸ "These are people picked up off the battlefield in Afghanistan...They were picked up on the battlefield, fighting American forces, trying to kill American forces." President Bush, June 20, 2005. Retrieved November 4, 2007 from http://www.theatlantic.com/doc/prem/200602/taj_taylor_2006-02-07.

"The people that are there are people we picked up on the battlefield, primarily in Afghanistan. They're terrorists. They're bomb makers. They're facilitators of terror. They're members of Al Qaeda and the Taliban...We've let go those that we've deemed not to be a continuing threat. But the 520-some that are there now are serious, deadly threats to the United States." Vice President Cheney, June 23, 2005. Retrieved November 4, 2007 from http://www.theatlantic.com/doc/prem/200602/taj_taylor_2006-02-07.

"If we do close down Guantánamo, what becomes of the hundreds of dangerous people who were picked up on battlefields in Afghanistan, who were picked up because of their associations with [al-Qa'ida]?" Condoleezza Rice, quoted by John D. Banusiewicz for American Forces Press Service, May 21, 2006. Retrieved November 3, 2007 from <http://www.defenselink.mil/news/newsarticle.aspx?id=15706>.

although false in almost all cases—has been an important proposition for the Government, which has used it to justify the casting of detainee status as a military question as to which the Department of Defense should be granted great deference.

Similarly to “battlefield capture” claims, “return to the battlefield” claims have abounded in public statements made by senior Government officials—and are almost entirely refuted by the data provided by the Department of Defense.

II.

The Department of Defense’s Own Data Indicates that Instances of “Recidivism” Are Far Fewer Than Government Officials Have Publicly Claimed.

The Department of Defense has repeatedly claimed that some thirty (30) former Guantánamo detainees have been released only to return to the battlefield, where they have been either re-captured or killed.⁹ In July 2007, the Department of Defense issued a news release in which it attempted to identify these alleged “recidivists”,¹⁰ its attempt falls considerably short. Instead of identifying the thirty (30) individuals it alleges are recidivists, the Department describes at most fifteen (15) possible recidivists, and identifies only seven (7) of these individuals by name. Further, two of the individuals included have not been “re-captured or killed,” as the Government claimed, but, apparently, are believed to be engaged in some kind of unspecified military operations.

More importantly, the majority of the individuals identified by the Department of Defense as recidivists appear to be miscategorized. Eight (8) of them are accused of nothing more than speaking critically of the Government’s detention policies, and ten (10) have neither been re-captured nor killed. Of the five (5) who are alleged to have been re-captured or killed, two (2) are not listed as ever having been detained at Guantánamo, and the other three (3) include one (1) who was killed in an apartment complex in Russia by local authorities and one (1) who is not listed among former Guantánamo detainees but who, since his death, has been alleged to have been detained under a different name.

There appears to be a single individual who is alleged to have both been detained in Guantánamo and later killed or captured on some battlefield.

⁹ “These detainees are dangerous enemy combatants...They were picked up on the battlefield, fighting American forces, trying to kill American forces.” White House press secretary Scott McClellan, June 21, 2005. Retrieved November 4, 2007 from http://www.theatlantic.com/doc/pem/200602/nj_taylor_2006-02-07.

¹⁰ “I had a son on that battlefield and they were shooting at my son and I’m not about to give this man who was captured in a war a full jury trial.” Supreme Court Justice Antonin Scalia, just prior to oral arguments in *London*. As quoted by *Newsweek*, March 8, 2006.

⁹ See Appendix I for complete list of quotes. It is, possible, of course, that some former detainees have engaged in military actions against coalition forces but have neither been re-captured nor killed. The Department of Defense release, however, does not make any claim with respect to any such individuals.

¹⁰ “Former Guantánamo Detainees who have returned to the fight” Department of Defense (July 12, 2007). Retrieved November 10, 2007 at <http://www.defenselink.mil/news/d20070712formertgmo.pdf>.

A. The Department of Defense's Definition of "Anti-Coalition Activity" is Over-Inclusive.

The July 2007 news release contains a preamble followed by brief descriptions of the Government's bases for asserting that each of seven identified "recidivists"¹¹ has "returned to the fight."

The preamble, in relevant part, reads as follows:

Former Guantánamo Detainees who have returned to the fight:

Our reports indicate that at least 30 former GTMO detainees have taken part in anti-coalition militant activities after leaving U.S. detention. Some have subsequently been killed in combat in Afghanistan.

Although the US Government does not generally track ex-GTMO detainees after repatriation or resettlement, we are aware of dozens of cases where they have returned to militant activities, participated in anti-US propaganda or other activities through intelligence gathering and media reports. (Examples: Mehsud suicide bombing in Pakistan; Tipton Three and the Road to Guantánamo; Uighurs in Albania).

The following seven former detainees are a few examples of the 30, each returned to combat against the US and its allies after being released from Guantánamo.

With this preamble, interestingly, the Department of Defense abandons its oft-repeated allegation that at least thirty (30) former detainees have "returned to the battlefield" in favor of the far less sensational allegation that "at least 30 former GTMO detainees have taken part in *anti-coalition militant activities* after leaving U.S. detention."¹¹

"Returned to the battlefield" is unambiguous, and describes—clearly and without qualification—an act of aggression or war against the United States, or at least against its interests. In contrast, it is not clear on its face whether the use of the phrase "anti-coalition militant activities" is intended to embrace only overt, military, hostile action taken by the former detainee, or rather to extend to include activities that are political in nature. Further review of the preamble and the news release as a whole reveals that it is this latter meaning that prevails—and thus the shift from "return to the battlefield," to "return to militant activities" reflects a wholesale retreat from the claim that thirty (30) ex-detainees have taken up arms against the United States or its coalition partners.

¹¹ Emphasis added.

The Department of Defense's retreat from "return to the battlefield" is signaled, in particular, by the Department's assertion that it is "aware of dozens of cases where they have returned to militant activities, participated in anti-US propaganda or other activities[.]"¹² Although the "anti-US propaganda" to which the news release refers is not militant by even the most extended meaning of the term, the Department of Defense apparently designates it as such, and is consequently able to sweep distinctly non-combatant activity under its new definition of "militant activities."

As a result, the Uighurs in Albania and "The Tipton Three,"—who, upon release from Guantánamo, have publicly criticized the way they were treated at the hands of the United States—are deemed to have participated in "anti-coalition militant activities" despite having neither "returned to a battlefield" nor committed any hostile acts whatsoever. "The Tipton Three" have been living in their native England since their release. The Uighurs remained in an Albanian refugee camp until relatively recently; they now have been resettled in apartments in Tirana—except for one, who lives with his sister in Sweden and has applied for permanent refugee status. Despite having been neither re-captured nor killed, these eight (8) individuals are swept under the banner of former Guantánamo detainees who have "returned to the fight."

Even as the Department of Defense attempts to qualify its public statements that thirty former Guantánamo detainees have "returned to the fight," and to widen its lens far beyond the battlefield, it still reaches at most fifteen (15) individuals—only half its stated total of Guantánamo recidivists.

B. The Department of Defense (1) Identifies "Recidivists" Who Have Never Been Identified as Guantánamo Detainees, and (2) Admits That It Does Not Keep Track of Former Detainees.

On April 19, 2006, the Government published the names of the 558 detainees for whom CSRT proceedings had been convened at Guantánamo.¹³ On May 15, 2006, the Government published a second list of 759 names representing every individual ever detained at Guantánamo.¹⁴ Additionally, the Government has released transcripts and other documents related to Administrative Review Board hearings, which also contain detainee names.¹⁵ Contained in these three sets of records are more than 900 different names. The full CSRT returns, among other Government documents, increase the number of different names to more than 1000. This abundance of names does not discredit the Government's assertion that only 759 detainees have passed through Guantánamo "between January 2002 and May 15, 2006"¹⁶—but it does demonstrate the difficulty the Government has had in identifying the detainees by name.

¹² Emphasis added.

¹³ Available at: http://www.defenselink.mil/pubs/foi/detainees/detainee_list.pdf.

¹⁴ Available at: <http://www.defenselink.mil/pubs/foi/detainees/detaineesFOIArelease15May2006.pdf>.

¹⁵ Procedures provide that, for each prisoner determined to be an "Enemy Combatant," a yearly Administration Review Board (ARB) must be convened.

¹⁶ This is the language used to describe the list of 759 detainees produced by the Government on May 15, 2006.

The Government's identification problems have created difficulties for the detainees, as well. One detainee, Mohammed Al Harbi—who remains at Guantánamo Bay—objected to the allegation that his name was found “on a document.” The detainee stated:

There are several tribes in Saudi Arabia and one of these tribes is Al Harbi. This is part of my names [sic] and there are literally millions that share Al Harbi as part of their name. Further, my first names Mohammad and Atiq are names that are favored in that region. Just knowing someone has the name Al Harbi tells you where they came from in Saudi Arabia. Where I live, it is not uncommon to be in a group of 8-10 people and 1 or 2 of them will be named Mohammed Al Harbi. In fact, I know of 2 Mohammed Al Harbis here in Guantánamo Bay and one of them is in Camp 4. The fact that this name is recovered on a document is literally meaningless.¹⁷

The detainee's concern illustrates one of the difficulties in deciphering the Department of Defense's July 2007 news release. The release identifies seven (7) individuals by name, but does not identify a single detainee by his Internment Serial Number (“ISN”), despite that doing so would have simplified the identification process, as well as made the Government's representations more readily verifiable.¹⁸

Compounding the confusion surrounding the identification process is the Government's curious admission that it does “not generally track ex-GTMO detainees after repatriation or resettlement[.]” It is unclear how the Government is able to identify Guantánamo recidivists if it does not keep itself apprised of ex-detainee whereabouts. Furthermore, it seems counterintuitive that the Government would elect not to keep track of former detainees, given its continuing insistence that more than thirty former detainees have “returned to the fight.”

In any event, none of the available information regarding the detainees supports the claim of the news release that any of three individuals identified by the Department of Defense as having “returned to the fight”—Abdul Rahman Noor; Abdullah Mehsud and Maulavi Abdul Ghaffar—have ever been identified as having been detained at Guantánamo.

¹⁷ Mohammad Atiq Al Harbi, ISN 333, goes on to state that there are documents available to the United States that will prove that his classification as an enemy combatant is wrong. He also objects to anonymous secret evidence: “It is important you find the notes on my visa and passport because they show I was there for 8 days and could not have been expected to go to Afghanistan and engage in hostilities against anyone. . . . I understand you cannot tell me who said this, but I ask that you look at this individual very closely because his story is false. If you ask this person the right question, you will see that very quickly. I am trusting you to do this for me.”

¹⁸ Identifying former detainees by ISN is significantly more helpful than by name. The Department of Defense has a demonstrated inability to clearly identify prisoners by name. A potential criticism regarding the Government's “return to the battlefield” statements is that, if a former detainee had in fact been recaptured or killed on the battlefield, then the Government should be able to specifically identify that former detainee by his ISN.

C. The Department of Defense Identifies Fifteen (15) Alleged Recidivists; Each of These Identifications is Problematic.

“Return to the Fight” vs. “Return to the Battlefield”

Recent statements by Department of Defense officials have attempted to reframe prior statements, including the statement made by Daniel J. Dell’Orto, Deputy Counsel of the Department of Defense, before the Senate Arms Committee in April 2007.¹⁹ While Mr. Dell’Orto had claimed that thirty former detainees had been captured or killed “on the battlefield,” two Defense Department statements—both made on May 9, 2007—attempted to reframe the language of this prior statement, and provided instead that the same number of ex-detainees had “returned to the fight.”²⁰ As the substance of the July 2007 news release reveals, this term is distinguishable from “captured or killed on the battlefield,” but these two terms, among others, are significantly conflated by the Department of Defense in its public statements. Neither Tipton, England, nor an Albanian refugee camp fall within the typical definition of battlefield—but both must fall within the definition upon which the Department of Defense relies, for the Department to arrive at its claim that thirty (30) former detainees have returned to the battlefield.

The phrase “returned to the fight” implies a taking up of arms, or some other act of overt aggression, but the Department of Defense concludes in its July 2007 news release that fifteen (15) detainees have “returned to the fight”—but fails to justify its conclusion with any indication that a majority of these fifteen (15) have participated in any “fight” besides appearing in a film or writing an opinion piece for the New York Times.

The “Tipton Three”

The “Tipton Three”—Shafiq Rasul, Asif Iqbal and Ruhel Ahmed—are three childhood friends from England who became the first English-speaking detainees released from Guantánamo after they had been imprisoned without charges for more than two years.²¹ Since their release in 2004, the young men have been living freely in their native Britain, and have not been charged with any crime. They have, however, been vocal regarding what they perceive to be the injustices suffered by them during their detention.

In 2006, the “Tipton Three” recounted their Guantánamo experiences for Michael Winterbottom’s commercial film, *The Road to Guantánamo*, which has been shown at major film festivals including Berlin and Tribeca.²² The film features interviews with the men, as well as dramatic re-enactments of them being bound in “stress” positions for hours and forced to listen to painfully loud music.²³

¹⁹ See Appendix I for timeline of quotes.

²⁰ *Id.*

²¹ David Rose, “Using Terror to Fight Terror” *The Observer*, February 26, 2006. Retrieved November 26, 2007, at <http://film.guardian.co.uk/features/featurepages/0,,1717953,00.html>

²² Caryn James, “Critics Notebook: At the Tribeca Film Festival, Foreign Movies Hit Close to Home” *New York Times*, Retrieved November 26, 2007 at http://www.roadto Guantanamo movie.com/reviews/nytimes/ny1_01.html.

²³ *Supra* note 21.

The men's contributions to the film are not "militant" in nature, and cannot constitute a return to the battlefield. The "Tipton Three" have participated neither in "battle" or "fighting" of any kind, nor do they fall in the category of having been "re-captured" or "killed." For the Department of Defense, however, the men's participation in *The Road to Guantánamo*—in the absence of any other allegations—is apparently enough to justify their inclusion among the "at least 30 former GTMO detainees [who] have taken part in anti-coalition militant activities after leaving U.S. detention."²⁴

The Uighurs

Five Uighurs—ethnic Chinese who practice Islam—were extradited in May 2006 from Guantánamo Bay to Albania, where they were taken in as refugees.²⁵ Following three years of incarceration at Guantánamo, the five men were released to the same refugee camp in Tirana, Albania. A May 5, 2006 certification by Samuel M. Whitten, a representative of the Department of State, certified that these men had been transferred "to Albania for resettlement there as refugees."²⁶ Mr. Whitten noted that "[a]s applicants for refugee status, [the men] are free to travel around Albania, and once refugee status has been granted will be free to apply for travel documents permitting overseas travel." According to the camp director, Hidajet Cera, "They are the best guys in the place. They have never given us one minute's problem."²⁷ Since that time, four have since been resettled in apartments in Tirana, and one has joined his sister in Sweden, where he has applied for permanent refugee status.

The Department of Defense has never recanted its assertion that the Uighurs had been improperly classified as "enemy combatants," but it has not accused the Uighurs of any wrongdoing since their release. They have been neither "re-captured" nor "killed."

Most likely, the Department of Defense categorizes as "anti-coalition militant activity" an opinion piece, written by one of the Uighur men and published in the *New York Times*, which urged American lawmakers to protect habeas corpus.²⁸ This would at least be consistent with the Department of Defense's apparent inclusion of speech—if critical of the United States Government—as "anti-coalition militant activity."

²⁴ *Supra* note 10.

²⁵ *Id.*

²⁶ Emergency Motion to Dismiss as Moot, *Abu Bakkar Qassim et. al. v. George W. Bush, et. al.*, Filed May 5, 2006 in the U.S. Court of Appeals for the District of Columbia.

²⁷ Jonathan Fimer, "After Guantanamo, An Empty Freedom" *Washington Post Foreign Service*, October 17, 2007, Page A13. Retrieved November 26, 2007 at <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/16/AR2007101602078.html>.

²⁸ Abu Bakker Qassim, "The View From Guantánamo" *New York Times*, September 17, 2006. Retrieved November 26, 2007 at http://www.nytimes.com/2006/09/17/opinion/17qassim.html?_r=2&oref=slogin&oref=slogin.

Mullah Shazada

According to the Department of Defense, Mullah Shazada “was killed on May 7, 2004 while fighting against U.S. forces.”²⁹ The name Mullah Shazada does not appear on the official list of Guantánamo detainees;³⁰ however, after Mullah Shazada’s death, the Government announced that he had been previously detained in Guantánamo under the name “Mohamed Yusif Yaqub.”³¹ There is a “Mohammed Yusif Yaqub” listed as being detained in Guantánamo, but he was released before Combatant Status Review Tribunals were convened. Thus, his name appears only on the government’s list of 759 detainees that were detained in Guantánamo.³² That list indicates an individual named “Mohammed Yusif Yaqub,” but the detainee is one of seven (7) Afghan detainees for whom a date of birth is “unknown.”³³ The authors of this report extend the benefit of the doubt to the Government, however, and assume that these two names refer to one individual who was in fact previously detained in Guantánamo.

Abdullah Mehsud

Abdullah Mehsud committed suicide during a raid by Pakistani authorities in what the Department of Defense characterizes as a “suicide bombing.”³⁴ (No one but Mehsud was harmed in this episode.)³⁵ The name “Abdullah Mehsud” does not appear in the official list of detainees³⁶; neither does the name “Noor Alam”—another name that has been associated with Abdullah Mehsud³⁷—appear on the list. According to the Government, Abdullah Mehsud was released from Guantánamo in March 2004, before Combatant Status Review Tribunals were convened.

Maulavi Abdul Ghaffar

Maulavi Abdul Ghaffar was reportedly “captured in early 2002 and held at GTMO for eight months.”³⁸ He was “killed in a raid by Afghan security forces” in September 2004.³⁹ The name “Maulavi Abdul Ghaffar” does not appear on the list of detainees. Two detainees with

²⁹ *Supra* note 10.

³⁰ *Supra* note 14.

³¹ *Supra* note 10.

³² *Supra* note 14.

³³ *Id.*

³⁴ *Supra* note 10.

³⁵ “Pakistani Militant Blows Self Up To Avoid Arrest” Associated Press, July 24, 2007. Retrieved November 26, 2007 at <http://www.msnbc.msn.com/id/19923800/>.

³⁶ Although not a very close match to “Abdullah Mehsud,” the government does list one “Sharaf Ahmad Muhammad Masud” (ISN 170) as a detainee in Guantánamo. This detainee, however, cannot be the individual to which the government refers, as he had both a Combatant Status Review Tribunal and Administrative Review Board hearings. These hearings occurred significantly after the March 2004 release claimed by the Department of Defense.

³⁷ “Profile: Abdullah Mehsud” BBC, October 15, 2004. Retrieved November 26, 2007 at http://news.bbc.co.uk/2/hi/south_asia/5745962.stm.

³⁸ *Supra* note 10.

³⁹ *Supra* note 10. Both “Abdul Ghafour,” ISN 954, and “Abdul Ghafaar,” ISN 1032, had Combatant Status Review Tribunal and Administrative Review Board hearings. These hearings occurred significantly after the September 2004 death claimed by the Department of Defense.

similar names were still imprisoned when Ghaffar was allegedly killed.⁴⁰ One other detainee with a similar name was still in Guantánamo until at least March 1, 2004—more than a year after the government alleges Maulavi Abdul Ghaffar was released.⁴¹

Mohammed Ismail

The Department of Defense accuses this individual of “participating” in an attack against United States forces “near Kandahar,” and alleges that at the time of his re-capture, he was carrying “a letter confirming his status as a Taliban member in good standing.”⁴²

The name “Mohammed Ismail” does appear on the official list of Guantánamo detainees. However, there is a discrepancy as to the date of birth. News sources consistently pinpoint Mohammed Ismail’s age at approximately thirteen (13) at the time of his initial capture, and fifteen (15) at the time of release in 2004.⁴³ However, the Department of Defense lists Mohammed Ismail’s year of birth as 1984, which would make him several years older.⁴⁴ Despite this discrepancy,⁴⁵ the authors of this report extend the benefit of the doubt to the Government, and assume that this individual was in fact formerly detained at Guantánamo.

Abdul Rahman Noor

The name “Abdul Rahman Noor” does not appear in either of the official lists of prisoners that the Department of Defense was ordered to release in 2006.⁴⁶ However, a similar name, “Abdul Rahman Noorani,” does appear. It is possible that these two names refer to the same individual, but (a) “Abdul” and “Rahman” are very commonplace names in the region, and (b) the Department of Defense does not indicate that these two names refer to the same person, whereas it did so indicate with respect to another alleged recidivist with an alias, “Mullah Shazada.” It would seem that the Department of Defense would have indicated whether the alleged recidivist was listed under a different name, in this case it did not. Thus, one cannot conclude that “Abdul Rahman Noor” was ever officially detained in Guantánamo. According to the Government, this individual was released in July 2003, before Combatant Status Review Tribunals were convened. The Department of Defense claims to have identified Abdul Rahman Noor “fighting against U.S. forces near Kandahar,” but he apparently has neither been captured nor killed.⁴⁷

⁴⁰ *Supra* note 14.

⁴¹ “Abdullah Ghofoor,” ISN 351, was listed as being in Guantánamo as of March 1, 2004 in documents released by the Department of Defense.

⁴² *Supra* note 10.

⁴³ See, for example, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/02/08/v Guantanamo08.xml>.

⁴⁴ *Supra* note 14.

⁴⁵ The discrepancy is also noted at by the anti-death penalty organization, Reprise. Retrieved December 3, 2007 at <http://icj.icj.org/IMG/AppendixK.pdf>.

⁴⁶ *Supra* note 14.

⁴⁷ *Supra* note 10.

Mohammed Nayim Farouq

According to the Department of Defense, Mohammed Nayim Farouq—who was released from Guantánamo in July 2003, before Combatant Status Review Tribunals were convened—“has since become re-involved in anti-Coalition militant activity,” but has neither been re-captured nor killed.⁴⁸

Ruslan Odizhev

Ruslan Odizhev, a Russian, reportedly was killed in an apartment complex by Russia’s Federal Security Service in June 2007.⁴⁹ The Service did not specify why it was trying to detain him.⁵⁰ The name “Ruslan Odizhev” does not appear in the official lists of prisoners the Department of Defense was ordered to release in 2006, but “Ruslan Anatolovich Odjjev”—a name which is phonetically similar to “Ruslan Odizhev”—does appear on the Department of Defense’s list. The authors of this report extend the benefit of the doubt to the Government, and assume that these two names refer to one individual. It should be noted, however, that the June 2007 death of “Ruslan Odizhev” post-dated Department of Defense statements that thirty (30) former Guantánamo detainees had returned to the battlefield, where they were re-captured or killed.

Summary of Problems with the Individual Identifications

Extending to the Government the benefit of the doubt as to ambiguous cases, the list of possible Guantánamo recidivists who could have been captured or killed on the battlefield consists of two individuals: Mohammed Ismail and Mullah Shazada. If an apartment complex in Russia falls within the definition of “battlefield,” then as of June 2007—after the Department of Defense had already cited thirty (30) as the total number of recidivists—an additional individual, Ruslan Odizhev, can be added to the list. Thus, at most—of the approximately 445 detainees who have been released from Guantánamo⁵¹—three (3) detainees, or less than one percent (1%), have subsequently returned to the battlefield to be captured or killed. Two (2) other detainees (Abdul Rahman Noor and Mohammed Nayim Farouq), while not re-captured or killed, are claimed to be engaged in military activities, although the information provided by the Government in this regard cannot be cross-checked.

⁴⁸ Id.

⁴⁹ “Russian Agents Kill Ex-Gitmo Detainee” CBS News, June 27, 2007. Retrieved November 26, 2007 at <http://www.cbsnews.com/stories/2007/06/27/world/printable2987393.shtml>.

⁵⁰ Id.

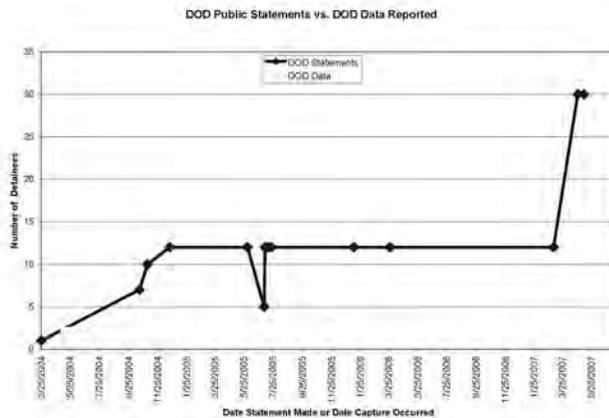
⁵¹ “Detainee Transfer Announced,” Department of Defense (September 29, 2007), Retrieved on December 8, 2007 at <http://www.defenselink.mil/releases/release.aspx?releaseid=11368>.

D. Statements Made Publicly by the Department of Defense and Other Government Officials Do Not Reflect the Department of Defense's Own Data.

The Department of Defense has made at least twelve (12) different statements as to the number of released Guantánamo detainees who have returned to the battlefield to be captured or killed. The range of numbers proffered by the Defense Department is similar to the range of numbers given by other Government departments.

The Department of Defense's statements about the number of recidivists who returned to militant activities and were killed or captured on the battlefield consistently ranges from between ten (10) and twelve (12) from November 2004 to March of 2007. (See graph below.) In March 2007, a total of twelve (12) recidivists were "confirmed" by the Department of Defense, but it was suggested by the Government that "another dozen have returned to the fight." By April, the number cited by the Department of Defense was thirty (30). No explanation has been offered for this precipitous increase in the cited numbers.

The line graph below represents each instance that a Department of Defense official stated a specific number (or range of numbers) of Guantánamo recidivists, as well as the date when the statement was made. A second line on the graph represents the number of ex-detainees claimed to have been killed or captured on the battlefield by the July 12, 2007 Department of Defense news release.



The July 2007 news release issued by the Department of Defense contradicted all of the claims that had been made by Government officials—including Department of Defense officials—that any more than three (3) former detainees could have been killed or captured on a battlefield after being released from Guantánamo. The Department of Defense, in its release, identifies seven (7) individuals by name, but: as many as three (3) of those seven (7) named were never in Guantánamo according to the Department of Defense's official list of detainees; two (2) of the remaining four (4) have neither been killed captured; and of the three (3) who remain, one (1) was killed in his apartment complex in Russia by local authorities—after Daniel J. Dell'Orto, the Deputy General Counsel of Department of Defense, testified before Congress in April 2007.

The July 2007 news release indicates that every single statement made publicly by the Department of Defense as to the number of Guantánamo recidivists was erroneously inflated—including the Deputy General Counsel's claim to the Senate Armed Services Committee on April 26, 2007 that: "[I]t's a combination of 30 we believe have either been captured or killed on the battlefield, so some of them have actually died on the battlefield." Mr. Dell'Orto did not identify the thirty (30) "returnees" by name or ISN, but the Department of Defense's subsequent news release makes clear that that his representation was incorrect.

The July 2007 news release claimed that five (5) former detainees were captured or killed on the battlefield: two (2) in May 2004; one (1) in September 2004; one (1) in October 2004; and one (1) in June 2007 (although not all of the named individuals appear of the Government's official list of former detainees). Thus, any time prior to June 2007 that a Department of Defense spokesperson or any other Government official represented that more than four (4) former detainees had been killed or captured on a battlefield, that representation was false. Any public representations made after June 2007, asserting that more than five (5) former detainees had been killed or captured on a battlefield, were likewise false.

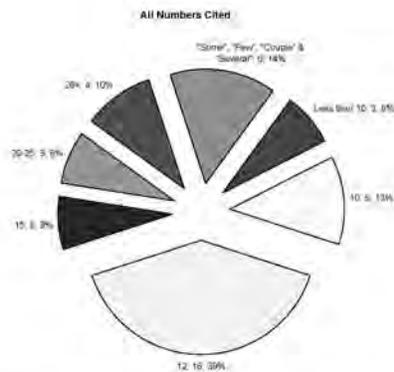
Such incorrect representations include not only statements made by Mr. Dell'Orto to the Senate Armed Services Committee, but also statements made by former Secretary of Defense Donald Rumsfeld, who stated on January 10, 2006 that twelve (12) detainees who had been released from Guantánamo had returned to the battlefield and had been re-captured by United States forces.

Officials from all branches of the Government have made similar pronouncements, perhaps in reliance upon the Department of Defense's public statements. For instance, on March 7, 2006 former Attorney General Alberto R. Gonzales stated that "Unfortunately, despite assurances from those released, the Department of Defense reports that at least 15 have returned to the fight and been captured or killed on the battlefield." Members of both the House and Senate have made similarly incorrect claims—understandably, given the Department of Defense's testimony to Senate and Congressional committees from 2004 throughout the first half of 2007.

III.

When Government Officials Describe the Number of Detainees that have Returned to the Battlefield, they Generally do so with Equivocating Terms.

More than forty (40) Government officials have characterized the number of detainees who have returned to the battlefield and thereafter been killed or captured. The cited numbers of recidivists ranges from one (1) to thirty (30), and are not always consistent with one another. More than forty (40) times, Government officials have stated that detainees have returned to the battlefield only to be killed or recaptured, but almost none of the Government officials have described the alleged recidivists.



Furthermore, the Government's statements as to the total of recidivist ex-detainees are almost always hedged with qualifications. For instance, on June 20, 2005, Scott McClellan—then the White House Press Secretary—stated the following:

*I think that our belief is that about a dozen or so detainees that have been released from Guantánamo Bay have actually returned to the battlefield, and we've either recaptured them or otherwise dealt with them, namely killing them on the battlefield when they were again attacking our forces.*²²

Former Secretary McClellan's short statement limited the number of "recidivists" by *four* qualifying terms. This was the predominate approach, as it turns out, for eighty-two percent

²² Emphasis added. See Appendix for complete timeline of quotes.

(82%) of the publicly made claims catalogued in Appendix I of this report contain qualifying language, including terms such as: “at least”,⁵³ “somewhere on the order of”,⁵⁴ “approximately”,⁵⁵ “around”,⁵⁶ “just short of”,⁵⁷ “we believe”,⁵⁸ “estimated”,⁵⁹ “roughly”,⁶⁰ “more than”,⁶¹ “a couple”,⁶² and “about”.⁶³ Seven (7) times, officials declined to identify the number of recidivist detainees, relying instead on such terms as “some,”⁶⁴ “a few”⁶⁵ or “several.”⁶⁶

Whether Government officials have given exact numbers, numerical ranges, or vague approximations, however, it is evident that the totals given—ranging from “one”⁶⁷ to “at least thirty (30)”⁶⁸—vary widely. Further, while it would be natural for the numbers to change over time, it is surprising that high level Government officials would not know the precise number of recidivists at a given time.

⁵³ H.R. Comm. on Armed Services, *Guantanamo Bay*, Statement of Patrick F. Philbin Associate Deputy Attorney U.S. Department of Justice, 110th Cong. (Mar. 29, 2007).

⁵⁴ H.R. Subcomm. on Def. of the Comm. On Appropriations, *Rep. John P. Murtha Holds a Hearing on the Military Detention Center at Guantanamo Bay, Cuba*, 110th Cong. (May. 9, 2007).

⁵⁵ *Id.*

⁵⁶ Sen. Comm. on Armed Services, *To Receive Testimony on Legislative Issues Regarding Individuals Detained by the Department of Defense as Unlawful Enemy Combatants*, 110th Cong. 108 (Apr. 26, 2007).

⁵⁷ *Id.*

⁵⁸ Sen. Comm. on Armed Services, *U.S. Senator John W. Warner (R-VA) Holds a Hearing on Guantanamo Bay Detainee Treatment*, 110th Cong. (July 13, 2005).

⁵⁹ Sen. Comm. on the Judiciary, *U.S. Senator Arlen Specter (R-PA) Holds a Hearing on the Detainee Trials*, 110th Cong. (Aug. 2, 2006).

⁶⁰ Vince Crawley, *Releasing Guantanamo Detainees Would Endanger World, U.S. Says: State Department legal adviser discusses human-rights concerns in webchat*, <http://usinfo.state.gov/dhr/Archive/2006/May/26-543698.html> (May 25, 2006).

⁶¹ George W. Bush, *Remarks on the War on Terror*, Sept. 11, 2006 Pub. Papers.

⁶² John D. Banusiewicz, *Rice Responds to Call for Guantanamo Detention Facility's Closing*, <http://www.defenselink.mil/news/newsarticle.aspx?id=15706> (May, 21 2006).

⁶³ U.S. Dept. of Def., *Defense Department Special Briefing on Administrative Review Boards for Detainees at Guantanamo Bay, Cuba*, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3171> (July 8, 2005).

⁶⁴ Dorna Miles, *Bush: Guantanamo Detainees Receiving Humane Treatment*, <http://www.defenselink.mil/news/newsarticle.aspx?id=16359> (June 20, 2005).

⁶⁵ U.S. Dept. of St., *Press Gaggle with Scott McClellan and Farvar Shirzad, Aboard Air Force One En Route Prestwick, Scotland*, <http://www.state.gov/p/eur/rls/rm/49002.htm> (July 6, 2005).

⁶⁶ U.S. Dept. of St., *Guantanamo Detainees*, <http://usinfo.state.gov/archives/display.html?p=washfile-english&y=2004&m=March&s=20040316162613mduobba0.2819483> (Mar. 16, 2004).

⁶⁷ Donald H. Rumsfeld, then-Secretary of Defense, U.S. Dept. of Def., *Defense Department Operational Briefing*, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2366> (Mar. 25, 2004).

⁶⁸ “Former Guantanamo Detainees Who Have Returned to the Fight” Department of Defense News Release, July 12, 2007. Retrieved November 26, 2007 at <http://www.defenselink.mil/news/d20070712formertgmo.pdf>.

CONCLUSION

The Department of Defense has failed to provide information indicating that any more than five (5) former Guantánamo detainees have been re-captured or killed. Even among these five (5), two (2) of the individuals' names do not appear on the list of individuals who have at any time been detained at Guantánamo, and the remaining three (3) include one (1) individual who was killed in an apartment complex in Russia by local authorities and one (1) who is not listed among former Guantánamo detainees but who, after his death, has been alleged to have been detained under a different name.

Publicly cited numbers other than those listed above are highly suspect and inconsistent with the information provided by the Department of Defense.

APPENDIX I

**GUANTÁNAMO BAY DETAINEES ALLEGEDLY RELEASED
AND SUBSEQUENTLY RE-CAPTURED OR KILLED
IN COMBAT AGAINST THE UNITED STATES**

TIME LINE OF NUMBERS CITED PUBLICLY BY GOVERNMENT OFFICIALS:

DATE:	NUMBER CITED:	GOV. OFFICIAL:	QUOTE:	*CITE
May 09, 2007	*Approx. 30	Joseph A. Benkert , Principal Deputy Assistant Secretary of Def for Global Affairs	"Reporting to us has led the department to believe that somewhere on the order of 30 individuals whom we have released from Guantánamo have rejoined the fight against us"	1
May 09, 2007	*Approx. 30	Rear Admiral Harry B. Harris Jr. (USN), Commander, Joint Task Force Guantánamo	"Of those detainees transferred or released, we believe approximately 30 have returned to the fight."	2
Apr. 26, 2007	*Approx. 30	Daniel J. Dell'Orto , Principal Deputy General Counsel Dept. of Def	"The General number is around – just short of 30, I think " "It's a combination of 30 we believe have either been captured or killed on the battlefield, so some of them have actually died on the battlefield."	3
Apr. 17, 2007	24	Michael F. Scheuer , Former Chief, Bin Laden Unit, C.I.A.	"But the rub comes with the release, and that is where we are going to eventually have to come down and sit down and do some hard talking, as the Europeans said, because we have had already two dozen of these people come back from Guantánamo Bay and either be killed in action against us or recaptured."	4
Mar. 29, 2007	**At Least 29	Patrick F. Philbin , Associate Deputy Attorney, U.S. Dept. of Justice	"The danger that these detainees potentially pose is quite real, as has been demonstrated by the fact that to date at least 29 detainees released from Guantánamo re-engaged in terrorist	5

			activities, some by rejoining hostilities in Afghanistan where they were either killed or captured on the battlefield."	
Mar. 08, 2007	12	Senator Lindsey Graham (SC)	" Twelve of the people released have gone back to the fight, have gone back to trying to kill Americans and civilians."	6
Mar. 06, 2007	**At Least 12-24	Sr. Defense Official	"I can tell you that we have confirmed 12 individuals have returned to the fight, and we have strong evidence that about another dozen have returned to the fight."	7
Nov. 20, 2006	**At Least 12	Alberto R. Gonzales, U.S. Atty. Gen.	"As you may know, there have been over a dozen occasions where a detainee was released but then returned to fight against the United States and our allies again."	8
Sept. 27, 2006	**At Least 10	Senator Jon Kyl (AZ)	"According to an October 22, 2004 story in the Washington Post, at least 10 detainees released from Guantánamo have been recaptured or killed fighting U.S. or coalition forces in Afghanistan or Pakistan."	9
Sept. 06, 2006	**At Least 12	President George W. Bush	"Other countries have not provided adequate assurances that their nationals will not be mistreated or they will not return to the battlefield, as more than a dozen people released from Guantánamo already have."	10
Aug. 02, 2006	*Approx. 25	Senator Arlen Specter (PA)	"as you know, we have several hundred detainees in Guantánamo. A number estimated as high as 25 have been released and returned to the battlefield, so that's not a desirable thing to happen."	11
July 19, 2006	**At Least 10	Senator James M. Inhofe	" At least 10 detainees we have documented that were released in Guantánamo, after U.S. officials concluded that they posed no real threat or no significant threat, have been recaptured or killed by the U.S. fighting and coalition forces, mostly in Afghanistan."	12

June 20, 2006	15	Senator Jeff Sessions (AL)	"They have released several hundred already, and 15 of those have been rearrested on the battlefield where they are presumably attempting to fight the United States of America and our soldiers and our allies around the world."	13
June 20, 2006	*Approx. 12	Senator Lindsey Graham (SC)	" About a dozen of them have gone back to the fight, unfortunately. So there have been mistakes at Guantánamo Bay by putting people in prison that were not properly classified."	14
May 25, 2006	*Approx. 10% of "hundreds"	John B. Bellinger III, Senior Legal Adviser to Sec. of St. Condoleezza Rice.	" Roughly 10 percent of the hundreds of individuals who have been released from Guantánamo 'have returned to fighting us in Afghanistan,' Bellinger said."	15
May 21, 2006	"a couple"	Condoleezza Rice, U.S. Sec. of St.	"because the day that we are facing them again on the battlefield -- and, by the way, that has happened in a couple of cases that people were released from Guantánamo."	16
Mar. 28, 2006	*Approx. 12	U.S. Dept. of Def.	" Approximately a dozen of the more than 230 detainees who have been released or transferred since detainee operations started at Guantánamo are known to have returned to the battlefield."	17
Mar. 07, 2006	**At Least 15	Alberto R. Gonzales, U.S. Atty. Gen.	"Unfortunately, despite assurances from those released, the Department of Defense reports that at least 15 have returned to the fight and been recaptured or killed on the battlefield."	18
Feb. 14, 2006	*Approx. 15	U.S. Embassy in Tirana – Albania	"Unfortunately, of those already released from Guantánamo Bay, approximately fifteen have returned to acts of terror and been recaptured."	19
Jan. 10, 2006	12	Donald H. Rumsfeld, Defense Secretary	Twelve detainees who'd been released from Guantánamo had returned to the battlefield and had been re-captured by U.S. forces	20

July 21, 2005	*Approx. 12	Matthew Waxman , Dep. Ass. Sec. of Def. for detainee affairs	“About a dozen individuals who were released previously, he said, returned to the battlefield “and tried to harm us again.”	21
July 13, 2005	*Approx. 12	Gen. Bantz Craddock , Commander, U.S. Southern Command	“We believe the number's 12 right now -- confirmed 12 either recaptured or killed on the battlefield.”	22
July 08, 2005	*Approx. 12	Rear Adm. James McGarrah	“About a dozen of the 234 that have been released since detainee operations started in Gitmo we know have returned to the battlefield -- about a dozen.”	23
July 06, 2005	“ a few ”	Scott McClellan , White House Press Sec.	“I mean, the President talked about how these are dangerous individuals; they are at Guantánamo Bay for a reason -- they were picked up on the battlefield. And we've returned a number of those, some 200-plus, we've returned a number of those enemy combatants to their country of origin. Some of -- a few of them have actually been picked up again fighting us on the battlefield in the war on terrorism.”	24
July 06, 2005	**At Least 5	Anonymous Defense Official	“At least five detainees released from Guantánamo have returned to the (Afghan) battlefield,” said the defense official, who requested anonymity.”	25
June 27, 2005	12	Senator Jim Bunning , (KY)	“I could describe many individuals held at Guantánamo and give reasons they need to remain in our custody, but I only will mention a few more. 12, to be exact. That is the number of those we know who have been released from Guantánamo and returned to fight against the coalition troops.”	26
June 20, 2005	*Approx. 12	Scott McClellan , White House Press Sec.	“I think that our belief is that about a dozen or so detainees that have been released from Guantánamo Bay have actually returned to the battlefield, and we've either recaptured them or otherwise dealt with them, namely killing them on the battlefield when they	27

			were again attacking our forces.”	
June 20, 2005	“some”	President George W. Bush	The president was quick to point out that many of the detainees being held “are dangerous people” who pose a threat to U.S. security. Some of those who have been released have already returned to the battlefield to fight U.S. and coalition troops, he said.	28
June 17, 2005	*Approx. 10	Vice President Dick Cheney	“ In some cases, about 10 cases , some of them have then gone back into the battle against our guys. We’ve had two or three that I know of specifically by name that ended up back on the battlefield in Afghanistan where they were killed by U.S. or Afghan forces.”	29
June 16, 2005	12	Congressman Bill Shuster (PA)	“In fact, about two-hundred of these detainees have been released and it’s been proven that twelve have already returned to the fight.”	30
June 14, 2005	**At Least 10	Vice President Dick Cheney	He provided new details about what he said had been at least 10 released detainees who later turned up on battlefields to try to kill American troops.	31
June 13, 2005	**At Least 12	Scott McClellan, White House Press Sec.	“There have been -- and Secretary Rumsfeld talked about this recently -- at least a dozen or so individuals that were released from Guantánamo Bay, and they have since been caught and picked up on the battlefield seeking to kidnap or kill Americans.”	32
June 06, 2005	“some”	Air Force Gen. Richard B. Myers	“We’ve released 248 detainees, some of whom have come back to the battlefield, some of whom have killed Americans after they have been released.”	33
June 01, 2005	**At Least 12	Donald H. Rumsfeld, Defense Secretary	“ At least a dozen of the 200 already released from GITMO have already been caught back on the battlefield, involved in efforts to kidnap and kill Americans.”	34

Dec. 20, 2004	**At Least 12	Gordon England , Secretary of The Navy	"And as you are aware, there's been at least 12 of the more than 200 detainees that have been previously released or transferred from Guantánamo that have indeed returned to terrorism."	35
Nov. 03, 2004	**At Least 10	Charles Douglas "Cully" Stimson , Dep. Ass. Sec. of Def. for Detainee Affairs	Of the roughly 200 detainees the United States has released from its Guantánamo Bay, Cuba, detention facility, intelligence claims that at least 10 returned to terrorist activity, the deputy assistant secretary of defense for detainee affairs said here Nov. 2.	36
Oct. 19, 2004	"a couple"	Vice President Dick Cheney	"And we have had a couple of instances where people that were released, that were believed not to be dangerous have, in fact, found their way back onto the battlefield in the Middle East."	37
Oct. 17, 2004	**At Least 7	U.S. Military Officials	at least seven former prisoners of the United States at Guantánamo Bay, Cuba, have returned to terrorism, at times with deadly consequences.	38
Mar. 25, 2004	1	Donald H. Rumsfeld , Defense Secretary	"Now, have we made a mistake? Yeah. I've mentioned earlier that I do believe we made a mistake in one case and that one of the people that was released earlier may very well have gone back to being a terrorist."	39
Mar. 16, 2004	"several"	Dept. of Def.	"Releases are not without risk. Even though the threat assessment process is careful and thorough, the U.S. now believes that several detainees released from Guantánamo have returned to the fight against U.S. and coalition forces."	40

* "Approx." indicates the specific language used was an approximation; the specific number cited was used contextually with qualifying language. See "QUOTE" column for actual qualifying language used within the immediate textual area of the number cited.

** "At Least" indicates that the phrase "at least" was used in connection with the number provided; the number provided is therefore a baseline, or the lowest number possible

APPENDIX 2

*CITATIONS:

1	HR. Subcomm. on Def. of the Comm. On Appropriations, <i>Rep. John P. Murtha Holds a Hearing of the Military Detention Center at Guantánamo Bay, Cuba</i> , 110 th Cong. (May, 9, 2007).
2	HR. Subcomm. on Def. of the Comm. On Appropriations, <i>Rep. John P. Murtha Holds a Hearing of the Military Detention Center at Guantánamo Bay, Cuba</i> , 110 th Cong. (May, 9, 2007).
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8	U.S. Dept. of Just., <i>Prepared Remarks of Attorney General Alberto R. Gonzales at the U.S. Air Force Academy Regarding Civil Liberties and the War on Terrorism</i> , http://www.usdoj.gov/ag/speeches/2006/ag_speech_061120.html (Nov. 20, 2006).
9	152 Cong. Rec. S 10270 (Sept. 27, 2006).
10	George W. Bush, <i>Remarks on the War on Terror</i> , Sept. 11, 2006 Pub. Papers.
11	Sen. Comm. On the Judiciary, <i>U.S. Senator Arlen Specter (R-PA) Holds a Hearing on the Detainee Trials</i> , 110 th Cong. (Aug. 2, 2006).
12	Sen. Comm. On Armed Services, <i>U.S. Senator John W Warner (R-VA) Holds a Hearing on Detainee Trials Following Supreme Court Ruling in Hamdan v. Rumsfeld</i> , 110 th Cong. (July 19, 2006).
13	U.S. Senator Jeff Sessions, <i>Senate Floor Statement of Senator Sessions: National Defense Authorization Act for Fiscal Year 2007</i> , http://sessions.senate.gov/pressapp/record.cfm?id=257513 (June 20, 2006).
14	152 Cong. Rec. S 6113 (June 20, 2006).
15	Vince Crawley, <i>Releasing Guantánamo Detainees Would Endanger World, U.S. Says</i> State Department legal adviser discusses human-rights concerns in webchat, http://usinfo.state.gov/dhr/Archive/2006/May/26-543698.html (May 25, 2006).

16	John D. Banusiewicz, <i>Rice Responds to Call for Guantánamo Detention Facility's Closing</i> , http://www.defenselink.mil/news/newsarticle.aspx?id=15706 (May, 21 2006).
17	U.S. Dept. of Def., <i>Defense Department Update, March 28, 2006 - GIMMO Detainees: U.S. Naval Station Guantánamo Bay, Cuba</i> , http://www.defenselink.mil/home/dodupdate/For-the-record/documents/20060328a.html (Mar. 28, 2006).
18	U.S. Dept. of Just., <i>Prepared Remarks by Attorney General Alberto R. Gonzales at the International Institute for Strategic Studies</i> , http://www.usdoj.gov/ag/speeches/2006/ag_speech_060307.html (Mar. 7, 2006).
19	U.S. Embassy in Tirana – Albania, <i>The Truth About Guantánamo</i> , http://tirana.usembassy.gov/06pr_0214.html (Feb. 14, 2006).
20	Gerry J. Gilmore, <i>Detention Puts Terrorists Out of Action, DoD Official Says</i> , http://www.defenselink.mil/news/newsarticle.aspx?id=14649 (Jan. 10, 2006).
21	U.S. Dept. of St., <i>United States Intent on Repatriating as Many Detainees As Possible, State Department's Prosper says release tied to risk-management issues</i> , http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2005&m=July&x=20050721153553jhtrop08918726 (July 21, 2005).
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25	Shaun Waterman, <i>Released detainees return to fighting U.S.</i> , http://www.upi.com/International_Intelligence/Analysis/2004/07/05/released_detainees_return_to_fighting_us/4578/ (July 5, 2005).
26	151 Cong. Rec. S 7398 (June 27, 2005).
27	The White House, <i>Press Briefing by Scott McClellan</i> , http://www.whitehouse.gov/news/releases/2005/06/20050620-20.html (June 20, 2005).
28	Donna Miles, <i>Bush: Guantánamo Detainees Receiving Humane Treatment</i> , http://www.defenselink.mil/news/newsarticle.aspx?id=16359 (June 20, 2005).
29	The White House, <i>Radio Interview of the Vice President by Steve Gill, The Steve Gill Show</i> , http://www.whitehouse.gov/news/releases/2005/06/20050617-9.html (June 17, 2005).
30	The U.S. House of Rep., <i>Shuster Calls for Detainees to Remain at Guantánamo</i> , http://www.house.gov/list/press/pa09_shuster/Guantánamo.html (June 16, 2005).
31	Elisabeth Bumiller, <i>Cheney Calls Guantánamo Prison Essential</i> , http://www.nytimes.com/2005/06/

	14/politics/14cheney.html?ex=1276401600&en=2a8f657e230d562a&ei=5090&partner=rssuserland&mc=rss June 14, 2005.
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35	U.S. Dept. of Def., <i>Special Defense Department Briefing on Status of Military Tribunals</i> , http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2043 (Dec. 20, 2004).
36	Samantha L. Quigley, <i>Former Detainees Released by U.S. Rejoining Fight</i> , http://www.defense.gov/news/newsarticle.aspx?id=24933 (Nov. 3, 2004).
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38	CBS News (AP), <i>Gitmo Detainees Return To Terror, 7 Ex-Prisoners Allegedly Violated Pledge To Renounce Violence</i> , http://www.cbsnews.com/stories/2004/09/24/terror/main645493.shtml (Oct. 17, 2004).
39	U.S. Dept. of Def., <i>Defense Department Operational Briefing</i> , http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2366 (Mar. 25, 2004)
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APPENDIX 3

Former Guantanamo Detainees who have returned to the fight:

Our reports indicate that at least 30 former GTMO detainees have taken part in anti-coalition militant activities after leaving U.S. detention. Some have subsequently been killed in combat in Afghanistan.

These former detainees successfully lied to US officials, sometimes for over three years. Many detainees later identified as having returned to fight against the U.S. with terrorists falsely claimed to be farmers, truck drivers, cooks, small-scale merchants, or low-level combatants.

Other common cover stories include going to Afghanistan to buy medicines, to teach the Koran, or to find a wife. Many of these stories appear so often, and are subsequently proven false that we can only conclude they are part of their terrorist training.

Although the US government does not generally track ex-GTMO detainees after repatriation or resettlement, we are aware of dozens of cases where they have returned to militant activities, participated in anti-US propaganda or other activities through intelligence gathering and media reports. (Examples: Mehsud suicide bombing in Pakistan; Tipton Three and the Road to Guantanamo; Uighurs in Albania)

The following seven former detainees are a few examples of the 30; each returned to combat against the US and its allies after being released from Guantanamo.

Mohamed Yusif Yaqub AKA Mullah Shazada:

After his release from GTMO on May 8, 2003, Shazada assumed control of Taliban operations in Southern Afghanistan. In this role, his activities reportedly included the organization and execution of a jailbreak in Kandahar, and a nearly successful capture of the border town of Spin Boldak. Shazada was killed on May 7, 2004 while fighting against US forces. At the time of his release, the US had no indication that he was a member of any terrorist organization or posed a risk to US or allied interests.

Abdullah Mehsud:

Mehsud was captured in northern Afghanistan in late 2001 and held until March of 2004. After his release he went back to the fight, becoming a militant leader within the Mehsud tribe in southern Waziristan. We have since discovered that he had been associated with the Taliban since his teen years and has been described as an al Qaida-linked facilitator. In mid-October 2004, Mehsud directed the kidnapping of two Chinese engineers in Pakistan. During rescue operations by Pakistani forces, a kidnapper shot one of the hostages. Five of the kidnappers were killed. Mehsud was not among them. In July 2007, Mehsud carried out a suicide bombing as Pakistani Police closed in on his position. Over 1,000 people are reported to have attended his funeral services.

Maulavi Abdul Ghaffar:

After being captured in early 2002 and held at GTMO for eight months, Ghaffar reportedly became the Taliban's regional commander in Uruzgan and Helmand provinces, carrying out attacks on US and Afghan forces. On September 25, 2004, while planning an attack against Afghan police, Ghaffar and two of his men were killed in a raid by Afghan security forces.

Mohammed Ismail:

Ismail was released from GTMO in 2004. During a press interview after his release, he described the Americans saying, "they gave me a good time in Cuba. They were very nice to me, giving me English lessons." He concluded his interview saying he would have to find work once he finished visiting all his relatives. He was recaptured four months later in May 2004, participating in an attack on US forces near Kandahar. At the time of his recapture, Ismail carried a letter confirming his status as a Taliban member in good standing.

Abdul Rahman Noor:

Noor was released in July of 2003, and has since participated in fighting against US forces near Kandahar. After his release, Noor was identified as the person in an October 7, 2001, video interview with al-Jazeera TV network, wherein he is identified as the "deputy defense minister of the Taliban." In this interview, he described the defensive position of the mujahideen and claimed they had recently downed an airplane.

Mohammed Nayim Farouq:

After his release from US custody in July 2003, Farouq quickly renewed his association with Taliban and al-Qaida members and has since become re-involved in anti-Coalition militant activity.

Ruslan Odizhev:

Killed by Russian forces June 2007, shot along with another man in Nalchik, the capital of the tiny North Caucasus republic of Kabardino-Balkaria. Odizhev, born in 1973, was included in a report earlier this year by the New York-based Human Rights Watch on the alleged abuse in Russia of seven former inmates of the Guantanamo Bay prison after Washington handed them back to Moscow in 2004.

As the facts surrounding the ex-GTMO detainees indicate, there is an implied future risk to US and allied interests with every detainee who is released or transferred.

APPENDIX 4

Unclassified

Combatant Status Review Board

TO: Personal Representative

FROM: DIC, CSRT (31 August 04)

Subject: Summary of Evidence for Combatant Status Review Tribunal, KHADR, OMAR AHMED

1. Under the provisions of the Secretary of the Navy Memorandum, dated 29 July 2004, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base Cuba*, a Tribunal has been appointed to review the detainee's designation as an enemy combatant.
2. An enemy combatant has been defined as "an individual who was part of or supporting the Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."
3. The United States Government has previously determined that the detainee is an enemy combatant. This determination is based on information possessed by the United States that indicates that he is a member of al Qaida and participated in military operations against U.S. forces.
 - a. The detainee is an al Qaida fighter:
 1. The detainee admitted he threw a grenade which killed a U.S. soldier during the battle in which the detainee was captured.
 2. The detainee attended an al Qaida training camp in the Kabul, Afghanistan area where he received training in small arms, AK-47, Soviet made PK guns, RPGs.
 3. The detainee admitted to working as a translator for al Qaida to coordinate land mine missions. The detainee acknowledged that these land mine missions are acts of terrorism and by participating in them would make him a terrorist.
 - b. The detainee participated in military operations against U.S. forces:
 1. Circa June 2002, the detainee conducted a surveillance mission where he went to an airport near Khost to collect information on U.S. convoy movements.
 2. On July 20, 2002 detainee planted 10 mines against U.S. forces in the mountain region between Khost and Gharderz. This region is a choke point where U.S. convoys would travel.
4. The detainee has the opportunity to contest his designation as an enemy combatant. The Tribunal will endeavor to arrange for the presence of any reasonably available witnesses or evidence that the detainee desires to call or introduce to prove that he is not an enemy combatant. The Tribunal President will determine the reasonable availability of evidence or witnesses.

Unclassified

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Page 1 of 1

Exhibit R-1

**THE EMPTY BATTLEFIELD
AND THE
THIRTEENTH CRITERION**

AN ANALYSIS OF THE DATA AND METHODOLOGY IN
THE DEPARTMENT OF DEFENSE'S RESPONSE TO
CONGRESSIONAL REQUEST FOR JUSTIFICATION OF THE
GUANTÁNAMO DETENTIONS

By

Mark Denbeaux
Professor, Seton Hall University School of Law and
Joshua Denbeaux, Esq.
Denbeaux & Denbeaux
Counsel to two Guantánamo detainees

And

Grace Brown, Jillian Camarote, Douglas Eadie,
Jennifer Ellick, Daniel Lorenzo, Mark Muoio, Courtney Ray
Students and Research Fellows
Seton Hall University School of Law

With

Matthew Darby, Shana Edwards, David Gratz, John Gregorek,
Daniel Mann, Megan Sassaman, Helen Skinner
Research Fellows at the Seton Hall Center for Policy and Law.

THE EMPTY BATTLEFIELD AND THE THIRTEENTH CRITERION:**EXECUTIVE SUMMARY**

The Seton Hall Center for Policy and Research (“Seton Hall”) published its first report on the Guantánamo detainees—a comparison between detainees’ enemy combatant designations and detainees’ Combatant Status Review Tribunal (“CSRT”) unclassified summaries of the evidence—nearly two years ago. That report was based entirely upon the Department of Defense’s own data, and revealed that the Defense Department’s records were at odds with its claim that those detained were properly classified as enemy combatants.

Due to a Congressional request, the Department of Defense delegated to West Point’s Combating Terrorism Center (“West Point”) the task of responding to the Seton Hall reports. In the process, West Point’s report³ recast the argument from whether a detainee’s enemy combatant status is justified by the unclassified summary of evidence in his CSRT, to whether a detainee’s unclassified summary meets arbitrary “threat levels” invented by West Point. This report analyzes West Point’s attempt to fulfill this congressional mandate.

West Point’s report attempts to challenge only the first of Seton Hall’s six Guantánamo reports.⁴ West Point does not, for instance, attempt to address the procedural defects of the CSRT as identified by Seton Hall in its subsequent reports.

Part One (A) of this report discusses West Point’s response to Seton Hall, and reveals the following:

1. West Point does not dispute any of Seton Hall’s key findings.
2. To the extent that West Point purports to find defects in Seton Hall’s methodology, it actually criticizes the Department of Defense’s evidentiary bases for the detention of Guantánamo detainees as enemy combatants.

Part One (B) of this report discusses West Point’s confirmation of Seton Hall’s findings, and reveals the following:

³ Jarrett Brachman, *et al.*, *Combating Terrorism Ctr., An Assessment of 516 Combatant Status Review Tribunal (CSRT) Unclassified Summaries* (2007) (hereinafter “WP Report”).

⁴ See Mark Denbeaux, *et al.*, *Report on Guantánamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data* (2006) (hereinafter “SH Profile”). Available at http://law.shu.edu/news/guantanamo_reports.htm.

1. West Point confirms Seton Hall's finding that ninety-five percent (95%) of those detained as enemy combatants were not alleged to have been captured by United States forces.
2. This fact, confirmed by West Point, directly contradicts the executive branch's contention that Guantánamo was populated by individuals who were "picked up on the battlefield, fighting American forces, trying to kill American forces."
3. Upon further examination, the data shows that only twenty-one (21) of the 516 detainees in Guantánamo are accused of ever having been on a battlefield.
4. *Only one* (1) detainee in Guantánamo was alleged to have been captured by United States forces on a battlefield.
5. These new battlefield statistics are corroborated by Department of Defense data revealing that (a) fifty-five percent (55%) of those detained were never accused of committing a hostile act; (b) ninety-two percent (92%) were never accused of being a fighter; and (c) sixty percent (60%) were accused *not* of being members of al-Qa'ida or the Taliban, but merely of being "associated" with those groups.

Part Two of this report discusses West Point's methodology and reveals the following:

1. West Point uses a methodology that is not only arbitrary but ultimately circular. It confuses rather than clarifies the issue of whether detainees are properly designated as enemy combatants. West Point deviates from Defense Department data and terminology, justifying such departures—if at all—with anecdotal evidence. West Point employs repetitive data fields and engages in double-counting, piling up statistics in favor of its implicit thesis that the detainees' dangerousness is sufficiently evident from the CSRT unclassified summaries of evidence.
2. While this process results in twelve explicit "threat variables," West Point's categories are vast enough to include literally tens of millions of Americans as evidencing threat. The explicit threat variables make sense only when coupled with West Point's implicit *thirteenth variable*: namely, that a detainee poses some type of threat if he satisfies any one of West Point's twelve variables *and* he satisfies the *criterion of being detained at Guantánamo*. Obviously, such reasoning is circular. Nonetheless, West Point applies this reasoning to its analysis of each detainee's CSRT unclassified summary.

3. When all of West Point's faulty categories are stripped away, all that remains are the variables contained within the Government's definition of "enemy combatant."
4. Despite erring heavily on the side of over-inclusion, West Point essentially concedes that at least twenty-seven percent (27%) of CSRT unclassified summaries of evidence *do not necessarily indicate that a detainee is in fact threatening*, as well as that more than one percent (1.16%) evidence *no threat whatsoever*.

INTRODUCTION

In February 2006, the Seton Hall Center for Policy and Research published its first in a series of six reports on the Guantánamo detainees. In this report, Seton Hall provided a detailed picture of the detainees, how they ended up in Guantánamo, and what the Department of Defense purported were the bases of their enemy combatant designations.⁵ Seton Hall based its profile of the detainees entirely upon the Department of Defense's own records: namely, the unclassified summaries of the evidence for each of 516 detainees for whom a CSRT had been convened.

Seton Hall found the Government's claim that those detained at Guantánamo were the "worst of the worst"⁶ to be at odds with the Department of Defense's own evidence. Among Seton Hall's findings were that: Fifty-five percent (55%) of detainees were not alleged to have committed any hostile acts against the United States or its allies; only eight percent (8%) of detainees were characterized as al-Qa'ida fighters; and five percent (5%) of detainees were captured by United States forces, whereas eighty-six percent (86%) were captured by either Pakistan or the Northern Alliance and handed over to the United States at a time when the United States offered large bounties for capture of suspected enemies.⁷

In subsequent reports, Seton Hall identified defects in the CSRT process, including, for example: that the Government relied upon hearsay and secret evidence; that the detainees were denied the opportunity to provide witnesses or other evidence; and that the detainees were denied adequate representation.

⁵ SH Profile at 2.

⁶ The Washington Post, in an article dated October 23, 2002, quoted then-Secretary Donald Rumsfeld as terming the detainees "the worst of the worst." Donald Rumsfeld Holds Defense Briefing. (March 28, 2002). FDCH Political Transcripts. Retrieved January 10, 2006 from Lexis-Nexis database.

⁷ SH Profile at 2-3.

The Department of Defense, at the request of Senator Carl Levin, Chair of the Senate Armed Services Committee, agreed on April 26, 2007 to respond to Seton Hall's reports.⁸ However, the Department of Defense did not identify "any specific disagreement" with the accuracy of the Seton Hall reports pursuant to Senator Levin's request. Instead, the Department of Defense commissioned faculty at the Military Academy at West Point to respond to Seton Hall's profile.⁹ Ninety days later, West Point's Combating Terrorism Center published its response, which, however, never addresses the central issue that the Senate Armed Services Committee was considering when Senator Levin issued his request. That is, West Point never attempts to address the question--Were the Combatant Status Review Tribunals an adequate substitute for habeas corpus?¹⁰

⁸ Senator Carl Levin, Chair of the Senate Armed Services Committee:

"Would you get, for the Committee, any specific disagreements that you have...factually, with the reports of Mr. Denbeaux."

Daniel J. Dell'Orto, Principle Deputy General Counsel, Department of Defense:

"... Within a relatively short period of time, although I think one of the reviews is taking--it's going to take us about another 30 days."

Senate Armed Services Committee Hearing, April 26, 2007.

⁹ Lt. Col. Joseph H. Felter, West Point faculty member and director of West Point's Combating Terrorism Center, acknowledged "that military officials had indicated they wanted to contest the Seton Hall report. "They had been getting a lot of inquiries related to this previous study," he said. "They had a lot of concerns with the conclusions, but they did not have another study." Glaberson, William, "Pentagon Study Sees Threat in Guantánamo Detainees." *The New York Times*, July 26, 2007.

¹⁰ The West Point study authors disclaim that their study is the official position of West Point Military Academy, the CTC, the U.S. Army, or the Department of Defense. If the Pentagon-commissioned report does not reflect the official position of the Department of Defense, then the Department has still not officially responded to Senator Levin's request that it identify its specific disagreements with the Seton Hall study. For the sake of brevity, this response refers to the study—authored by the Director and the Director of Research at West Point Military Academy's Combating Terrorism Center—as the "West Point" report.

▪ PART ONE (A) ▪

WEST POINT'S RESPONSE TO THE SETON HALL STUDY

West Point, on behalf of the Department of Defense, does not list its factual disagreements with any of Seton Hall's reports, despite Senator Levin's request.¹¹ Instead, West Point's report invents its own methodology (discussed in Part Two of this report) for evaluating detainee dangerousness, and limits its disagreements with Seton Hall to an appendix in which it attempts to make four criticisms of just one of Seton Hall's reports. West Point's criticisms are without merit, and are discussed in detail below.

First, however, it is important to stress that the Pentagon-commissioned West Point report does not dispute any of the following:

- A. According to the Department of Defense, the majority of those detained in Guantánamo as enemy combatants were not accused of engaging in any combat against either the United States or its allies. In fact, fifty-five percent (55%) of the detainees were not determined to have committed any hostile acts against the United States or its coalition allies. That means that fifty-five percent (55%) of the "worst of the worst"¹²—those alleged to be enemy combatants—are actually civilians.
- B. Only eight percent (8%) of the detainees were characterized as al-Qa'ida fighters. Of the remaining detainees, forty percent (40%) had no definitive connection with al-Qa'ida, and eighteen percent (18%) had no definitive affiliation with either al-Qa'ida or the Taliban. Sixty percent (60%) of those detained were alleged only to have had some kind of "association" with one or the other. Furthermore, it is undisputed that to have been associated with the Taliban is to have been associated with the ruling party of Afghanistan before the United States took military action there.

¹¹ *Supra* note 6.

¹² *Supra* note 4.

- C. Moreover, detainees' alleged relationships with supposed terrorist groups vary considerably. Eight percent (8%) were detained because they were deemed "fighters for" such groups, and thirty percent (30%) were characterized as group "members"—but a large majority (60%) of detainees were detained merely because they are allegedly "associated with" a group or groups the Government asserts are terrorist organizations. As to two percent (2%) of prisoners, the Government identified no relationship with any terrorist group whatsoever.
- D. According to the Department of Defense, a maximum of five percent (5%) of those detained in Guantánamo were captured by United States forces and even fewer were captured on *any* battlefield.¹³ This data is expressly confirmed by West Point, and is discussed in detail in below.
- E. The Department of Defense's own documents show that eighty-six percent (86%) of the detainees were arrested by either Pakistan or the Northern Alliance and later turned over to United States custody.
- F. These detainees were handed over to the United States at a time during which the United States offered large bounties for the capture of suspected enemies.
- G. The Government has detained numerous persons based on alleged affiliations with a variety of groups. Many of these groups either do not exist, or do exist and the Department of State allows their members into the United States.

Furthermore, West Point does not attempt to address the glaring procedural defects in the CSRT proceedings, which Seton Hall identified in its *No Hearing Hearings* report.¹⁴ Thus, West Point does not dispute any of the following:

- A. The Government (1) did not produce any witnesses in any hearing; (2) did not present any documentary evidence to the detainee prior to the hearing in ninety-six percent (96%) of cases; and (3) relied on classified evidence that it kept secret from the detainee and which was presumed to be reliable and valid.
- B. Detainees were not allowed to produce evidence. All requests by detainees for witnesses not already detained in Guantánamo were denied, and the only documentary evidence that the detainees were allowed to produce was from family or friends.

¹³ "The CTC [at West Point] did confirm that only 5% of the publicly released 516 CSRT unclassified summaries provide information that an individual was captured by U.S. forces. CTC faculty also found that the majority of those captured, for whom the CSRT unclassified summaries provide data, were captured by forces other than the United States." WP Response at 7.

¹⁴ Available at http://law.shu.edu/news/guantanamo_reports.htm.

- C. Detainees were denied lawyers. Instead, each detainee was assigned a “Personal Representative” whose role, both in theory and practice, was minimal.
- D. Even when detainees won, they lost. In each case where the Tribunal found a detainee to be not/no-longer an enemy combatant, the Department of Defense ordered a new Tribunal convened, and the detainee was then determined to be an enemy combatant. In one instance, a detainee was found to be no-longer an enemy combatant by *two* tribunals, before a third Tribunal was convened which then determined the detainee to be an enemy combatant. The detainee was not informed of his favorable decision.

Although the West Point report does not dispute any of Seton Hall’s key findings, the study makes—in its appendix—four criticisms of the methodology Seton Hall used in its first report. At the core of each criticism is not Seton Hall’s particular use of the Department of Defense data, but rather deficiencies that West Point finds in the Department’s data itself.

A key difference between Seton Hall’s methodology and West Point’s methodology is that the Seton Hall profile assumed as true and accurate every piece of evidence that the Department of Defense provided to prove that those detained in Guantánamo are enemy combatants. Thus, Seton Hall accepted and honored the data that the Department of Defense produced; West Point does not.

West Point’s criticisms of Seton Hall’s methodology are as follows: (1) Seton Hall should have used more categories of data; (2) Seton Hall should not have made any distinction between “guest houses” and “safe houses”; (3) Seton Hall’s report failed to make clear that the Department of Defense may have more evidence than was published; and (4) the list of organizations in Seton Hall’s appendix included groups that were not terrorist organizations.

Seton Hall responds to each criticism in detail below. As a preliminary matter, however, it must be noted that: (1) the categories of data used by Seton Hall mirrored the *categories used by the Department of Defense*; (2) Seton Hall applied *the Department of Defense’s distinction* between “guest” and “safe houses”; (3) Seton Hall evaluated the *data that the Department of Defense provided* in the summaries of the evidence (in support of its determination of detainees’ enemy combatant status), and did not assume that the Department’s data was incomplete; and (4) the organizations listed by Seton Hall in its appendix were drawn from organizations *cited by the Department of Defense* as groups with which membership or associations were considered grounds for continued detention.

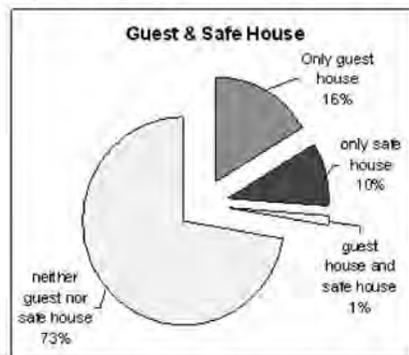
I. West Point contends that Seton Hall used too few data categories.¹⁵

The West Point study suggests that an increased number of categories of data necessarily results in better findings. While that could in theory be true, West Point fails to explain why any of its new categories are relevant or might lead to more reliable findings. More accurate and more precise categories necessarily lead to more accurate data and more precise findings; more categories only lead to more data. There is no logical correlation between sheer quantity of categories and quality of findings.

The Seton Hall profile employed the same categories that were used by the Department of Defense. The West Point report does not honor the Department of Defense's categories, but rather invents its own.

II. West Point suggests that Seton Hall erred in making a distinction between "safe houses" and "guest houses."¹⁶

The West Point study's second criticism is that the Seton Hall report failed to appreciate the contextual meaning of the term "safe house." Specifically, the study contends that Seton Hall erred by failing to recognize that "safe houses" are a well known haven for criminals and terrorists, and that "guest houses" are exactly the same as "safe houses." As West Point correctly notes, Seton Hall's report did distinguish between "guest houses" and "safe houses"; Seton Hall drew that distinction because the Department of Defense drew that distinction. As in all aspects of its study, Seton Hall honored the Department of Defense's data and terminology. Therefore, where the Department of Defense characterized a facility as a "safe house," Seton Hall maintained



that facility's characterization as a "safe house," and where the Department characterized a facility as a "guest house," Seton Hall maintained that facility's characterization as such.

For instance, the Department of Defense's data stated that 16% of the detainees stayed in "guest houses," 10% stayed in "safe houses," and 1% used both. Seton Hall illustrated the data as it was described by the Department of Defense with the pie chart reprinted here.¹⁷

Seton Hall's methodology required that Seton Hall accept all of the Department of Defense's data and definitions. As such, Seton Hall's study used the Department of Defense's terms objectively and accepted their plain meanings—unlike the West Point

¹⁵ WP Report at 4.

¹⁶ *Id.*

¹⁷ See SH Profile at Figure 15.

study—which subjectively interprets the Department’s terms in order to extrapolate different meanings from what was given. It is logically possible that West Point is correct, but that would be a reflection on the carefulness and accuracy of the Department of Defense’s records. However, West Point does not provide any basis for equating guest houses and safe houses other than the obvious problem with detaining an individual in part based on his stay in a “guest” house.

III. West Point contends that Seton Hall erred by failing to recognize that other data, unpublished by the Department of Defense, may exist.¹⁸

West Point points out that, although the Department of Defense may not have reported certain evidence, it does not follow that unreported evidence does not exist. While this is true, it is irrelevant to the purpose of Seton Hall’s study.¹⁹ Seton Hall repeatedly made clear that its analysis was of the Department of Defense’s *published* data; the Department of Defense stated that the published data comprising the summaries of evidence formed the bases upon which detainees were held as enemy combatants, and Seton Hall, for the purpose of its profile, assumed the truthfulness of everything the Department of Defense stated.

West Point does not go so far as to allege that Seton Hall ever explicitly contended that there could be no unpublished evidence known to the Department of Defense; rather, West Point suggests that Seton Hall’s language might lead a reader to that conclusion. West Point writes:

"[L]anguage in the Seton Hall study can potentially mislead readers by suggesting that if a CSRT record does not contain a direct reference to a piece of evidence, that it does not exist."²⁰

In fact, no such language appears in Seton Hall’s report. Because Seton Hall reported what the Department of Defense said—and not what the Department of Defense did not say—issues of incomplete data are issues to be taken with the Department of Defense, not with Seton Hall. If there are deficiencies in the data, those deficiencies exist because either (1) the Department of Defense does not have sufficient evidence to support its findings of enemy combatant status, or (2) the Department of Defense has, but failed to provide, sufficient evidence to support its findings of enemy combatant status.

A final point on the topic of potentially misleading implications about the existence or non-existence of unpublished evidence: West Point implies that any additional, unpublished data would support the Department of Defense’s findings of enemy combatant status, but the facts suggest otherwise. The recent declaration by Lieutenant Colonel Stephen Abraham, dated June 15, 2007 and filed in the United States

¹⁸ WP Report at 4.

¹⁹ The purpose of the Seton Hall study was to analyze the evidence that the Department of Defense actually *produced* to support its finding that a detainee was an “enemy combatant.”

²⁰ *Id.*

Supreme Court in *Al Odah v. U.S.*,²¹ describes the Department of Defense's refusal to acknowledge whether exculpatory evidence had been withheld. If Lt. Colonel Abraham's declaration is correct, then there exists unclassified evidence— withheld by the Department of Defense—that would likely have portrayed the detainees in a far more benign light than did the data that the Department elected to provide.

IV. West Point contends that Seton Hall erroneously included non-terrorist organizations in its appendix.²²

The Department of Defense, in its published data, listed detainees' affiliations with more than seventy "organizations" as evidence of enemy combatant status. West Point correctly notes that many of the organizations cited by the Department as terrorist organizations either did not exist or were not properly characterized as terrorist organizations. Again, Seton Hall—in keeping with its stated methodology—simply recorded the names of the groups that the Department of Defense cited in its evidentiary bases for detainees' detention as enemy combatants. That the groups were not properly categorized as terrorist or non-terrorist groups is a criticism of the Department of Defense and not of Seton Hall.

²¹ 127 S.Ct. 3067 (2007).

²² WP Report at 5.

• PART ONE (B) •

THE EMPTY BATTLEFIELD

As noted previously, West Point expressly confirms one of Seton Hall's key findings with its acknowledgment that:

The [West Point] CTC did confirm that only 5% of the publicly released 516 CSRT unclassified summaries provide information that an individual was captured by U.S. forces.²³

Thus, West Point confirms that ninety-five percent (95%) of detainees *were not reported to have been captured by the United States, on the battlefield or anywhere else.*²⁴ Another two percent (2%) of detainees were captured by coalition forces. The term "coalition forces" is not defined by the Department of Defense and the Department of Defense distinguishes "coalition forces" from Pakistani Authorities and the Northern Alliance/Afghani Authorities.

West Point's confirmation of this finding is significant because it directly refutes the claims of numerous government officials, including President Bush,²⁵ Vice President Cheney,²⁶ Secretary of State Condoleezza Rice,²⁷ former White House press secretary

²³ *Id.* at 41.

²⁴ The profile of the twenty-four (24) detainees who were captured by United States forces, twenty (20) of them were never on a battlefield, fourteen (14) of them are not accused of committing any hostile act, and, of course only one (1) of the remaining ten (10) was ever accused of being on a battlefield. Eleven (11) of those twenty-four (24) captured by US forces were captured in Afghanistan. Of those eleven (11), two (2) were in Tora Bora at some point. The location of capture is not stated for the other thirteen (13).

²⁵ "These are people picked up off the battlefield in Afghanistan....They were picked up on the battlefield, fighting American forces, trying to kill American forces." President Bush, June 20, 2005. Retrieved November 4, 2007 from http://www.theatlantic.com/doc/prem/200602u/nj_taylor_2006-02-07.

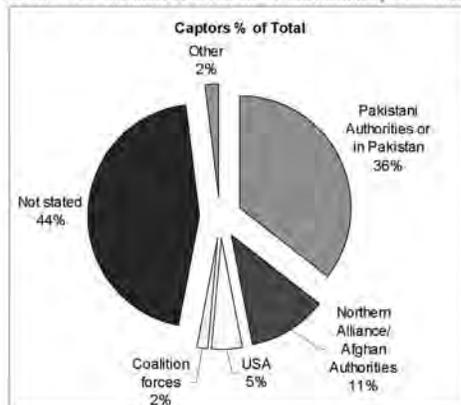
²⁶ "The people that are there are people we picked up on the battlefield, primarily in Afghanistan. They're terrorists. They're bomb makers. They're facilitators of terror. They're members of Al Qaeda and the Taliban....We've let go those that we've deemed not to be a continuing threat. But the 520-some that are there now are serious, deadly threats to the United States." Vice President Cheney, June 23, 2005. Retrieved November 4, 2007 from http://www.theatlantic.com/doc/prem/200602u/nj_taylor_2006-02-07.

Scott McClellan,²⁸ and Supreme Court Justice Antonin Scalia.²⁹ Each of these government officials has made public statements in perpetuation of the myth that the individuals detained at Guantánamo were captured on the battlefield by the United States.

There were no United States forces involved in the capture of ninety-five percent (95%) of those detained as enemy combatants. According to the same Department of Defense data, only four percent (4%)—or twenty-four (24) detainees— were reported to have been captured by US forces.

Fifty-five percent (55%) of those detained in Guantánamo were not accused of hostile acts. Of the forty-five percent (45%) that were accused of hostile acts, less than four percent (4%), or twenty-one (21) detainees, were accused of ever being on a battlefield.³⁰

According to the Department of Defense data that West Point reviewed, *only one* (1) of those detained in Guantánamo captured by United States forces was alleged to have been on a battlefield. The battlefield upon which the United States captured this single detainee is not identified. Therefore, according to Department of Defense and West Point, of the 516 detainees held in Guantánamo, 515 were not captured by United States forces



on a battlefield. Of the other twenty (20) alleged to have been captured on a battlefield, one (1) was turned over to the US by coalition forces, and the other nineteen (19) were turned over by non-coalition forces.

Again in accordance with our methodology, we assume that all government data is accurate. As indicated by the graph, referenced as Figure 12 in Seton Hall's first report, the government states that five percent (5%) were captured by U.S. forces, eleven percent (11%) by Northern Alliance/Afghan

²⁷ "If we do close down Guantánamo, what becomes of the hundreds of dangerous people who were picked up on battlefields in Afghanistan, who were picked up because of their associations with [al-Qa'ida]." Condoleezza Rice, quoted by John D. Banusiewicz for American Forces Press Service, May 21, 2006. Retrieved November 3, 2007 from <http://www.defenselink.mil/news/newsarticle.aspx?id=15706>.

²⁸ "These detainees are dangerous enemy combatants...They were picked up on the battlefield, fighting American forces, trying to kill American forces." White House press secretary Scott McClellan, June 21, 2005. Retrieved November 4, 2007 from http://www.theatlantic.com/doc/prem/200602u/nj_taylor_2006-02-07.

²⁹ "I had a son on that battlefield and they were shooting at my son and I'm not about to give this man who was captured in a war a full jury trial." Supreme Court Justice Antonin Scalia, just prior to oral arguments in *Hamdan*. As quoted by *Newsweek*, March 8, 2006.

³⁰ The CSRT unclassified summaries only alleged that twenty-one (21) detainees were on battlefields or in battle.

Authorities, thirty-six percent (36%) by Pakistani Authorities or in Pakistan, two percent (2%) by other groups and two percent (2%) by coalition forces. The government does not identify the capturing entity for the remaining forty-four (44%) of the detainees.

Of the five hundred seventeen (517) detainees whose records were reviewed, four hundred ninety-six (496) were never reported to have ever been on any battlefield. This does not necessarily mean that these four hundred ninety-six (496) detainees were never on a battlefield; it means that the American Government either knows that the remaining prisoners were not captured on a battlefield *or* the government lacks a factual basis to assert that these prisoners were captured on a battlefield.

If one takes the view that all of Afghanistan is a metaphoric battlefield, then the seventy-one (71) detainees captured in Afghanistan were captured on a battlefield. None of those detained in Guantánamo were ever captured by US forces in either Pakistan or in the Afghanistan Pakistan border region.³¹

However, using these countries as synonymous with battlefields produces results contrary to the Government's grounds for detention of the individuals at Guantánamo. For example—as noted in Seton Hall's first Guantánamo report—fifty-five percent (55%) of those for whom a CSRT was convened were not accused of committing a hostile act.³² Furthermore, only eight percent (8%) of detainees were alleged to have been "fighters." Because the majority of detainees were captured in Afghanistan or Pakistan, while the majority of detainees were *not accused of committing a hostile act*, it is not possible that the Government is considering the whole of these two countries to be a giant battlefield.

Thus, the majority of those detained at Guantánamo as enemy combatants are actually enemy *civilians*.

Part One in Review

West Point's CTC Report, on behalf of the Department of Defense, essentially concedes the Seton Hall report's key findings.

To the extent that the West Point response purports to find defects in Seton Hall's methodology, the response in fact criticizes the Department of Defense's evidentiary bases for the detention of Guantánamo detainees as enemy combatants. Thus, any alleged defects stem from deficiencies in the Department of Defense's data—not from Seton Hall's methodology—and are unrelated to Seton Hall's findings.

West Point concedes that the Defense Department's data is contrary to the executive branch's contention that the majority of Guantánamo detainees were captured on the battlefield by United States forces. This confirmation of Seton Hall's finding is

³¹ Forty-six percent (46%) of the detainees were not identified as having been captured in either Pakistan, Afghanistan or the Pakistan Afghanistan Border region and another two percent (2%) were affirmatively alleged to have been captured elsewhere, such as Bosnia, Gambia, Iran, or the Kashmir.

³² SH Profile at 2.

supported by Defense Department data revealing that the vast majority of detainees were neither captured by United States forces nor captured on any battlefield, and is consistent with the fact that the majority of detainees were not alleged to have committed a single hostile act.

With its response to Seton Hall, West Point's Combating Terrorism Center supplements, rather than rebuts, Seton Hall's profile in demonstrating the defects in the evidence upon which the Department of Defense determined that detainees were enemy combatants.

• **PART TWO** •

WEST POINT'S METHODOLOGY AND THE THIRTEENTH CRITERION

At the core of the methodology West Point uses to evaluate the detainees' dangerousness is the invention of a three-tiered³³ hierarchy of detainee "threat" with each of the three levels containing four discrete variables. If a detainee's CSRT unclassified summary of the evidence indicates the satisfaction of any one variable within a given level, that detainee is classified as evidencing that level of threat.³⁴

Rather than distinguishing between enemy combatants and non-enemy combatants (as was the purpose of the CSRT process), West Point attempts to distinguish instead between the three levels of "Demonstrated," "Potential," and "Associated" threat in order to evaluate the detainees in terms of a more ambiguous concept—"dangerousness." West Point seems to equate enemy combatant status with dangerousness—every factor that supports a finding of enemy combatant status³⁵ also supports a determination of threat under West Point's system. West Point goes beyond the enemy combatant definition, however, and creates threat variables classifying even behavior such as possessing a digital watch as threatening.

The over-inclusiveness and arbitrariness of many of West Point's threat variables necessitate West Point's reliance on a thirteenth variable which, when coupled with any of West Point's other twelve variables, solidifies a detainee's classification as threatening. West Point's threat variables, if applied to the population at large, would include an enormous number of individuals. An additional limitation—a thirteenth criterion—is necessary if West Point is to avoid this result.

³³ Additionally, West Point concedes that six (6) unclassified summaries do not satisfy any of West Point's threat variables; thus these six are classified as "Level IV: No Evidence of Threat."

³⁴ WP Report at 4.

³⁵ The second paragraph from each CSRT unclassified summary of the evidence reads: "[A]n enemy combatant has been defined as: an individual who was part of or supporting the Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy forces."

The implied thirteenth criterion is as simple as it is circular: the individual in question is held at Guantánamo.

Below is a visual representation of West Point's hierarchy of threat variables. If one were to strip away the variables that are either over-inclusive or contain "other" as their largest or near-largest subcategory, only those variables contained in the Government's definition of "enemy combatant" would remain.³⁶

Threat Level	Variable	Key Problem
Demonstrated Threat	Hospitalities	An element of the definition of Enemy Combatant
	Fighters	An element of the definition of Enemy Combatant
	Combat Weapons	Variable is over-inclusive
	Training Camps	"Other" appears as variable's largest or near-largest subcategory
Potential Threat	Affiliations	An element of the definition of Enemy Combatant
	Small Arms	Variable is over-inclusive
	Commitment	"Other" appears as variable's largest or near-largest subcategory
	Support	"Other" appears as variable's largest or near-largest subcategory
Associated Threat	Connections	An element of the definition of Enemy Combatant
	International Travel	Variable is over-inclusive
	Pocket Litter	Variable is over-inclusive
	Guest House Stay	Variable is over-inclusive

Figure 1.

³⁶ Figure 1 represents only the primary problems with each variable. Some variables contain multiple problems; these are discussed in detail in the sections that follow.

I. Level IV Dangerousness: “No Evidence of Threat”

Six (6) of the 516 unclassified summaries do not contain data fitting into any of the twelve variables created by West Point.³⁷ West Point does not identify the six (6) detainees for which it was unable to find any incriminating information. West Point concedes, then, that detention at Guantánamo is not in and of itself evidence of threat.

II. Level III Dangerousness: “Associated Threat as an Enemy Combatant”

Like Levels I and II, West Point’s third level of threat contains exactly four discrete variables: “Guest House Stay”; “Travel to Three or More Countries”; “Pocket Litter”; and “Connections.”³⁸ To satisfy one of these four variables is to be classified by West Point as an “Associated Threat”—which evidently signifies that a detainee is *even less than* a “Potential Threat” (West Point’s second level of threat). West Point determines that seventy-seven percent (77%) of the CSRT unclassified summaries contain data satisfying at least one of its four Level III variables, and thus classifies these 77% of summaries as evidencing “Associated Threat.”³⁹

The four variables that comprise West Point’s third level of threat are over-inclusive and non-determinative of threat. These variables would sweep up millions of individuals under each threat level, if not for the thirteenth variable—being detained at Guantánamo.

A. Threat Variable: “Guest House Stay”

CSRT unclassified summaries indicating that a detainee stayed in a guest house, safe house, or both, are classified by West Point under the “Guest House Stay” Level III threat variable. Although the Department of Defense distinguished between “guest houses” and “safe houses” in the CSRT unclassified summaries, West Point chooses to abandon distinctions between the two in its report without citing any basis to justify that choice. While a “guest house” is, by its plain meaning, “a house for the reception of paying guests,”⁴⁰ West Point asserts that a “guest house” (synonymous with “safe house”) is any “type of infrastructure that houses individuals involved in nefarious activities.”⁴¹

In fact, guest houses are a preferred form of lodging for American, European, and local travelers in the region.⁴² Guest houses typically offer budget rates compared with

³⁷ WP Report at 6.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Oxford English Dictionary.

⁴¹ WP Report at 26.

⁴² For example, The Embassy of Afghanistan in Washington, D.C. informs travelers visiting its website that two types of accommodations exist in Afghanistan: hotels and guest houses. The Embassy explains that the difference between the two is one of cost and amenities: “Guest houses are generally less expensive than hotels because fewer amenities are offered: guests usually share bathrooms.” Thirty-three places for travelers to stay are listed on the Embassy’s website—twenty-six of these are guest houses. *The Embassy of*

large hotels, and are similar to bed-and-breakfasts. The actual definition of “guest house” is important not only because it is quite different from what is connoted by the term “safe house,” but also because the Department of Defense itself distinguished between the two in detainees’ unclassified summaries.⁴³

West Point’s decision to merge two terms that the Department of Defense itself distinguished has the effect of being over-inclusive. Although seventeen percent (17%) of detainees were alleged by the Department of Defense in their unclassified summaries to have stayed only at a “guest house,” West Point asserts that where the Department of Defense said “guest house” it really meant to say “safe house.” Consequently, West Point sweeps up detainees never alleged by the Department of Defense to have stayed at a “safe house” under what it calls its “Guest House Stay” threat variable. West Point finds that twenty-four percent (24%) of CSRT unclassified summaries meet this criterion.⁴⁴ Thus, according to West Point, to have stayed in a guest house is to have “interacted with members of terrorist groups or exhibited behavior frequently associated with terrorist group members.”⁴⁵ This determination is inconsistent with what the Department of Defense actually stated, and is over-inclusive and non-determinative of threat.

B. Threat Variable: Travel to Three or More Countries

West Point includes all CSRT unclassified summaries indicating that a detainee traveled to three or more countries under its “International Travel” threat variable.⁴⁶ Given that a majority of detainees were captured in the Afghanistan-Pakistan region,⁴⁷ it is not surprising that those two countries were by far the most common countries to appear in detainees’ travel histories. Based upon West Point’s Figure 20, it appears that travel within Afghanistan and Pakistan totals approximately three times the amount of detainees’ travels to all other countries combined.⁴⁸ Thus, detainees who fled for Pakistan when violence erupted in Afghanistan had only to have traveled to one other country to be considered a “Travel” threat.

West Point’s statement concedes that “operationally relevant travel history” is “not determinative of an individual’s threat or propensity to commit hostile acts”

Afghanistan, Washington, D.C.: Travel Information. Retrieved October 15, 2007 from <http://www.embassyofafghanistan.org/travel/travel4.html>.

⁴³ Because Seton Hall’s original report strictly honors the Department of Defense’s data and terminology, it accurately represents that the detainees’ unclassified summaries alleged that sixteen percent (16%) of detainees had stayed at a “guest house,” ten percent (10%) had stayed at a “safe house,” and one percent (1%) had stayed at both. See SH Profile at Fig. 15.

⁴⁴ WP Report at 6.

⁴⁵ *Id.*

⁴⁶ *Id.* West Point purports to concern itself with a detainee’s “operationally relevant travel.” However, West Point evidently considers any travel to three or more countries to be “operationally relevant.” Although West Point contends, anecdotally, that “[t]here are multiple known al-Qa’ida and Jihadist international travel routes[,]” it fails to cite to any authority on this matter, and never claims to limit its consideration of “International Travel” to such “known” routes.

⁴⁷ WP Report at 23.

⁴⁸ *Id.* at 29.

(emphasis added).⁴⁹ Nonetheless, each of the 119 unclassified summaries determined by West Point to indicate travel to three or more countries⁵⁰ is classified as a Level III threat. Again, West Point employs a data field that is over-inclusive⁵¹—and, by its own admission, not determinative of threat—to evaluate the detainees’ dangerousness.

C. Threat Variable: Pocket Litter

CSRT unclassified summaries satisfying West Point’s “Pocket Litter” threat variable are summaries indicating that a detainee possessed one of either a digital watch “of a concerning type” or “a large amount” of United States or foreign currency.⁵² West Point does not define what constitutes “a large amount” of currency; nor does it describe what causes a digital watch to be “of a concerning type” (although the Department of Defense data indicates that the watches were made by Casio).⁵³

West Point concedes that “in itself possession of large amounts of currency is not a highly concerning indicator of threat.”⁵⁴ However, West Point mitigates this concession with a contention that, “when taken in concert with *other variables*,” the possession of a large amount of money “tends to provide some sense of an individual’s role within an organization” (emphasis added).⁵⁵ West Point posits one of these “other variables”: “being in an active combat zone.”^{56, 57} Accordingly, West Point strays from its stated methodology of considering each of its threat variables discretely, and implicitly acknowledges its reliance on a thirteenth variable: that is, to exhibit one of West Point’s threat variables is not necessarily to be a threat, *unless* one exhibits the additional criterion of being detained at Guantánamo.

D. Threat Variable: Connections

West Point includes all CSRT unclassified summaries indicating that a detainee had an “individual-to-individual relationship” with someone who was affiliated with al-Qa’ida, the Taliban, “or associated forces,” under its “Individual Connections” threat

⁴⁹ *Id.* at 28.

⁵⁰ *Id.* at 29.

⁵¹ It is interesting to imagine how many Americans would satisfy West Point’s “Travel” threat variable, given that in the 2006 fiscal year alone, 12,133,537 United States passports were issued. *Bureau of Consular Affairs*. Retrieved October 23, 2007 from http://travel.state.gov/passport/services/stats/stats_890.html.

(Of course, Americans who travel internationally fail to satisfy West Point’s thirteenth criterion because they are not held at Guantánamo.)

⁵² WP Report at 29.

⁵³ Incidentally, Casio sold 33 million timepieces world-wide in 2006 alone, and has sold 60 million of its G-Shock digital watches to date. *Casio Corporate Report 2007*. Retrieved October 23, 2007 from http://world.casio.com/env/pdf/report_2007/All_ENG.pdf.

⁵⁴ WP Report at 29.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Only five percent (5%) of detainees are even alleged to have been captured on the battlefield. See SH Profile at 2.

variable.⁵⁸ The stated difference between “Connections” and “Affiliations” (which West Point classifies as a Level II threat variable) is that a “connection” is a relationship between two individuals, whereas “affiliation” is “an ongoing relationship between an individual and an organization, group or institution[.]”⁵⁹ In light of these definitions, it seems counterintuitive that affiliations would be more numerous than connections; to be affiliated, it would seem, is necessarily to be connected to at least one other affiliated person. Nonetheless, West Point finds 155 fewer instances of “Connection” than of “Affiliation.”⁶⁰

The “Connections” variable as an indicator of threat is problematic. First, what it means to be connected is never explained by West Point. Acquaintanceships are evidently termed connections by West Point. Furthermore, while “connection with a Taliban member” is cited by West Point as the most common type of connection,⁶¹ it is undisputed that to have been connected to a member of the Taliban is to have been connected to someone who was a member of what was the ruling party of Afghanistan at the time of its invasion by the United States.⁶²

Like the other Level III threat variables, West Point’s “Connections” variable is over-inclusive and non-determinative.

III. Level II: “Potential Threat as an Enemy Combatant”

West Point’s third level of threat again contains four discrete variables: “Small Arms”; “Commitment”; “Support Roles”; and “Group Affiliations.”⁶³ Although *West Point concedes that classification as a Level II threat does not necessarily indicate threat*, to satisfy one of these four variables is to be classified by West Point as a “Potential Threat.” West Point determines that ninety-five percent (95%) of the CSRT unclassified summaries contain data satisfying at least one of its four Level II variables, and thus classifies these 95% of summaries as evidencing “Potential Threat.”⁶⁴

⁵⁸ WP Report at 25.

⁵⁹ *Id.*

⁶⁰ *Id.* at 24-25.

⁶¹ *Id.* at 25.

⁶² See SH Profile at 16:

“The Taliban was a religious state which demanded the most extreme compliance of all of its citizens and as such controlled all aspects of their lives through pervasive Governmental and religious operation. Under Mullah Omar, there were 11 governors and various ministers...ministries of the Interior, Public Health, Police, and the Department of Virtue and Prevention of Vice. There was a Health Minister, Governor of the State Bank, an Attorney General, an Education Minister, and an Anti-Drug Control Force. Each city had a mayor, chief of police, and senior administrators.

None of these individuals are at Guantánamo Bay” (emphasis added).

⁶³ WP Report at 5.

⁶⁴ *Id.*

A. Threat Variable: Small Arms

West Point includes CSRT unclassified summaries indicating that a detainee either received small arms training or possessed small arms under its “Small Arms Training/Possession” threat variable.⁶⁵ Like other variables above and below it, the “Small Arms” variable is vastly over-inclusive—and in this instance, West Point concedes as much, writing:

In the Afghanistan-Pakistan region where most of these individuals were captured, familiarization with and possession of AK-47’s and other small arms *is a part of daily life for many and not a sufficient indicator of threat*⁶⁶ (emphasis added).

Small arms, as West Point concedes, are ubiquitous in the Afghanistan-Pakistan region.⁶⁷ Furthermore, and rather importantly, West Point admits that the “Small Arms” variable *is not a sufficient indicator of threat*. It explains that:

For this reason, [West Point’s Combating Terrorism Center] felt it was prudent to identify and separate those unclassified summaries containing evidence of weapons training/possession limited to small arms such as AK-47’s and include them as a Level II versus Level I threat.⁶⁸

West Point *explicitly concedes* that the satisfaction of its “Small Arms” variable is not a significant indicator of threat; yet, it treats the satisfaction of that variable as a basis for the categorization of a detainee as a Level II threat. Thus, a detainee’s unclassified summary need not allege a sufficient indicator of threat for West Point to categorize him as a Level II threat.

This is a significant error. Since detainees who are categorized as at most level II threats are not actually threatening, this means that the twenty-seven percent (27%) of detainees classified by West Point as at most Level II threats⁶⁹ are not in fact threatening.

⁶⁵ *Id.*

⁶⁶ *Id.* at 23.

⁶⁷ In fact, United Nations experts estimate that there are approximately 10 million small arms circulating throughout Afghanistan, a country with a population of about 23 million. *Center for Defense Information*. Retrieved October 15, 2007 from file://C:\DOCUME~1\Owner\LOCALS~1\Temp\DVRL9V62htm.

Small arms are similarly commonplace in the United States, where the National Rifle Association claims 3 million members. *National Rifle Association*. Retrieved October 23, 2007 at <http://www.nra.org/aboutus.aspx>. There are nearly 80 thousand licensed gun dealers in the United States. *The Brady Center*. Retrieved October 10, 2007 from <http://www.bradycenter.org/gunindustrywatch/>.

⁶⁸ WP Report at 23.

⁶⁹ Seventy-three percent (73%) of CSRT unclassified summaries rise to West Point’s first level of threat. *Id.* at 5.

B. Threat Variable: Commitment

According to West Point, its “Commitment” threat variable is satisfied by ninety-eight (98) CSRT unclassified summaries indicating that a detainee “expressed a commitment to pursuing violent Jihadist goals.”⁷⁰ However, little more than the mention of jihad in a detainee’s unclassified summary is enough to qualify as “Commitment” for West Point. Out of 516 unclassified summaries, there are exactly *zero* instances where the word “violent” (or any variation thereof) is used in any relation to the word “jihad” (or any variation thereof).⁷¹ Furthermore, in only twenty-six (26) instances can a detainee’s commitment to violent jihad be contextually inferred.⁷²

Of the ninety-eight (98) unclassified summaries West Point classifies as expressing commitment, forty-seven (47) of these are categorized under “other commitment,”⁷³ making up the largest subcategory of commitment. West Point does not describe what it means by “other commitment” but does not include in that category any of the following: providing non-combat support in waging “violent jihad”; pledging to continue “violent jihad”; pledging to continue to motivate others to wage “violent jihad”; admitting willingness to follow a fatwa to wage “violent jihad”; and pledging allegiance to Osama bin Laden.⁷⁴

Conceptions of jihad range from one of religious warfare to that of “a ceaseless struggle...to distinguish the compassion, love and beauty of God in all things and to strip away everything else.”⁷⁵ The following conversation, which occurred between a detainee and CSRT Members—through an interpreter—illustrates how the concept of jihad can often be confusing, even to believers:

Question: Do you believe in jihad?

Response: I believe in Islam. Do not dissect Islam.

Q. I’m not. All I’m asking is do you believe in jihad.

R. I cannot answer that question. It is a mysterious question and I cannot answer it.

Q. Do you know what jihad is?

⁷⁰ *Id.*

⁷¹ In fact, the word “violent” occurs only once in the whole of the CSRT unclassified summaries. The word “violent” also occurs exactly one time in the unclassified summaries.

⁷² Additionally, among unclassified summaries which contain data indicating a detainee’s commitment to jihad in any form (violent or non-violent), fifty-six (56) summaries designate the detainee as “hostile,” and only fifteen (15) designate the detainee as a “fighter.”

⁷³ WP Report at 22.

⁷⁴ *Id.*

⁷⁵ Karen Armstrong, *A History of God* 241 (1994).

R. Jihad, as far I'm thinking has many meanings. Just like what he was doing there, helping people or what he was doing when Russia was attacking. Don't think that when you are saying jihad, that you are always talking about somebody killing somebody. Jihad could mean somebody helping other people. Opening schools all these are part of the jihad. So when I went to Pakistan, I went to do just the humanitarian part of the jihad.

Q. But jihad does mean killing people correct?

R. That is true but I'm a coward, I cannot go into these things. All I did for my part of the jihad is helping people. That's why I chose (inaudible).⁷⁶

Although West Point acknowledges that "Commitment" is a "somewhat subjective" measure,⁷⁷ the study's authors are not deterred from defining a category for determining "Commitment" that essentially amounts to little more than word-tallying. Instead of appreciating that jihad is a complicated and amorphous concept subject to a multitude of interpretations, West Point concludes that, for every detainee, commitment to any concept of jihad necessitates commitment to personal violence. Again, West Point invents a threat variable that is over-inclusive.

C. Threat Variable: Support Roles

West Point includes CSRT unclassified summaries indicating that a detainee performed roles other than that of a fighter under its "Support Roles" threat variable.⁷⁸ West Point names twenty-six (26) subcategories of "Support Roles," including "Accountant," "Driver," "Cook," and "Medical Care Giver."⁷⁹

Of West Point's twenty-six (26) subcategories, "Bodyguard" and "Other" are by far the largest, with "Other" approximately four times greater than the next largest category.⁸⁰ Thus, another of West Point's variables is subdivided into categories, the largest or near-largest of which is "Other."

D. Threat Variable: Group Affiliations

West Point includes all CSRT unclassified summaries indicating that a detainee had a relationship "with al-Qa'ida, the Taliban, [or] other terrorist/extremist groups" under its "Group Affiliations" threat variable.⁸¹ The "Group Affiliations" variable is similar to the "Individual Connections" variable, except that the former describes

⁷⁶ CSRT Transcript, ISN 589, FOIA 001875.

⁷⁷ WP Report at 20.

⁷⁸ *Id.* at 19.

⁷⁹ *Id.* at 20.

⁸⁰ *Id.*

⁸¹ *Id.* at 5.

individual-to-group relationships—including “informal” as well as formal relationships—while the latter describes individual-to-individual relationships.⁸²

Although affiliation with the Taliban is one of West Point’s most frequently cited affiliations,⁸³ it is undisputed that to have been affiliated with the Taliban is to have been affiliated with what was the ruling party of Afghanistan at the time of its invasion by the United States.

IV. Level I: “Demonstrated Threat as an Enemy Combatant”

Comprising West Point’s top level of threat are four variables that overlap considerably: “Hostilities”; “Fighter”; “Training Camps”; and “Combat Weapons.”⁸⁴ West Point contends that seventy-three percent (73%) of the CSRT unclassified summaries contain data satisfying at least one of its four Level I threat variables, and thus classifies these 73% of summaries as evidencing “Demonstrated Threat.”⁸⁵

The four variables comprising West Point’s top level of threat, in stark contrast to West Point’s other variables, are serious and *would seem* to bear a discernible relation to a detainee’s actual dangerousness, to the extent that dangerousness can be defined. However, the force of West Point’s classification of 73% of unclassified summaries as evidencing “Demonstrated Threat” is weakened by problems with West Point’s methodology.

For example, West Point concedes that:

In addition to RPG’s, grenades, explosives, and sniper rifles, forty records contained evidence of training/possession of “other” weapons which were coded separately than [sic] “AK-47’s and “Other Small Arms.” Records that included weapons in the “other” category were included in the count for the variable “COMBAT WEAPONS[.]”⁸⁶

Thus, where an unclassified summary indicates the possession of any unnamed weapon, West Point imposes a classification of “Combat Weapon” on what is at best unidentified and at worst might be as innocuous as a pocketknife. Nonetheless, to satisfy West Point’s problematic “Combat Weapons” threat variable is to be classified as a top level threat.

Another problem arises with the “Training Camps” variable. Here, West Point admits the “commonly accepted understanding [that] the majority of those trained in those camps would not go on to formally join al-Qa’ida.” West Point further admits that its training camp criteria relies instead upon “anecdotal evidence suggest[ing] that a large

⁸² As noted previously in section II(d), West Point counterintuitively determines that there are far fewer unclassified summaries indicating “Connection” than there are summaries indicating “Affiliation.”

⁸³ WP Report at 24.

⁸⁴ *Id.* at 5.

⁸⁵ *Id.*

⁸⁶ *Id.* at 18.

percentage still did participate in some level of violent of violent Jihad, including participation with the Taliban or associated groups and movements.”⁸⁷ Furthermore, “Other” occurs once again as the largest or near-largest subcategory of West Point’s threat variable—of the fifteen (15) subcategories within “Training Camps,” “Other” is by far one of the two largest, and is more than five times greater than the next largest category.⁸⁸

Also worth noting is that, while West Point implies that any additional, unpublished data would support the Department of Defense’s determinations of enemy combatant status, the facts suggest otherwise. The recent declaration by Lieutenant Stephen Abraham, dated June 15, 2007 and filed in the United States Supreme Court in *Al Odah v. U.S.*,⁸⁹ describes the Department of Defense’s refusal to acknowledge whether exculpatory evidence had been withheld from Tribunal Members. If Lieutenant Colonel Abraham’s declaration is correct, then there exists unclassified evidence—withheld by the Department of Defense—that would likely have portrayed the detainees in a far more benign light than did the data that the Department of Defense elected to provide.

Part Two in Review

Although West Point, on behalf of the Department of Defense, relies upon circular reasoning and problematic methodology in its attempt to paint a portrait of the Guantánamo detainees as exceedingly dangerous, West Point is nonetheless forced to concede that at least twenty-seven percent (27%) of CSRT unclassified summaries do not indicate that a detainee is threatening. It is only through the use of West Point’s implied thirteenth criterion—the incarceration of a detainee in Guantánamo—that West Point can arrive at its conclusions.

⁸⁷ *Id.* at 15.

⁸⁸ *Id.* at 16.

⁸⁹ *Supra* note 19.

CONCLUSION

With its response to Seton Hall, West Point supplements, rather than rebuts, Seton Hall's profile in demonstrating the defects in the evidence upon which the Department of Defense determined that detainees were enemy combatants.

West Point's confirmation that ninety-five percent (95%) of detainees were not captured by United States forces—on battlefields or anywhere else—dispels the myth perpetuated by government officials that the Guantánamo detainees were captured by United States soldiers on the battlefield.

West Point's report creates a hierarchy of threat variables in an attempt to evaluate detainees' dangerousness, but when all of its faulty categories are stripped away, all that is left is the Government's definition of "enemy combatant." Problematic categories notwithstanding, West Point concedes that at least twenty-seven percent (27%) of unclassified summaries do not necessarily indicate that a detainee is threatening.

Mr. DELAHUNT. We shall return. And Colonel, please bear with us. We look forward to seeing you maybe in 45 minutes.

[Recess.]

Mr. DELAHUNT. Let me apologize for the intermittent nature of this hearing. It is certainly common in Congress to have interruptions. I had hoped today, we did not anticipate we would have votes as early as we did. We swore in a new Member from Mississippi, and that counted for the earlier hour. And I would have hoped to have concluded. But let me, without any further ado, ask Colonel Abraham to proceed.

STATEMENT OF STEPHEN ABRAHAM, ESQ., FINK AND ABRAHAM, LLP (RETIRED LIEUTENANT COLONEL, U.S. ARMY, RESERVE)

Colonel ABRAHAM. Thank you, Chairman Delahunt, and to the House Oversight Committee, for permitting me to speak today. I begin my remarks with a request that you remember the following dates: September 16th and September 25th, and the numbers 33 and 35.

On April 13th, 1945, Supreme Court Justice Jackson, speaking on the matter of war crimes trials, observed that “farcical judicial trials conducted by us will destroy confidence in the judicial process as quickly as those conducted by any other people.” He continued, “the world yields no respect to courts that are merely organized to convict.” Organized to convict. He would later serve as chief prosecutor at the Nuremberg War Crimes Trials.

Sixty years later, in *Hamdi v. Rumsfeld*, Supreme Court Justice O’Connor wrote that “due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker.” That same day the Court in *Rasul v. Bush* would extend the fundamental rights expressed in *Hamdi* beyond accidental boundaries of citizenship.

Others have spoken before this committee on the abuses suffered by detainees at Guantanamo. I will not speak to those matters. Their voices do not need my inadequate words to express the indignities wrought by our hands. Rather, I will address that which I have observed, understood through the prism of experiences spanning nearly three decades, as an officer in the United States Army Intelligence Corps for more than 26 years, and as a lawyer for more than 14. I will address the Combatant Status Review Tribunals based on my personal involvement in nearly every aspect of their conduct. But more importantly, I will discuss the response by members of the international community, personally observed by me, to Guantanamo, though I will leave to you to assess the consequences for American national security and foreign policy objectives.

I was assigned to the Office for the Administrative Review of Detention of Enemy Combatants, OARDEC, from September 2004 to March 2005. Prior to that time I had served after 9/11 as lead counterterrorism analyst with the Pacific Command. It was during my tenure at OARDEC that nearly all of the detainee tribunals were performed. I served as an interagency liaison. I also served

as a tribunal member, and had the opportunity to observe and participate in all aspects of the tribunal process.

The executive branch's detainee review process was designed not to ascertain the truth, but to legitimize detentions, while appearing to satisfy the mandates in *Rasul* and *Hamdi*, decided only 8 days earlier. The tribunal process was designed not to fail as much as to succeed in a way alien to the purposes declared in *Rasul* and *Hamdi*. Lacking essential information, and subjected to undue command influence, the tribunals did little more than confirm prior determinations. That CSRT process was proof of the executive power to detain anyone. But the question posed today is not of the nature of Guantanamo, but rather the world's response to our use of Guantanamo as an instrument of our policies.

I draw my experiences from a recent—I draw my conclusions from a recent experience. On February 28th of this year, I appeared before a joint hearing of the Committee on Civil Liberties and the Subcommittee on Human Rights of the European Parliament. A principal subject of the hearing was repatriation of former detainees. However, the discourse between members of Parliament, including representatives of some of our greatest allies, grew rancorous, revolving around the question of which countries had participated in the United States' campaign of extraordinary rendition and which countries, together with the United States, ultimately bore responsibility for the stateless condition of scores of former detainees. I explained that our system of justice was founded on principles shared by many of the countries represented by that body, principles evoked not only by our charters of freedom, but that resonated two centuries later in the declarations of human rights of the United Nations. Regrettably, the unmistakable message conveyed by a number of parliamentary members were those were merely words, as dry as the parchment on which they were penned, abandoned for the sake of political or military expedience.

Ultimately, I drew conclusions from the experience. As to Guantanamo, the opinions emerged that Guantanamo was a place in which fundamental human rights did not apply, that judicial safeguards did not reach, and that lack of transparency permitted intelligence-gathering activities to displace balanced national and international policies.

The second opinion may be explained by reference to remarks easily recognized. We as a people refused assent to laws, the most wholesome and necessary for the public good. We as a people have affected to render the military independent of, and superior to, the civil power. We as a people deprived men, in many cases, of the benefit of trial by jury. And ultimately, we as a people transported men beyond seas to be tried for pretended offenses. Ultimately, we as a people denied the self-evident truths that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness.

This subcommittee heard testimony not too long ago, not this morning, but a number of weeks ago, and I will respond merely to one statement that I read that stuck in my mind. Guantanamo is neither a necessity nor inevitable part of the grant of authorization by Congress on September 11th, 2001. Guantanamo very simply is

a consequence of our disposition to suffer, while evils are sufferable than to right ourselves by abolishing the forms to which we are accustomed.

Simply put, Guantanamo was created and no one had the resolve to eliminate it. As a result, more than 700 were imprisoned for years, and more than 270 languish even today. Guantanamo is, at its core, evidence of how speedily we tired of our constitutional rights, and how greatly we clamored for the illusion of security that we so quickly, so easily, and so completely surrendered one for the other.

Moreover, Guantanamo is evidence of how willingly we caused to be forcibly divested essential human dignities of those over whom we presumed to exercise dominion.

Mr. DELAHUNT. Colonel Abraham, your statement reminds me of the observation attributed to Benjamin Franklin that those who would give up essential liberty to purchase some temporary safety deserve neither liberty nor safety. I think you are echoing, centuries later, an observation that is so important to who we are and what we are as a people, particularly in terms of our rhetoric. And now to see this disparity between our rhetoric and our deeds. And I daresay that it is time to read some history.

Colonel ABRAHAM. It is.

Mr. DELAHUNT. Maybe we ought to go back and read a little more Ben Franklin and George Washington and Thomas Jefferson. And of course John Quincy Adams.

Colonel ABRAHAM. Of course.

Mr. DELAHUNT. But proceed.

Colonel ABRAHAM. Mr. Chairman, what I experienced when I was at OARDEC a number of years ago came back to me—

Mr. DELAHUNT. Let me note, too, the presence of a friend and colleague who is very focused on this issue. I know that this morning she had an opportunity, I think, to host Mr. Stafford Smith. This is an issue, as I said earlier to our witness from Bremen, Germany, that we will pursue, that we are a people of laws, and as you mentioned, Mr. Sulmasy, it is important that we do it in a way that is not accusatory, but that is thorough, that is exhaustive, and that reflects well on our sense of fairness, our sense of balance, and reclaiming that moral authority that I think we all feel has been eroded and jeopardized because of this mistake. Again, my apologies, Colonel.

Colonel ABRAHAM. Sir, no apology is ever necessary. This morning on the way to this hearing I stopped a bit early. I got off the Metro at Arlington Cemetery and walked from there in a rather indirect line to the Supreme Court, mirroring to a very small degree the steps that I took each day that I worked at OARDEC. And along the way I saw a number of monuments. But one monument that I did not see today is one neither built with the bricks nor mortar with which the others are formed, and yet, though it is nowhere to be seen within thousands of miles of this city, it is by one word more recognizable than every institution that we have built over the last 200 years. And that word, predictably, is Guantanamo.

In the beginning I invoked the words of the great champion of justice, but it is not to those ghosts of Nuremberg that I allude.

Rather the experiment called Guantanamo may be compared to laws adopted in 1935, 10 years before the first war crimes trial would commence. Those laws spoke to the protection of a people and of a state and of the divestment of laws of those not entitled by right of birth to the same. For just a moment, if I may, I am reminded, as I was today, and as I was on December 5th of last year during the Supreme Court argument of the statement never before in history have these people been given more rights. The words that rang in my ears, then uttered by the solicitor general, and that I have heard today also, as I have heard on a number of other occasions, have rung not only in my ears, but in the ears of my family members.

Ultimately, those laws, the Nuremberg laws, reported to legitimize acts of inhumanity with no parallel in the history of mankind. How can I speak of such matters when I was not a witness to them? I asked you in the beginning to remember two dates and two numbers. The latter were the numbers of the transport trains, 33 and 35, that on September 16 and September 25 of 1942 sent members of my family to their deaths at Auschwitz. Just as the world silently witnessed the events of 1935, the entire world bears witness not only to the facts of what Guantanamo is, but as importantly, the manner in which we have responded.

At the opening session of the Nuremberg trials, Justice Jackson exclaimed, "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow."

Mr. Chairman, what is the history by which history will judge us?

[The prepared statement of Colonel Abraham follows:]

**Remarks of Stephen Abraham,
Lieutenant Colonel, U.S. Army Reserve (Ret.),**

before the

**House Committee on Foreign Affairs
Subcommittee on International Organizations, Human Rights and Oversight**

“The Mistakes of Guantánamo and the Decline of America’s Image”

Tuesday, May 20, 2008

The Ghosts of Nuremburg

**Remarks of Stephen Abraham,
Lieutenant Colonel, U.S. Army Reserve (Ret.),**

before the

**House Committee on Foreign Affairs
Subcommittee on International Organizations, Human Rights and Oversight**

“The Mistakes of Guantánamo and the Decline of America’s Image”

Tuesday, May 20, 2008

The Ghosts of Nuremburg

Thank you, Chairman Delahunt, Ranking Member Rohrabacher and the House Oversight Subcommittee, for permitting me to speak today.

I begin my remarks with a request, that you remember the following dates – September 16 and September 25 – and the numbers 33 and 35.

On April 13, 1945, following the sudden death of President Roosevelt, Supreme Court Justice Robert Jackson, speaking on the matter of war crimes trials, observed that “Farcical judicial trials conducted by us will destroy confidence in the judicial process as quickly as those conducted by any other people.” He continued, “The ultimate principle is that you must put no man on trial under the forms judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect to courts that are merely organized to convict.” He would later serve as chief prosecutor at the Nuremburg War Crimes Trials.

Nearly sixty years later, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), delivering the plurality opinion, Supreme Court Justice O’Connor wrote that while the government can exercise

the power to detain unlawful combatants, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker. Of significance were two specific observations. Firstly, “the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen’s *core rights* to challenge meaningfully the Government’s case and to be heard by an *impartial adjudicator*.” Secondly, the Court remarked upon the “possibility that the standards articulated could be met by an appropriately authorized and properly constituted military tribunal. [...] In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the *minimum* requirements of due process are achieved.” That same day, the Court, in *Rasul v. Bush*, 542 U.S. 466 (2004), would extend the protections of the writ of habeas corpus beyond the boundaries of citizenship. With reference to a transcendent principle, Justice Stevens, delivering the Court’s opinion, repeated that “Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land.” Justice Stevens correctly understood that certain rights are fundamental and not merely an incident of citizenship.

Others have spoken before this committee on the abuses suffered by detainees at Guantánamo. I will not speak to those matters, not only because their voices do not need my inadequate words to express the indignities wrought by our hands but because, having no first-hand knowledge of their treatment, my contributions, such as they might be, would lack credibility, leaving their message to suffer in the end.

Rather, I will address, as best I can, those matters that I have observed – closely, personally – understood through the prism of experiences spanning nearly three decades, as an officer in the United States Army Intelligence Corps for more than 26½ years and as a lawyer for fourteen.

I will address the Combatant Status Review Tribunals based on my personal involvement in nearly every aspect of their conduct, having served as a member of the organization charged with their conduct and as a member of a Tribunal.

But more importantly, I will discuss what I have personally observed to be the perceptions, if not the response, by members of the international community to Guantánamo, though I will leave to our leaders, political and diplomatic – you, the honorable members of this subcommittee and of our Congress – to assess the resulting consequences for American national security and foreign policy objectives.

I was assigned to the Office for the Administrative Review of the Detention of Enemy Combatants (“OARDEC”) from September 11, 2004 to March 9, 2005. OARDEC is the organization within the Defense Department responsible for conducting CSRTs and other administrative reviews of detainees in Guantánamo. It was during my tenure that nearly all of the CSRTs for detainees in Guantánamo were performed. While at OARDEC, in addition to other duties, I worked as an agency liaison, responsible for coordinating with government agencies, including certain Department of Defense (“DoD”) and non-DoD organizations, to gather or validate information relating to detainees for use in CSRTs. I also served as a member of a CSRT panel, and had the opportunity to observe and participate in all aspects of the CSRT process.

I came to OARDEC as an Army Reserve lieutenant colonel with then twenty-two years of experience as a military intelligence officer in the U.S. Army Reserve, both on and off active

duty. I was mobilized for service in support of Operation Desert Storm, and twice in support of Operation Enduring Freedom. My latest mobilization before my assignment to OARDEC was as Lead Counterterrorism Analyst for the Joint Intelligence Center, Pacific Command, from November 13, 2001 through November 12, 2002, for which I received the Defense Meritorious Service Medal. In that capacity, I became highly familiar with the wide variety of intelligence techniques and resources used in the fight against terrorism. My military resume is attached to my written testimony. I also came to OARDEC with more than ten years of experience as an attorney in private practice. I am a founding member of the law firm Fink & Abraham LLP in Newport Beach, California.

The process put in place by the Executive Branch to review its detention of the prisoners at Guantánamo was designed not to ascertain the truth, but to legitimize the detentions while appearing to satisfy the Supreme Court's mandate in *Rasul* that the government be required to justify the detentions. The CSRT process was initially created in haste immediately following the Supreme Court's decision in *Rasul* that federal courts had jurisdiction to hear habeas corpus actions brought by Guantánamo detainees requiring the government to justify the detentions. The Supreme Court decided *Rasul* on June 30, 2004, and the order establishing the CSRT process was issued eight days later on July 8, 2004.

Just as the creation of the CSRT process was a product of haste, so too were the Tribunals themselves, proceedings in more than 550 instances, conducted in but a few months time without the benefit of information necessary to the proper and just determination of the circumstances attending the detention of the detainees then at Guantánamo.

That CSRT process was nothing more than an effort by the Executive to ratify its prior exercise of power, and proof more broadly of its power to detain anyone in the war against

terror. The CSRT process was designed to rubber-stamp detentions that the Executive Branch either believed it should not have to justify, could not be bothered to justify, or could not justify.

In my observation, the system was designed not to fail as much as to succeed but on terms and as to objectives alien to the purposes declared in *Rasul* and *Hamdi*. This Sub-Committee should place no reliance on the procedures or the outcomes of those tribunals. The CSRT panels were an effort to lend a veneer of legitimacy to the detentions, to “launder” decisions already made. The CSRTs were not provided with the information necessary to make any sound, fact-based determinations as to whether detainees were enemy combatants. Instead, the OARDEC leadership exerted considerable pressure, and was under considerable pressure itself, to confirm prior determinations that the detainees in Guantánamo were enemy combatants and should not be released.

But the rendering of these conclusions alone are not the purpose of my remarks today. Rather, the question posed is not as to the nature of Guantánamo but, rather, the world’s response to our use of Guantánamo as an instrument of our policies, both foreign and domestic.

As we sit here today, the debate is not about Guantánamo; it is about here. It is not about the application of military law, but the application of all of our laws, whether they stem from acts of Congress, understandings of our Courts, or deeper, immutable principles of man and the rights attending our existence. It is not about our security but about our willingness to live under such conditions as we would impose on others. It is not about torture as much as it is about the invoking and exercising and recognition of every fundamental right. Ultimately, it is not about detainees by whatever names we may give them, but about every one of us.

So if we are left wanting to ask, “what is the world’s perception of us as a consequence of Guantánamo,” we must first understand how the world views Guantánamo. I draw my conclusions from a recent personal experience.

On February 28th, I had the distinct honor of appearing before a joint hearing of the Committee on Civil Liberties and the Sub-committee on Human Rights of the European Parliament. My written remarks before that body accompany other materials presented to this Sub-committee.

A principal subject of the hearing was the manner of repatriation of former detainees. However, the discourse between members of Parliament, including representatives of countries that we have historically numbered amongst our great allies, grew increasingly rancorous, revolving around the question of which countries had participated in the United States’ campaign of extraordinary rendition and which countries ultimately bore responsibility for the essentially stateless condition of scores of former Guantánamo detainees.

I explained that our system of justice was founded on principles shared by many of the countries represented by that body, principles invoked not only by our Charters of Freedom but that resonated two centuries later in the declaration of the United Nations that “Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

Regrettably, the unmistakable message conveyed by a number of the members of Parliament were that those were merely words, as dry as the parchment on which they were penned, though once embraced, now abandoned for the sake of political or military expedience.

Ultimately, two conclusions were to be drawn from the experience. As to Guantánamo, the opinions emerged that Guantánamo was a place in which fundamental human rights did not

apply; that judicial safeguards did not reach; and that lack of transparency permitted the creation of an environment in which intelligence gathering activities were allowed to displace balanced national and international policies based on a transient determination of parochial national imperatives that it is more convenient to hold somebody without legal or factual justification because of fear – no matter how well reasoned – that we may suffer in some way by their liberty.

The second opinion, far more reaching, as much a product of my perception of their remarks, may be explained by reference to remarks easily recognized.

- We as a people have refused Assent to Laws, the most wholesome and necessary for the public good.
- We as a people have affected to render the Military independent of and superior to the Civil Power.
- We as a people have deprived men in many cases, of the benefit of Trial by Jury.
- We as a people have transported men beyond Seas to be tried for pretended offences.

Ultimately, we as a people have denied the self-evident truths that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

The detention facilities at Guantánamo Bay, Cuba, are neither a necessary nor inevitable part of the grant of authorization by Congress on September 18, 2001. They are a consequence of our disposition “to suffer, while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed.”

They are evidence of how speedily we have tired of our constitutional rights, and how greatly we have clamored for the illusion of security that we should so quickly, so easily, and so completely surrender one for the other.

Moreover, they are evidence of how willingly we would cause to surrender fundamental human rights and forcibly relinquish essential human dignities those over whom we presume to exercise dominion.

In the beginning, I invoked the words of a great champion of justice and the words that preceded his appointment as chief prosecutor at the Nuremberg trials. But it is not to those ghosts of Nuremberg that I allude.

Rather, our participation in the experiment called Guantánamo may be compared to a body of laws adopted ten years before the first war crimes trial would commence. Those laws spoke to the protection of a people and of a state and of the divestment of rights of those not entitled by right of birth to the same. Ultimately, those laws, the Nuremberg Laws, would serve as the foundation for and would purport to legitimize acts of inhumanity that find no parallel in the history of mankind.

How can I speak of such matters when I was not a witness to them?

I asked you in the beginning to remember two dates – September 16 and September 25 – and two numbers 33 and 35. The latter were the numbers of the transport trains that on September 16th and 25th, 1942 sent members of my family to their deaths at Auschwitz.

Just as the world bore witness to events, guided as to their course in 1935, all of the word bears witness not only to the facts of what is Guantánamo but, as importantly, the manner in which we have responded.

At the opening session to the Nuremberg Trials, Robert Jackson, exclaimed, “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow.”

Mr. Chairman. What is the record on which you would wish history to judge us?

**Remarks of Stephen Abraham,
Lieutenant Colonel, U.S. Army Reserve (Ret.),**

before the

**House Committee on Foreign Affairs
Subcommittee on International Organizations, Human Rights and Oversight**

“The Mistakes of Guantánamo and the Decline of America’s Image”

Tuesday, May 20, 2008

The Ghosts of Nuremburg

ENCLOSURES

Military Resume

**Citation Accompanying the Award of the
Defense Meritorious Service Medal**

**Written Remarks to the Joint Hearing of the
Committee on Civil Liberties and the Sub-
Committee on Human Rights of the European
Parliament, February 25, 2008**

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ENCLOSURE

Military Resume

RESUME OF SERVICE CAREER

for

**STEPHEN EDWARD ABRAHAM, Lieutenant Colonel
Military Intelligence (USAR) (Retired)**

DATE AND PLACE OF BIRTH: 01 December 1960, Urbana, Illinois

YEARS OF COMMISSIONED SERVICE: 26 years

TOTAL YEARS OF SERVICE: 26 years

CURRENT OCCUPATION: Attorney, Fink & Abraham LLP, Newport Beach, California

MILITARY SCHOOLS ATTENDED:

Airborne School
Air Assault School
NBC Defense Course (USAREUR)
Military Intelligence School - Basic and Advanced Courses
Military Intelligence School – Counterintelligence/HUMINT Course
United States Army Command and General Staff College
DAME-1

EDUCATIONAL DEGREES:

University of California at Davis – BA Degree – Anthropology
University of the Pacific, McGeorge School of Law – JD Degree with honors – Law

FOREIGN LANGUAGE:

None recorded

STEPHEN EDWARD ABRAHAM, Lieutenant Colonel,
Military Intelligence (USAR) (Ret.)

MAJOR DUTY ASSIGNMENTS

FROM	TO	ASSIGNMENT
<u>Active Duty</u>		
Jan 82	Nov 82	Student, Intelligence Center and School, Fort Huachuca, Arizona (Basic, SOTIOC, CI/HUMINT Courses)
Dec 82	Dec 83	Assistant S-3, Plans and Training, 527 th Military Intelligence Battalion, Kaiserslautern, Germany
Jan 84	May 85	Chief, Intelligence Coordination Center, 66 th Military Intelligence Group, Munich Germany
May 85	Dec 85	Case Control Officer, Defense Counterespionage Branch, 66 th Military Intelligence Group, Munich Germany
Jan 86	Jul 86	Student, Intelligence Center and School, Fort Huachuca, Arizona (Advanced Course)
Aug 86		Student, Infantry School, Fort Benning, Georgia (Airborne Course)
Aug 86	Feb 87	S-4, 107 th Military Intelligence Battalion (CEWI), Fort Ord, California
<u>USAR – Not on Active Duty (Individual Ready Reserve)</u>		
Feb 89		Counterintelligence Officer, G-2, 10 th Infantry Division (Mountain), Fort Drum, New York
<u>USAR – Not on Active Duty (Individual Mobilization Augmentee Tours)</u>		
Jul 90		Intelligence Officer, APG Detachment, 902d Military Intelligence Group, Aberdeen Proving Grounds, Maryland
Jan 91		Defense Counterespionage Office, 902d Military Intelligence Group, Fort Meade, Maryland
<u>USAR – Mobilization (Desert Storm)</u>		
Apr 91	Aug 91	Executive Officer, OPSEC Support Detachment, 902d Military Intelligence Group, Fort Meade, Maryland
<u>USAR – Not on Active Duty (Individual Mobilization Augmentee Tours)</u>		
Jul 92		Counterintelligence Officer, OPSEC Support Detachment, 902d Military Intelligence Group, Fort Meade, Maryland

STEPHEN EDWARD ABRAHAM, Lieutenant Colonel,
Military Intelligence (USAR) (Ret.)

MAJOR DUTY ASSIGNMENTS

FROM	TO	ASSIGNMENT
Jul 93		Intelligence Officer, J-2, Alaska Command, Elmendorf Airbase, Alaska
<u>USAR – Not on Active Duty (Troop Program Unit / Drilling IMA)</u>		
Aug 93	Mar 96	S-2, 7 th Psychological Operations Group, Moffett Federal Air Field, California
Apr 96	Feb 98	Intelligence Officer, 478 th Military Intelligence Detachment (Strategic), Camp Parks, California
Mar 98	Apr 99	Division Head, Detachment 2, Reserve Production Center Camp Parks, Joint Intelligence Center, Pacific Command, Camp Parks, California
May 99	Sep 00	Army Element Director and Production Team Chief, Reserve Production Center San Diego, Joint Intelligence Center, Pacific Command, San Diego, California
Sep 00	Oct 01	Army Element Director and Production Manager, Reserve Production Center San Diego, Joint Intelligence Center, Pacific Command, San Diego, California
<u>USAR – Mobilization (Operation Enduring Freedom)</u>		
Nov 01	Oct 02	Lead Counterterrorism Analyst, Counterterrorism Branch, Joint Intelligence Center, Pacific Command, Pearl Harbor, Hawaii
<u>USAR – Not on Active Duty (Troop Program Unit / Drilling IMA)</u>		
Nov 02	Aug 03	Army Element Director, Reserve Production Center San Diego, Joint Intelligence Center, Pacific Command, San Diego, California
Sep 03	Sep 04	Joint Service Director, Joint Detachment San Diego, Joint Intelligence Center, Pacific Command, San Diego, California
<u>USAR – Mobilization (Operation Enduring Freedom)</u>		
Sep 04	Mar 05	OARDEC, Washington D.C.
<u>USAR – Not on Active Duty (Troop Program Unit / Drilling IMA)</u>		
Jun 05	Feb 08	Operations Officer, redesignated Sep 2006 as 3300 Det 1, Strategic Intelligence Group

STEPHEN EDWARD ABRAHAM, Lieutenant Colonel,
Military Intelligence (USAR) (Ret.)

PROMOTIONS

<u>Rank</u>	<u>Component</u>	<u>Date</u>
2LT	USAR	18 Dec 81
1LT	USAR	27 Jul 93
CPT	USAR	1 Sep 85
MAJ	USAR	17 Dec 93
LTC	USAR	2 Sep 00

US DECORATIONS AND BADGES:

Individual Decorations and Citations

Defense Meritorious Service Medal
 Joint Services Commendation Medal
 Army Commendation Medal (with 2 Oak Leaf Clusters)
 Joint Services Achievement Medal
 Army Achievement Medal
 Army Reserve Components Achievement Medal (with 3 Bronze Oak Leaf Clusters)
 Armed Forces Reserve Medal (with Silver Hourglass, "M" and "2" Devices)
 Global War on Terrorism Service Medal
 National Defense Service Medal (with 1 Bronze Service Star)
 Overseas Ribbon
 Army Service Ribbon

Unit Citations

Joint Meritorious Unit Award

Badges

Basic Parachutist Badge
 Air Assault Badge
 German Military Proficiency Badge

SOURCE OF COMMISSION: ROTC (December 1981)

Stephen E. Abraham

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ENCLOSURE

**Citation Accompanying the Award of the
Defense Meritorious Service Medal**



THE UNITED STATES OF AMERICA

TO ALL WHO SHALL SEE THESE PRESENTS, GREETING:

THIS IS TO CERTIFY THAT
THE SECRETARY OF DEFENSE
HAS AUTHORIZED THE AWARD OF THE
DEFENSE MERITORIOUS SERVICE MEDAL

TO
LIEUTENANT COLONEL STEPHEN E. ABRAHAM
UNITED STATES ARMY RESERVE

FOR
EXCEPTIONALLY MERITORIOUS SERVICE
FOR THE ARMED FORCES OF THE UNITED STATES
13 NOVEMBER 2001 TO 13 NOVEMBER 2002

GIVEN UNDER MY HAND THIS 23RD DAY OF OCTOBER 2002

DIRECTOR FOR INTELLIGENCE
COMMANDANT OF CENTER



K. M. Levitre
BY **K. M. LEVITRE**
Rear Admiral, U.S. Navy

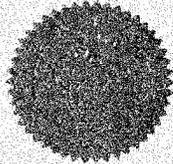
Permanent Order 189-02

DD FORM 1 MAY 00

NOTATION TO ACCOMPANY THE AWARD OF
THE DEFENSE MERITORIOUS SERVICE MEDAL

TO
STEPHEN E. ABRAHAM

Lieutenant Colonel Stephen E. Abraham, United States Army Reserve, distinguished himself by exceptionally meritorious service while serving as Lead Counterterrorism Analyst, Directorate of Operations, Joint Intelligence Center Pacific, Pearl Harbor, Hawaii, from 13 November 2001 to 12 November 2002. As Lead Counterterrorism Analyst, Colonel Abraham developed an Actionable Intelligence program focused on identifying significant terrorism activities in the Pacific theater and potential counterterrorism strategies and operations to defeat those activities. This program resulted in a weekly briefing to the Commander in Chief and Director for Operations, United States Pacific Command, which was pivotal in defining the intelligence support required to prosecute the war on terrorism. He also developed and implemented the Joint Intelligence Center Pacific Counterterrorism and Actionable Intelligence database, which was instrumental in shaping the Department of Defense Terrorism Database being implemented by the Defense Intelligence Agency. Colonel Abraham was personally selected to develop and lead the Joint Intelligence Center Pacific Special Studies Team for counterterrorism. His exceptional efforts and commitment to mission accomplishment significantly enhanced mutual intelligence cooperation and support to the United States Pacific Command. Through his distinctive accomplishments, Colonel Abraham reflected great credit upon himself, the United States Army Reserve, and the Department of Defense.



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ENCLOSURE

**Written Remarks to the Joint Hearing of the
Committee on Civil Liberties and the Sub-
Committee on Human Rights of the European
Parliament, February 25, 2008**

Stephen E. Abraham

**Speech Before the Joint Hearing of
the Committee on Civil Liberties and
the Sub-committee on Human Rights
on Guantánamo Bay**

European Parliament

Brussels, 28 February 2008

Chairman Deprez, Vice Chairman Bradbourn, Vice Chairman Lambrinidis, Vice Chairwoman Gál, Vice Chairman Catania, and honorable members of the Committee on Civil Liberties,

Chairwoman Flautre, Vice Chairman Howitt, Vice Chairman Gaubert, Vice-Chairwoman Baroness Ludford, Vice Chairman Pinior, and honorable members of the Subcommittee on Human Rights,

I have been invited to speak regarding controversies that now rest with various courts, including the highest court of my nation. While I would not presume to speak for that or any other court, I humbly offer the following observations, shaped by my experiences as an intelligence officer and a lawyer, and by my participation in and service as a member of the Office for the Administrative Review of the Detention of Enemy Combatants (“OARDEC”), the organization the activities of which lie at the heart of the matter now before this body.

I do not speak on behalf of the United States. I do not speak on behalf of the United States Army. I do not speak on behalf of any group or any other individual. But as a citizen of the United States, and as a commissioned officer in the United States Army for 27 of my 47 years, I can no more separate myself from them than can I from the entirety of humanity that serves as a backdrop for all that we are and all that we do.

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), delivering the plurality opinion, Justice O’Connor wrote that while the government can exercise the power to detain unlawful combatants, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker. Of significance were two specific observations, both of which would foreshadow years of uncertainty, the latest chapter of which is the decision yet to be reached by that Court.

Firstly, “the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen’s *core rights* to challenge meaningfully the Government’s case and to be heard by an *impartial adjudicator*.”

Secondly, the Court remarked upon the “possibility that the standards articulated could be met by an appropriately authorized and properly constituted military tribunal. [...] In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved.”

That same day, the Court, in *Rasul v. Bush*, 542 U.S. 466 (2004), would extend the protections of the writ of habeas corpus beyond the boundaries of citizenship. With reference to a transcendent principle, Justice Stevens, delivering the Court’s opinion, repeated that “Executive imprisonment has been considered oppressive

and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land.”

Both of those opinions were delivered on June 24, 2004.

Two weeks later, the Secretary of the Navy would announce the implementation of a process, admittedly created in haste, on its face intended to effectuate the decisions of the Supreme Court in *Hamdi* and *Rasul*.

As described by the Secretary, the process would be “a thoughtful exercise to make sure it is fair,” notwithstanding the fact that detainees would not be represented by counsel and witnesses would not be called; in fact, there was no budget for witnesses. The expectation was that the board would run concurrently, three a day, four detainees per board, six days a week, 72 detainees a week, concluding the entire process within 90-120 days.

It was at that time, from September of 2004 until March of 2005, the period during which nearly all of the Combatant Status Review Tribunals for detainees at Guantánamo were conducted, that I, a Lieutenant Colonel with twenty-two years of experience as a military intelligence officer, serving both on active duty and as a member of reserve components, was assigned to OARDEC. Prior to my assignment, I served for one year as a Lead Counterterrorism Analyst for the Joint Intelligence Center, Pacific Command, for which I was decorated. I also came to OARDEC with more than ten years of experience as an attorney.

While there, in addition to other duties, I worked as an agency liaison, coordinating with various government agencies to gather or validate information relating to detainees for use in Tribunals. In that capacity, I was asked to confirm that the organizations did not possess “exculpatory information” relating to the subject of the Tribunal. I also served as a member of a Tribunal, and had the opportunity to observe and participate in all aspects of the Tribunal process.

At the end of February 2005, my assignment at an end, I concluded my military duties, returning to my civilian life, comforted by the belief that I would have no need to reflect upon my past tour of duty or the consequences of the actions of the organization to which I had been assigned. That belief would remain untested for more than two years, though the legal tableau relating to the Guantánamo detainees continued to evolve.

In September 2006, Congress approved the Military Commissions Act of 2006. The following month, the President signed the Act into law. Under the Act, the

rights guaranteed by the third Geneva Convention to lawful combatants were expressly denied to unlawful military combatants.¹

The Act also held the decision of the Tribunal that a detainee was an unlawful enemy combatant to be dispositive for purposes of jurisdiction for trial by military commission. Of relevance, the Act also contained provisions that stripped the Courts of the jurisdiction to hear applications for writs of habeas corpus filed by or on behalf of aliens who had been determined to have been properly detained as enemy combatants or were awaiting such determinations.

On February 20, 2007, the United States Court of Appeals for the District of Columbia decided the case of *Boumediene v. Bush*, consolidated with *al Odah v. United States*. The first question was whether the Military Commissions Act applies to the detainees' habeas petitions. To this question, the Court's opinion was delivered with a degree of force uncharacteristic in its tenor. "Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the Act was to overrule *Hamdan*. Everyone, that is, except the detainees."

Excerpting statements from the Congressional Record, the answer to the first question could not have been more clear. "The *Hamdan* decision did not apply . . . the [Detainee Treatment Act] retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now." Continuing, "[O]nce . . . section 7 is effective, Congress will finally accomplish what it sought to do through the [Detainee Treatment Act] last year. It will finally get the lawyers out of Guantánamo Bay."

Deciding that the Military Commissions Act did apply, the Court turned to the second question of whether that Act was an unconstitutional suspension of the writ of habeas corpus. Seemingly avoiding the question, the Court held that the detainees' status, both geographic and legal, foreclosed their claims to constitutional rights, ultimately concluding that federal Courts had no jurisdiction in these cases.

Petitions for writ of certiorari were filed on behalf of *Boumediene* and *al Odah* in the United States Supreme Court. On April 2, 2007, having failed to obtain four votes in favor of review, the petition was denied. Three justices voted to grant review. However, two justices, in a fairly unusual move, filed separate statements, explaining that they were rejecting the appeals on procedural grounds but leaving open the possibility of hearing the case at a later date, remarking that "[t]his Court

¹ (Section 948b: (g) Geneva Conventions Not Establishing Source of Rights — No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.)

has frequently recognized that the policy underlying the exhaustion-of-remedies doctrine does not require the exhaustion of inadequate remedies.”

During the first week of June, I was contacted by my sister, an attorney with a law firm that served as counsel to a detainee in *Bismullah v. Gates*, another case then pending before the United States Court of Appeals, the same court that had previously decided *Boumediene* and *al Odah*. We spoke of a presentation that would be given by the attorneys for Bismullah and of an invitation for me to listen to that presentation and, perhaps, provide comments regarding my experiences at OARDEC.

To that point, knowledge of my assignment to OARDEC was known by few people beyond my family, co-workers, and members of my temple; as to the particulars of my tour, even less was known. I was equally unaware of the activities of my sister’s firm or of the particulars of any detainee case, whether before the Court of Appeals or the Supreme Court.

Following the presentation, I was called by two of the attorneys, the conversation culminating in my being forwarded a declaration to which I was asked to provide comments. That declaration had been submitted by Rear Admiral McGarrah in a case before the United States Court of Appeals. It purported to describe the degree to which the Tribunal process had satisfied the Supreme Court’s requirement, as expressed in *Hamdi* and *Rasul* of a meaningful factual inquiry before an impartial adjudicator.

My comments, an unclassified narrative summarizing my experiences as a member of OARDEC, were at considerable odds with the statements of Admiral McGarrah, particularly as related to details of which I had personal knowledge.

Those comments, ultimately set forth in declarations not only to the United States Court of Appeals but to the United States Supreme Court, to which were joined a subsequent declaration, set forth my observations as follows:

The Tribunal process had two essential components: an information-gathering component, conducted almost entirely in Washington, and the Tribunal proceedings that took place either in Guantánamo or in Washington, depending on whether the detainee elected to participate.

The Recorders (military officers who presented the cases to the Tribunal panels), personal representatives (who met with detainees briefly prior to the panel proceedings), and panel members had no role in the gathering of information to support an “enemy combatant” determination.

The information presented to the Tribunals was typically aggregated by individuals identified as “case writers.” These case writers, in most instances, had only a limited degree of knowledge and experience relating to the intelligence commu-

nity and evaluation of intelligence products. The case writers were primarily responsible for accumulating documents, including assembling documents to be used in the drafting of an unclassified summary of the factual basis for a detainee's designation as an enemy combatant. These case writers, in turn, depended entirely on government agencies to supply the information they used. The case writers and Recorders did not have access to the vast majority of information sources generally available within the intelligence community.

In conducting intelligence liaison duties related to the information gathering component, I was allowed only the most limited access to information, typically prescreened and filtered. The limited information provided by intelligence agencies ordinarily consisted only of distilled summaries and conclusory statements, lacking even the most fundamental indicia of credibility or, alternatively, consisted of volumes of information, most of which could not be determined to relate to a particular detainee, let alone a specific subject of my inquiry. Despite these extraordinary limitations, regulations applied to the conduct of the Tribunals required that the Tribunal presume that information presented was "genuine and accurate." Though my concerns regarding the efficacy of my reviews were communicated to my superiors, responses were dismissive and did nothing to address my concerns.

Ultimately, the information used to prepare the files to be used by the Recorders consisted, in large part, of finished intelligence products of a generalized nature - often outdated, often "generic," rarely specifically relating to the individual subjects of the Tribunals or to the circumstances related to those individuals' status. The content of those materials was often left entirely to the discretion of the organizations providing the information. The scope of information not included in the bodies of intelligence products was typically unknown to the case writers and Recorders, as was the basis for limiting the information. In other words, the persons preparing materials for use by the Tribunal panel members did not know whether they had examined all available information or why they possessed some pieces of information but not others.

Tribunal members reported through a line of succession to Admiral McGarrah. Any time a Tribunal determined that a detainee was not properly classified as an enemy combatant, the panel members would have to justify their finding. There would be intensive scrutiny of the finding that Admiral McGarrah would, in turn, have to explain to his superiors. Similar scrutiny was not applied to a finding that a detainee was classified as an Enemy Combatant.

Considerable emphasis was placed on completing the hearings as quickly as possible. The only thing that would slow down the process was a finding that a detainee was not an enemy combatant. These conditions encouraged Tribunal

members and other participants in the process to find the detainees to be enemy combatants.

On one occasion, I was assigned to a Tribunal panel with two other officers. We reviewed evidence presented to us regarding the status of Abdullah Al-Ghazawy, a detainee accused in the unclassified summary of being a member of the Libyan Islamic Fighting Group.

There was no credible evidence supporting the conclusion that Al-Ghazawy met the criteria for designation as an unlawful enemy combatant. The information presented to us had no substance. What were purported to be specific statements of fact lacked even the most fundamental hallmarks of objectively credible evidence. Statements allegedly made by percipient witnesses had no detail. Reports presented generalized, indirect statements in the passive voice without stating the source of the information or providing a basis for establishing the reliability or the credibility of the source. Material presented to the panel begged the conclusion that the detainee was an unlawful enemy combatant. Questions posed by members of the Tribunal yielded no answers but, instead, frustration borne out of a complete absence of factual matter.

On the basis of the paucity and weakness of the information provided both during and after the hearing, we determined that there was no factual basis for concluding that the individual should be classified as an enemy combatant. The validity of our findings was immediately questioned. We were directed to reopen the hearings, to allow for additional evidence to be presented. Ultimately, in the absence of any substantive response to our questions and no basis for concluding that additional information would be forthcoming, we left unchanged our determination that the detainee could not be classified as an enemy combatant.

The response to this determination was not acceptance but, rather, the expression that something had gone wrong. I was not assigned to another Tribunal panel.

Based on my observations and my experience, I concluded that the Tribunal process was little more than an effort to ratify the prior exercise of power to detain individuals in the war against terror while appearing to satisfy the Supreme Court's mandate in *Rasul and Hamdi*. The Tribunal process was designed to validate detentions that the Executive Branch either believed it should not have to justify, could not be bothered to justify, or could not justify.

I subsequently learned that the subject of the Tribunal, Al-Ghazawy, was subjected, two months later, without his knowledge or participation, to a second Tribunal that reversed my panel's unanimous determination that he was not an enemy combatant. I also learned that this particular panel also reconsidered and reversed the findings as to another detainee. So it appeared to me that this particu-

lar panel was convened precisely for the purpose of overturning prior findings favorable to the detainees.

On June 29, 2007, for reasons left unstated but that consensus attributes to my affidavit filed with the Supreme Court, that Court vacated its prior order denying the petitions for writs of certiorari and, instead, granted the petitions.

In the ensuing months, briefs would be submitted, literally from all corners of this Earth advocating a particular result to be reached by the Court. I would not presume to state the merit of those briefs or the weight to be accorded any of them.

On December 5th, I had the honor of attending oral argument before the Supreme Court. I observed much of the time to have been spent on the question of from what source the writ of habeas corpus emanated, whether derived from common law or statute and the basis for extending the rights attending that writ to the detainees. But, from that discussion emerged very clearly the points that respect of fundamental rights required, as to the fate of the detainees, a fair hearing before an impartial decision maker. In that regard, criticisms of the Tribunal process remained largely unrefuted.

As I sit here today, the Supreme Court has not yet announced a decision in the detainee cases. I would not presume to state how the Supreme Court will decide the two cases now submitted. But I am certain that near to the minds of those upon whose shoulders that task now rests are the words that first signaled the course by which our national destiny would be shaped. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

These words would resonate two centuries later in the declaration of the United Nations, that "Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

These two statements, one penned by witnesses to the birth of a nation, the other by members of a union of nations, were not the source from which any rights emanated. Rather, common to both was and is the recognition, explicitly stated in the Universal Declaration of Human Rights that "All human beings are born free and equal in dignity and rights."

The words that I have spoken are not intended as a disparagement of any person or of any organization. They are neither an indictment nor a criticism of a people possessed of no will nor intent to act in any particular manner towards the detainees at Guantánamo.

Following the submission of my declaration, I received and otherwise became aware of an outpouring of favorable responses transcending divisions of race, of politics, of religion, or of any other distinctions that the mind might conceive. There was, in those responses, an affirmation that fundamental rights of human beings, any human being, need not be subordinated to transient interests, no matter how expressed. Beyond that was the distinct message on the part of so many of an unwillingness to quietly submit to an erosion of fundamental human rights.



Mr. DELAHUNT. Thank you Colonel Abraham. And let me note that I am very proud to be a lawyer. And I think before me, I have five men who reflect the best in terms of American jurisprudence, and I believe that what you all are doing are contributing to ensuring that on this issue, there is no longer silence. It is the end of the silence. Because you are right, Colonel Abraham, it is important that we all speak up and not just simply to posture, to criticize for the sake of political advantage, but to remember that this is about what we are, who we are. In many ways it is not about the detainees at Guantanamo. It is about us. It really is about us. And if we should stay silent, as other societies have, when atrocities or mistakes, however you want to describe it, have been made, we fail our duty. We fail our country. We fail America. And we can't let that happen.

I think you probably heard today, implicit in the questions that various members of the panel posed, that we are waking up. And I want to convey, as I hope I did to our witness, that I have great belief in the goodness of this country and what we stand for. And, if we have tarnished that city on a hill, that shining city on a hill, we are going to buff it up again. We are going to reclaim it. Because it is important that the world looks to the United States for the moral leadership in many respects that we have earned through our history, whether it be slavery, whether it be discrimination against women or any minority group. And that a nation is powerful only because of the moral force that it exerts in this world.

You know, I often hear about a quote, I think was President Bush, I think it might have been Vice President Cheney, about how they hate us because of our values. No. I do not believe that for a minute. I think that they are disappointed because there is a belief that we have not been true to our values. Well, we are becoming, we are complying with our values today, and in the future and in the past.

Representative Schakowsky, if you want to make any kind of a statement, or ask any kind of questions before I proceed, you are more than welcome.

Ms. SCHAKOWSKY. Well I just I want to thank you, Mr. Chairman, for allowing me to sit in today. This is an issue of great concern to me. I have visited Guantanamo Bay a couple of times. The first time I went, it was after the OSCE, Parliamentary Council had made a resolution condemning Guantanamo Bay and certain members of the Parliamentary Council from the United States went to Guantanamo, that was their mission, to go there and see what was happening and met with Major General Jeff Miller, who I asked a very simple question, how do you know that all of these detainees are guilty of something, and how will you determine that? And he assured me that they were all bad guys and that the way one could be sure of that is because the process for screening them in Afghanistan was really foolproof, that it was such a wonderful process.

So I am just wondering, maybe you have been through all that already today, and I know I am coming in at the last minute, probably you are anxious to leave, but I am just wondering if any of you want to comment who on how these individuals got there in

the first place and how, speculation on how it might be that with such certainty, this person in charge of Guantanamo would say, kind of trust me they are all bad guys.

Colonel ABRAHAM. If I may, I had the opportunity to see most of the classified records and nearly all of the unclassified records during the time that I was at OARDEC. As they would go, as they would be processed, the packets, the files of information in Washington, either to be used in Guantanamo or to be used where tribunals were held in absentia, that is, where the detainee was not present because either he had determined not to participate or there were no witnesses. And in no instance, in fact, were there ever witnesses from any source outside of Guantanamo.

In almost none of the instances that I observed was there information that would have been sufficient, as of the time of the transfer of an individual to Guantanamo to justify his indefinite detention.

Ms. SCHAKOWSKY. Not any?

Colonel ABRAHAM. In all of the instances that I saw, I saw none where there was sufficient evidence of which the government was possessed, at the time of the detention, to justify efforts not to seek further evidence and to support the record of the CSRT on the basis of that information alone. In fact, I know of no instance where somebody came to a CSRT with a ready-made package, that is, with so much information available on them, that it was not necessary to do any research. Quite the contrary was the case in nearly every instance. That is, research teams would be asked to pull information on the detainees. In many instances, the detainee information was extremely limited. It might include the circumstances of their detention, which often was nothing more than a statement from the detaining authority as to how they came to be in that entity's possession and ultimately transferred to the United States.

Ms. SCHAKOWSKY. And would you know if someone was paid a bounty in order to turn somebody? Was that indicated at all in the information you had?

Colonel ABRAHAM. In terms of the information that would be received by the CSRT because after all we are talking about how an adjudicative body deals with the evidence. In most of the instances, the CSRTs did not know how the person came to be an American custody. There would be generalized statements about the effect that they were turned over by a particular group, that they were being held by Pakistani authorities, but very little more than that.

Mr. DELAHUNT. If the gentlelady would yield for a moment, I think that we should take note of the book by Pakistani President Musharraf who indicated that the Pakistan Government, out of fear of being, I think his words were, "the victim of a military assault on Pakistan," turned over some 369 Arabs and earned for the Government of Pakistan millions of dollars as for bounty. Let me go to Mr. Smith.

Mr. STAFFORD SMITH. May I just say, in terms of how we made so many mistakes, there is a sort of inevitability about this. And the guy who gave me this watch did 9 years on death row in Louisiana and he ended up and other people we have exonerated in an open legal system, it is quite clear how we made these mistakes.

And it tends to be that you have an informant who is acting on some self interest, whether it be for money or for other benefit. You then get into a legal system where there may be coercion of the defendant or whatever, and then you end up having a trial process that just doesn't expose the errors that have gone before. When you look at Guantanamo, of course, all of these things happen in a closed legal system. And we have talked and I have got these wonderful bounty fliers where you get \$5,000 minimum for turning someone in that you didn't like anyhow. You say they were in Tora Bora, then along come, instead of your stereotypical police officer from Louisiana threatening one of the prisoners, and I don't certainly don't mean to say that police officers do that all the time, but in our instance here they do, they apply enhanced interrogation techniques and having got you for a bounty, I then apply the enhanced interrogation techniques, it doesn't take long before you say, you were in Tora Bora.

And these are not sociopaths doing it. I think it is very important to recognize that in the Milgram experiments in the 1970s, 85 percent of just us normal people did what we were told and we cranked up the electricity to the point where we would have killed the person that we were questioning. And it is not sociopaths doing it. It is young men and women. It is soldiers who are just told to do this stuff.

Mr. DELAHUNT. If I can interrupt for a moment, I think the point that you make, the distinction between a closed justice system and an open justice system and recognizing that even in an open system, the frailty of that system, I sponsored legislation years ago that I am happy to say actually passed and was signed into law, you know, it was called the Justice For All, the Innocence Protection Act. But it was predicated on the huge number of exonerations in various cases, but specifically capital cases.

Ms. SCHAKOWSKY. None more than in Illinois.

Mr. DELAHUNT. Right. And there were 13, I think, on death row in Illinois that were exonerated. That is why in a closed system, the ability, or the capacity of that system to be examined and reviewed and subject to legitimate checks and balances is fraught with peril. Professor Denbeaux.

Mr. DENBEAUX. You know, I think part of this is buried in the problem of the evidence. It is not just the problem of the bounties. If the United States forces only picked up 5 percent of these people, they are being held based on evidence that is provided by, whether it is tribal chiefs, warlords, Pakistani officials, and there is no way to evaluate it, so I think the first problem you have is you are brought in. We then pay money for you. And I think there is a sense that you bought it, you broke it, you are stuck with it. We have now paid money for somebody. We have no way to evaluate the evidence. And as one military lawyer told me once, he told me the normal way you investigate crimes is you have a problem and you try to find who did it. Here, he said we have all these people brought in and the question was reversed. The question was, "Who should be released?" And at a time of fear, no one wants to release somebody. And therefore, if somebody has paid money to a tribal warlord who has said he is a bad guy, the weight of the force of

the responsibility for releasing somebody is enormous and we now know, in fact, that the government is claiming people—

Mr. DELAHUNT. I want to explore something you said, provoked a question in my mind that I would like to address to Colonel Abraham. Because you were there. You were inside the system. More than anyone in this room, probably anyone in this country, you saw firsthand the frailties. Could you describe for us, I would surmise that the pressures to secure convictions was immense. I mean, I am reading here a quote attributed to the general counsel of the Pentagon, a Mr. William Haynes II, informed Colonel Davis, “who you can identify for us in your response, that we can’t have acquittals at Guantanamo.” We can’t have acquittals at Guantanamo. When of course, if there were acquittals, it would have enhanced the credibility of the process. Colonel.

Colonel ABRAHAM. Thank you, Mr. Chairman. There are two different elements or aspects of the legal or quasi legal proceedings at Guantanamo that need to be understood. Both as to their distinctiveness and the way that they complemented one another.

Ultimately, that of which you speak are the commissions or the trials that were to be held. And of the particular concern that was raised as to what happens if somebody is essentially exonerated after being held in Guantanamo for years at what were essentially going to be the trials of the century, literally, trials demonstrating the existence of transnational terrorism, of international threats to American security. But long before the first of those trials was ever going to be held, because you asked the question about what I did every day that I was there. I was in Crystal City. I was here in Washington, DC, for most of the time. The research teams were there. The command leadership element of OARDEC was here.

And when you ask the question, what was the command influence to convict, or in the case of the tribunals, to find somebody to be an enemy combatant, what you really do is reverse the paradigm. Bear in mind you have people of good conscience and good will populating that organization. But the context in which they were there was one unlike anything that you would ever imagined anywhere else. Nine-eleven had happened. Iraq had been going on for some time. There were instances of international terrorism known or believed to have existed. And then suddenly, you are assigned to an organization where you are told before you get there, as was I, the worst of the worst are there.

During the year that I was in the Pacific theater, I knew very well of the activities of one of the worst of the worst. He is one of the people who is there. He has no problem acknowledging the activities in which he has participated.

He is one of the people that were there.

I did not go to OARDEC with the illusions that 550 of his peers were there at that time. I went with no assumptions regarding who was at Guantanamo or why they were there. But I will tell you in all candor that that was not the common experience. My experiences prior to my being assigned to OARDEC certainly were not typical. They were anything but typical. I was one of very few intelligence officers assigned to OARDEC. I was one of very few lawyers assigned to OARDEC, but not in a legal capacity. I was there as an intelligence officer. But when I was asked to come to OARDEC,

I was specifically told before I got there that that combination was precisely the kind of thing that they were looking for.

But when I got there, what I found were very willing, very able people, that is, people who were able to perform tasks assigned to them, but regrettably were ill-equipped to deal with kind of legal and intelligence issues that they faced from the moment they walked through those doors. They were given information and told, accept it as being true. They were given information and told, accept it as being complete. And they were given information largely without any source, any attribution, any validation, and told this is all the evidence that exists.

Do not presume that any facts exist other than those that you are given. And add to that the problem that in most of the instances, the people did not have clearances sufficient to deal with the type of information that is typically addressed through the types of organizations that would have been responsible for collecting the information in the first instance. And you begin to wonder within a few days of your assignment how people can do their jobs.

I recognized this almost immediately when I asked, "What systems do you have for the processing of top secret information?" And they said, "Oh, no we don't deal with that here. Not in this building in Washington, DC."

I said, how many times have you gone to, and I named four or five different organizations and asked them for information? And to three of the five organizations, the response was, who? This is not because of an intent on the part of anybody who was assigned to OARDEC to do ill to any of these individuals, but because we were told these were the worst of the worst. Don't question it. We were told, better people than you have already decided that these people should be here. You don't want to be the one to let them go.

But I will tell you, Mr. Chairman, on the Tuesday before Thanksgiving in 2004, I and two other officers hearing evidence submitted to us regarding one of the detainees, said, no way, no how, we drew the line there in one of the few instances, one of the few instances of OARDEC's history said there is no credible basis for concluding that this individual is an enemy combatant. After the moment of fear and panic subsided running throughout the organization, we were told, leave the record open. We had asked a number of questions that went not only to the quality of the evidence, but the assessments that were made regarding that evidence. The assessments that we were told were as irrebuttable in their conclusions as was the evidence itself.

But we resisted the temptation to accept it. We asked a number of questions, the record was left open. The recorder came back to us, a short time later, and said, I can't give you any more answers. There is no more evidence. The report was written indicating that that detainee, al Ghazawy, was not an enemy combatant.

Two months later, our tribunal would be overturned, Tribunal 23 would be overturned by Tribunal 32, the justification for their having been established was the claim that a number of the representatives of the prior tribunal were no longer assigned to OARDEC, even though I was still there and knew nothing of Tribunal 32,

unanimously concluded on largely the same evidence that Mr. Ghazawy was and should remain designated as an unlawful enemy combatant.

But more significantly than the fact of the reversal of that tribunal decision was that the fact that in the prior months, the determinations that were made by the tribunals were whether or not the individual was or was not an enemy combatant. But there was a subtle change that happened around that time. As the new designation would be whether they were no longer an enemy combatant.

Mr. Ghazawy remains at Guantanamo. And I am as convinced now as I was then, as I trust are the other two members of Tribunal Panel 23, that he did nothing to justify his presence nor his continued internment at Guantanamo.

Mr. DELAHUNT. What do we do now?

Mr. WILLETT. Mr. Chairman, could I add just one point to Congresswoman Schakowsky's question, which is, Murat Kurnaz was determined to be an enemy combatant in Kandahar under this process. He was then determined again to be an enemy combatant in his CSRT in 2004. So when General Miller told you this has all been done and we know they are all bad guys, well, we saw Murat Kurnaz today. The only difference between Murat Kurnaz and scores of people who are still there is that his adroit lawyer somehow managed to get the Chancellor of Germany to raise the issue with the President. It is not because there was any court process.

If it hadn't been for that diplomatic overture, he would be there today. He would have a DTA case today that would be suspended on the question of what pieces of paper the court can look at.

Mr. SULLMASY. Congresswoman, just two points on that, I think Professor Denbeaux hit on an excellent point about this as well in terms of in war in the sense of if we are going to free any of these people at a period of time, especially when you were visiting during General Miller's tenure, that there was a likelihood they were going back to battlefield. We can debate whether that is true or not but just getting the mindset of the military, as was eluded to, they are certainly noble folks that are trying to do their work there at Guantanamo, the military.

And I think we can take safety in knowing that the number was around 1,000, went down to 500 and went down to 270 now is what we are looking at. Certain that is not as expeditious as we might have hoped.

Ms. SCHAKOWSKY. Now it is what?

Mr. SULLMASY. Two-hundred and seventy. That number is the result of some of these people here and some of the Members here of Congress, but certainly that number has been going down, so there is an action being taken by the Armed Forces to respond to some of these concerns. And the other item I think that the chairman brought up—

Ms. SCHAKOWSKY. How many years later now? Some of these people have been detained in their seventh year right? Some of these individuals are in their seventh year of detention, however.

Mr. SULLMASY. That is correct. And some of them, as far as we know from our perspective, from the government perspective, would be that those folks are engaging in activities that are likely

to cause or engage in terrorist activities. There is some semblance we have, to defer at some point, that there are at least some people there that are likely to engage in terrorist activities at some point. I know you might disagree on the numbers and we can go back and forth.

Ms. SCHAKOWSKY. I don't disagree. Without any process however, without any genuine process, we have no way of knowing that. And I will tell you what; we do put ourselves at risk. You start rounding up people who are innocent and put them through years of incarceration in a cage, I saw those cages, and there may be some danger once you release them because they are going to be really mad. And their families are going to be really mad. And the consequences I think of not having due process, a legitimately, a legitimate process that is recognized internationally as a legitimate process, is a very dangerous thing for our country. I would agree with that.

Mr. SULMASY. And I do agree Congresswoman, but I do think we have to recognize as well that we would have these same issues in a conventional war. In a conventional war, we keep POWs until the end of hostilities and we have to find some way to find sort of a medium, which I alluded to my testimony, some sort of a hybrid method to accomplish these tasks. We can't simply put them in our civilian courts and we can't keep them in military commissions. There has to be a third way to look at this. That is incumbent on you, all of us, or you all as policy makers to be looking at—

Ms. SCHAKOWSKY. Does everybody agree with that, that we have top of a hybrid process?

Mr. WILLETT. No, certainly not.

Mr. DENBEAUX. I certainly don't. It always seems to me no matter what happens in life, whatever number of choices you have in front of you, we all want one more than that. If you have a choice between eating dinner at one restaurant or another and one is closer and one is better, somebody wants a third place. If your child wants to go to college you like this college but you don't like where it is located. I think people are always trying to find more options than there are.

I don't see why we need a hybrid. Everybody keeps talking as if we have to have this knotty problem figuring out how to solve the situation. Our legal system can handle it. There are knotty problems. I don't know why people have to have something. They are not prisoners of war. They can't be treated criminally. We have to come up with some new characterization. It will take us 5 years to figure it out. There will be litigation. There will be hassling. And I think the time has run out for finding secret tricks to solve this problem.

And I would like to add something. I heard everybody on the panel distressed about Mr. Kurnaz's situation. But you know, I think there are things that we can do for Mr. Kurnaz and one would be, is to find out who it was who evaluated him and decided he was an enemy combatant. I think it would be totally appropriate for this committee and I think it would be helpful to America, Kurnaz and everyone else to say how is it that all of these innocent people were found to be enemy combatants, the General convinced they were all bad, there was a process, we know everybody loses

in that process, somehow, as Lieutenant Colonel Abraham has pointed out. I think it would be right for us to learn how those things happen. This isn't an independent tribunal.

And I would really like to get to the bottom of it. I think there is lots of information that would come out, to be useful in history, to find out how this happened, to make sure it never happens again. And that is one of my concerns here.

Mr. DELAHUNT. If I can interrupt my colleague for a minute. You know, I understand there is debate about whether a third way or a hybrid is a better way, or resolves an issue. I think what, and I am not trying to put that off. But we haven't had a single trial yet before a military tribunal. It is how we got here, is what is most disturbing. As Congresswoman Schakowsky talks, it is 7 years. It is 7 years. I can remember when I first heard that the British detained alleged IRA terrorists for some 14 or 15 years. Maybe it is because of my heritage, but I was just stunned and shocked and appalled that that could happen in a democracy such as the United Kingdom. And the British didn't learn from that experience. Because people do get angry. And part of this hearing is clearly predicated on: What are the consequences to the United States in terms of our national security because of Guantanamo? They are profound.

As the ranking member can corroborate, we have had a series of hearings and polling data. And it isn't just the Islamic world. It is our traditional allies. And I am not suggesting that we are in a popularity contest. It is not that. It is about our self-interests. It is about, do we want to deal with these issues alone? Because that is the attitude that some might have in this country. But I can tell you it is not an attitude that I think results in a positive resolution of these very difficult issues. And it impacts us commercially. It impacts us in terms of all of our foreign policy objectives.

I yield back to the gentlelady from Chicago.

Ms. SCHAKOWSKY. One last question, and I truly appreciate this. Are any of you aware of any prisoner detainee who has died as a result of his incarceration, his treatment in detention by the United States?

Mr. STAFFORD SMITH. May I respond to that? Yes, certainly there are eight documented cases and indeed some of my clients in Guantanamo witnessed, not in Guantanamo, the ones that I know of were in Afghanistan and Bagram Air Force Base for the most part. But there were. And I think it is important to expose the truth on that. I mean, who knows? I have heard my client's version of events who says he saw it, then on the other hand, I think we should have a proper open elevation of what really happened.

Ms. SCHAKOWSKY. Has anybody been held accountable for that?

Mr. STAFFORD SMITH. There have been some processes. Indeed one of the guards I represent was going to be a witness for the defendant who is an American soldier, but in the end, that didn't go forward. But there hasn't been a thorough evaluation of any of those cases, let alone all of them.

Colonel ABRAHAM. If I may, Madam Congresswoman, I can't speak to anybody who has died at Guantanamo yet. And I think it important, without giving too little regard to those who have died under circumstances that may not yet be explained, I think it is

important to deal with one individual who is the subject of our tribunal, he is a man, much about the same age as me, also with a daughter, although the rest of the circumstances of our lives are totally different, is dying in Guantanamo right now. He has been diagnosed as having hepatitis. He was told by——

Ms. SCHAKOWSKY. What is his name?

Colonel ABRAHAM. Al Ghazawy.

Ms. SCHAKOWSKY. Is this the Candace Gorman—I have tried to help there?

Colonel ABRAHAM. Yes, Ma'am. And he, at one point, had been told that he had AIDS, then he was told he didn't have AIDS. But the fact is, it is the consensus of a large number of people who have had the opportunity to observe him, that unless he is treated, he will die. That is a particular concern to me for entirely selfish reasons. I do not represent any detainee. I am not a member of any law firm that represents any detainees. I have no interest in letting terrorists go. But quite frankly, by my involvement in OARDEC for 6 months, I, no matter what anybody else has to say about it, put him there. I put him there because I was a member of an organization that allowed the process that was put in place to continue unabated, not only during the 6 months that I was there, but years later, a process that allowed, by simple justification of its own existence, to declare people to be reasonable, rationally and legally held without any evidence whatsoever.

Madam Congresswoman, as far as I am concerned, if he dies without the truth of the nature of the claims against him being properly reviewed, that death is on my hands.

Mr. DELAHUNT. If I may, let me just ask all of you, I think I hear numbers like 50 or 60 detainees whom everyone agrees ought not to be there. Give us some suggestions, in terms of how we expedite their release, presuming that there is a thorough review of the evidence, to determine that they are not dangerous to the United States.

Mr. WILLETT. Mr. Chairman, if I can begin, and it gives me a chance to respond as well to something that Congressman Rohrabacher spoke earlier and that is the willingness of our allies to step up to the plate here. I have done a lot of sort of private diplomacy myself, on behalf of the Uighurs trying to find a country who will take them. And I have been right up at the gate of it. I could feel it a couple of times. And you always hit the Junior Minister in the Foreign Ministry who says, "Well, why won't the United States take any of these people if they are so innocent?" And I never have an answer to that question. But I am sure that if we showed a little leadership and if we paroled into this country a few of this population, there are a number of allies who also want to see the Guantanamo problem behind us, behind all of us, and who would help. But as long as we have a flat refusal to do that, we have this impasse where our allies say, well, if you won't help, why should we? I don't think this is a problem that we can't solve, but we have to participate ourselves if we are going to solve it.

Mr. DELAHUNT. Let me make an observation that in our last hearing, what I find particularly disturbing when we speak about how we are viewed in the world, is that in the case of several of the detainees, permission was granted to the security apparatus of

nations like China and Uzbekistan to come in and to interview these detainees. Do any of you have any information regarding that particular issue?

Mr. STAFFORD SMITH. Certainly. I represent a man called Omar Deghayes who is a Libyan, who is now home in Britain. Thankfully, the British did take a non-British national, and we were pulling together all the information about all the Libyans, and according to his statement, and this was consistent with various other people, there was a group of Libyans who were brought to Guantanamo, it is logical obviously they didn't fly themselves. We have the flight log of the plane, in fact, that went and picked them up from Tripoli, brought them to Guantanamo Bay, it was an American plane, whereupon there were some choice words were used. The Libyan delegation said to Mr. Deghayes, according to him, that "we can do nothing to you here, but when you come back to Libya, I personally will kill you," was one quote. Unfortunately, a bunch of stuff had been shared with them on the plane, on the way over about, why Mr. Deghayes was an opponent of the Ghadafi regime.

Well, I will tell you right here, I am an opponent to the Ghadafi regime, too. I think he is a despot. But because of that, sharing the information with the Ghadafi regime, they had therefore given evidence to the Ghadafi regime about why these Libyans in Guantanamo Bay should be persecuted if they were sent back to Libya, so it compounded the problem.

So fortunately, Mr. Deghayes is back in Britain, but there are another ten, I believe, Libyans who are not, who went through relatively similar unfortunate experiences in Guantanamo.

We have compounded those issues. But it doesn't serve us to go into that too much. I think what we have got to do is solve that problem now by finding them a place to go.

Colonel ABRAHAM. But Mr. Chairman, you asked the question: How do we solve the problem? One of the concerns is that there have been a number of individuals both within this body and outside who have said, Let the Federal courts review the cases. And the argument is very quickly made, but soon we will have Federal review of every POW detention, and we will have privates pulled off the battlefield to become witnesses in hearings.

But quite frankly, while I think this risk is overstated, what we are addressing today is the 270 and the question at this point after 7 years, a period of time longer than what our involvement was in World War II, a longer period of time than those individuals would have been POWs had they been caught on December 7 and held until Japan surrendered.

I think it is time to say they need to be reviewed in a transparent process. We had Federal trials for World Trade Tower I when we had the car bombing in the garage. Those individuals were successfully brought to justice. Their trials concluded without risk of exposure of intelligence information outside of security channels.

Mr. DELAHUNT. To corroborate your point, again, I will, just using the number 60 or 70, that there appears to be no disagreement, pose no threat, were not enemy combatants because of the failure of the initial phase embodied in this Combatant Status Review Tribunal. And I mean, we find ourselves now in this quan-

dary, too, where many of them are, for all intents and purposes, stateless because they can't return to those countries that have a systemic, have a record of systemic torture. Although we do, we have done that. We have had a hearing here in this committee where a Syrian-Canadian was sent to Syria rather than Canada based on diplomatic assurances. And in a letter from the then-deputy attorney general, we were told that to send him to Canada would have been prejudicial to the United States. I am waiting for some explanation as to why we could not send him to our neighbors to the north. I am unaware of many terrorist groups operating north of the border.

Mr. SULMASY. Mr. Chairman, I think one way to take care of this is actually have the military commissions work, as I think you alluded, to allow them to be tried in the Military Commission. If they are acquitted by the Military Commission while under the MCA, then so be it.

Mr. DELAHUNT. But you say that, Professor, and yet we have a judge in the system, and this is recently, on May 10, Captain Allred of the Navy, directed that the brigadier general, Thomas Hartland of the Air Force Reserve, a senior Pentagon official of the Office of Military Commissions, which runs the War Crimes System, have no further role in the first prosecution.

That is devastating. That is an indictment of the system.

Mr. SULMASY. I think in that regard, sir—

Mr. DELAHUNT. Again, this is not, let me interrupt you and I apologize. This is not a conservative from California or a liberal from Massachusetts talking. This is a Navy captain, clearly part of the Judge Advocate Corps that is saying that the senior official has prejudiced these hearings, these operations, because of a bias in favor of the prosecution.

Mr. SULMASY. Certainly, the first one with a legal adviser being removed does not mean he is removed permanently, but I think of all of our alternatives right now it would seem best to try them, use the military commissions again, you know, that I advocate for a third way, which obviously others might disagree with, but I think two points on that, if I can, Mr. Chairman, is when someone says we have two existing ways to do these now, we have the civilian way and the military commission and they exist, as Professor Denbeaux alluded to, I think that is true, but I think it is incumbent on us, particularly as academics, as policy makers, to look at other ways to do this, because it is clearly not working in either module, won't necessarily work. Actually, it is a duty of ours to look at different ways and think outside the box. And I certainly include myself on that.

And one comment dealing with the legal adviser, Mr. Chairman, the pressure to secure convictions, which is really an inherent problem in the whole military justice process, even with within courts martial, is the unlawful command influence is a flaw within the military system. And it is something that we all should be concerned about and why we need to have, perhaps, civilians oversee the system, because I am not sure we will ever get away from that. But historically, from what Colonel Davis alluded to during the *Clearant* case. President Roosevelt, actually in the *Clearant* case, directed Attorney General Bittel and the JAG of the Army working

for Secretary Stimson at that time, those exact words, he wanted convictions and he wanted them all executed, and that is a historical fact.

Mr. WILLETT. Mr. Chairman, it is very important not to get confused and off the track on these military commissions. Military commissions are about crimes. Almost no one, almost literally no one at Guantanamo is charged with a crime or will ever be tried for any kind of crime in any kind of system. So we have got 255 people, doesn't matter what kind of process you have for a crime, they are not going to be charged. They haven't been charged for 7 years. They are not going to be charged. The question is what do you do with those people?

Mr. DELAHUNT. As we know, if there were, if there were at one time a case, I can assure you after 7 years, having been a prosecutor myself for 22 years, that case is gone. That case is just out the door. Out the door.

Again, goes back to what we should have done early on rather than finding ourselves in this quandary. Let me yield to the gentleman from California.

Mr. ROHRABACHER. Thank you very much, Mr. Chairman. So we are talking about 255 human beings who are down there in Guantanamo who are finding themselves in the Twilight Zone or some bizarre situation that they are losing their minds. It is a crazy situation there.

Of those 255, is there anybody here who would give me a guesstimate as to how many are people who are really al-Qaeda terrorists and how many of them are just swept up in an effort after 9/11 that was somewhat, you know, too broad a grabbing of people? What percentage, what are we talking about here?

Mr. STAFFORD SMITH. I would love to respond to that. It was a wonderful extremely conservative Republican judge in Frank Williamson's case who is a guy on death row who gave Frank Williamson a retrial and got a lot of criticism for it. And at the end of his opinion, he said that he had had a conversation with a friend of his who had been critical of him, the judge, because perhaps he was letting go a murderer. And the judge replied, and it is in the opinion, he said, you know, we won't know that until we have had a trial. And he went on to say, thank goodness that is the American way. Well, it turned out this very conservative Republican judge was absolutely right.

Frank Williamson was exonerated off death row and the guy who really did it was later identified. So I think the only possible answer to your question is we won't know until we give them American due process.

Mr. ROHRABACHER. Or if we end up knowing afterwards when the American due process is done, we have already let 500 people go. And some of them have gone back and you may be, very afraid Colonel, that you might be responsible for the loss of that life. And I can certainly identify with that. You take your job very seriously and realize that what you have done may end up causing the loss of that life. All military people are put in those types of situations. That is why they are there. But one thing we do know is one of the people that was let out just recently went back and partici-

pated in the killing of six people, murdered them, blowing them up in Baghdad as part of a terrorist operation.

Now we do know that. And perhaps after the trial we still won't know until after a certain number of people have blown up other innocent people. And the question now is, those 255, we know some of them are terrorists. Everybody seems here to be afraid to try to come up with some suggestion as to what proportion, but we know some of them at least are terrorists. Some of the 500 we have already released have gone back and committed acts of terrorism. So we have to assume that, and that it isn't just an overreaching on the part of our Government in some of these cases, that does not prevent us as humanitarians and as people who believe in the truth, from trying to determine as best we can which ones are certainly not deserving of any of the treatment they got.

My partner here was a prosecutor. And I am a former journalist. And I will tell you that I know very well that in the United States, as committed as we are to human rights and to our justice and et cetera, once the prosecutors have got you targeted, they will keep coming at you until they get you on something. Do we not know that? Everybody knows that. And that is in this country.

And so, it certainly does not stretch the imagination that they picked up this poor Turkish fellow from Germany when he was on a bus just coming back from visiting religious shrines or whatever and without any evidence just decided, "oh, he is going to be our man because somebody said something," an unreliable witness, and then they kept him until they get something on him, until they get him to sign some piece of paper. That is not beyond anybody's imagination here. But our job is to try to find out and be honest there is a balance here of, yeah, if that is what is happening to this guy, like the other people targeted by prosecutors here, and there is an injustice being done, how do we address that without letting go these other people who are going to kill other innocent people?

And I can assure you if we end up letting 255 of these people go, there are going to be other dead people who are innocent people who are going to be killed by terrorist activity by some of these people. Does anybody dispute that? Do you think that we can let them all go and there won't be any terrorist activities being committed by these?

Mr. DELAHUNT. I think that Mr. Stafford Smith gave the right answer. It is a question, however, of, and I will let Professor Denbeaux respond to your 30 back-to-the-battlefield detainees. But I think it is very important that what has failed here is the process. What has failed is the process. Seven years. And, no one is suggesting just let people go. Just have a process that is constructed in a way, that protects our national security and respects human rights. That is what we are about as a people.

Mr. ROHRABACHER. But Mr. Chairman, we have already let 500 people go. This is not indicative that we have been intransigent here. The fact is that we have 500 that have been in custody who have now been released, some of whom went back and committed terrorist acts, does indicate that we are not being totally intransigent. Now whether or not some of these people like the Uighurs that you are talking about, now there may well be which I have been told a Uighur village because we do know that Afghanistan

does stretch way out there, there is a little stretch of Afghanistan goes all the way over to China.

It is conceivable there is a Uighur village there. But we also know that during this time period, there were many people who came from other countries whether it was China or elsewhere who were recruited by bin Laden into what was basically a radical Islamist terrorist foreign legion. That is what al-Qaeda was. And they were trained at that time to lie and to claim that, make all sorts of claims they were trained this way. And I don't think it is in dispute. You are welcome to dispute that if you like, but I believe that is pretty well documented.

And knowing that, we know that we face this dilemma and I am willing to certainly readily admit. Look, when I was a kid, one of the, and I have told this story once before. But there was a guy in my church and he was my dad's best friend, and he was a former Marine like my father was. And he told me when he fought in Guam as a Marine, that they went out one night, they were assigned 1 night to go out, and there were a group of Japanese, this is after the island had been already captured, but they knew there were groups of Japanese. They were supposed to capture this group of Japanese and sure enough, they came upon them at night. When the Japanese, they pounced upon them, they were around this fire and there were about six Japanese soldiers, and the Japanese actually got up and were surrendering. And my father's friend said, "There were several of us there and we just opened up on them and killed all of them."

Now, I don't know, I will just have to say, he kept that in his heart all these years. Were the U.S. Marines a bunch of real, do we look back on World War II and shame the U.S. Marines? Do we look back and have all these apologies about what our U.S. Marines did in World War II? Yeah. I am saying that if we have problems, we need to correct them. We need to go for the truth. We need to admit our Marines did that.

But let's not give in to this tendency of our allies, that is why I say for our allies to put up or shut up because all they are doing is being critical and nitpicking half the time. They aren't putting their own people in harm's way, except perhaps the British. And they are nitpicking us about a situation like this which is a hard situation for us to deal with the same way it was for that young Marine in Guam after he had seen his own people murdered or killed during the war to capture those Japanese and maybe somebody—not maybe—somebody went way over the line by killing them. So anyway, I know—

Mr. DELAHUNT. If you would yield for a moment. What I suggest, Mr. Rohrabacher, is that you and I begin a process, our own process. And I think the most logical population for us to focus on, because we have heard considerable testimony on the Uighurs, we know that the Albanians have accepted five. I would suggest it is a worthy project for this subcommittee to take their cause, to determine the facts as best we can, and to press our Government and other governments to accept them, and not to allow the shame that will be visited on us by international opinion, if we allow them to linger any longer in Guantanamo. It is just not right.

Mr. ROHRABACHER. If they are innocent people, you are absolutely right, and we need to make that determination. I will have—

Mr. DELAHUNT. Let's make that determination.

Mr. ROHRABACHER. Let me state for the record, again, you go to a Federal prison right now, and as much as you can tell—I am very aware that prosecutors target innocent people and go after—or go after somebody and get them. Just once they have been targeted, even if the prosecutor finds they are innocent, they will go on with the prosecution.

We know that. We have seen it dozens of times, okay? But that doesn't mean our jails are filled with innocent people. That means there are some innocent people in jail.

And you visit our jails, Mr. Chairman, and you are going to find almost every one of the prisoners will assure you that he is innocent of the charges against him. Almost every one of the prisoners—there are no guilty people in jail—and I suspect—

Mr. DELAHUNT. Mr. Rohrabacher, I put a lot of people in jail. Some of them are still there, thank God.

Mr. ROHRABACHER. Right.

Mr. DELAHUNT. And I can assure you that many of them would not claim their innocence.

Mr. ROHRABACHER. Well, we know this, that there have been some people, at least.

Mr. DELAHUNT. I am trying to get you to exercise some restraint on some of your remarks. I am a prosecutor.

Mr. ROHRABACHER. All right. We have some people—we have some people we know that have been cleared for release—like the Uighurs, okay—and there is no excuse that we keep people who have been cleared for release in incarceration. We can agree on that.

Mr. DELAHUNT. Thank you.

Mr. ROHRABACHER. And, in fact, that is one of the challenges we have for our nitpicking European friends right now: Accept at least those people that have been cleared for release. And a lot of times, what is interesting, they have been cleared for release by the very countries who now aren't accepting them.

Mr. DELAHUNT. Would you agree it ought to be the position of the United States to accept some of those people, whom we are unable to find an appropriate receiving country, to settle and parole here?

Mr. ROHRABACHER. I am going say something really heretical—

Mr. DELAHUNT. Heretical.

Mr. ROHRABACHER [continuing]. Heretical right now. And that is, I would hope that seeing that we are talking about 270 people, I would hope that our European friends, who aren't doing their share in this battle against radical Islam, that they might want to pick up that, rather than have the United States pick up that responsibility, whereas our guys are the guys getting their ass shot off, and that these people are hiding behind the protection, as they did during the Cold War, and as they would have lingered under Nazism if we wouldn't have landed there to save their ass, maybe it is about time they do something.

Mr. DELAHUNT. I would ask the gentleman to refrain from—

Mr. ROHRABACHER. Pardon me.

Mr. DELAHUNT [continuing]. The profanity.

Mr. ROHRABACHER. Anyway, the bottom line is, I think our European allies can pick up that responsibility, especially considering their nitpickiness about it, or their—or they are adamant, they feel very strongly about it, let them do it. And, in fact, I would not oppose efforts by them to take all of these prisoners off of our hands.

Mr. DELAHUNT. Noting that you haven't answered my question, let me recognize Mr. Stafford Smith. I think he wants to respond.

While he is doing that, I am going to request that the gentlelady from Texas take the chair, the gavel, and I will have to excuse myself since I do have another engagement. And I am so grateful for your forbearance, your patience, and I can't express how significant your testimony has been. I think you have opened some eyes, and we are in your debt.

Mr. STAFFORD SMITH. Mr. Rohrabacher, can I—

Mr. ROHRABACHER. I can stay for a couple more minutes and then I have to go, so go right ahead.

Mr. STAFFORD SMITH. I know you couldn't get the chairman, you know, you guys didn't quite agree on America, but why don't we agree on Italy at least?

I would love to go with you to Italy and explain to the new head of state in Italy why they need to take the Tunisians, many of whom lived in Italy and many of whom were rendered through Italian airspace with the Italians' knowledge, who have been quite hypocritical about this.

I am totally on your side on that, and if we could go there together and—

Mr. ROHRABACHER. For example, the fellow we had that the chairman was talking about, I think he was picked up in a rendition program.

By the way, rendition started under President Clinton, not President Bush. And he was picked up with the full cooperation, I believe, if my memory serves me right, of the Italian Government.

And almost all of these cases of rendition, when you dig deeply into them, you will find that our intelligence services were working in total cooperation with these Europeans. And now we just have to assume all of the burden of that responsibility.

I would hope they would pick up a little bit more of that. But I know that your colleague, there, has been waiting to pounce on me.

And please feel free to disagree. Yes.

Mr. DENBEAUX. I am sorry, you are talking to me?

Mr. ROHRABACHER. Yes, sir.

Mr. DENBEAUX. I apologize.

Mr. ROHRABACHER. No, no, I am the one who is apologizing. I talked a little too long. And I know you have a couple points you wanted to make.

Mr. DENBEAUX. I am in great danger of talking even longer than you. So I will have to show some restraint, as well.

I would like to go to the point about recidivism that you raised, because I think it is incredibly important in two ways. First of all, you keep saying that the other countries have to pick up their

share. At the same time, you keep saying many of these people, when released, will go back and kill on the battlefield.

You say, you know, for instance, that we will have to make some judgment on that point. And I think we have to recognize that it is truly against our national interest to have people falsely claiming the extent of the behavior of people after they are released.

And I am going to tell you that I made a study of every government official's statement about the released people returning to the battlefield. I found 45 quotes. They are from the Justice Department, they are from DoD, they are from the legislative branch, Senators, Congressmen, everybody else. None of the numbers agree.

They go up, they go down. There are 12 people. No, it's 20 people. Two weeks later they are down saying, it is really eight people. I don't think anybody in the government, including DoD, knows the answer to that question.

So, first of all, I think we should start, if we are asking people to help us find a way to release people, by making sure we know exactly what dangers there are. You have asked us to say how dangerous some of these people may be. I am suggesting our Government has to stop saying people are more dangerous than they are.

Now, you mentioned, I think, this DoD press release, which was issued in July.

Mr. ROHRABACHER. That's what I have to work from, right.

Mr. DENBEAUX. I understand that. I spent 1½ years trying to get this information, because it is being mentioned constantly, and no one could do it. And my students found this July press release from last year. And the first thing they looked at, they said, well, this is crazy. First of all, it doesn't say "returned to the battlefield"; it actually talks about the fact they have "returned to the fight."

Mr. ROHRABACHER. Right.

Mr. DENBEAUX. And the 30 number that you pick are 30 people who have returned to the fight. And I don't think American people consider that if the Uighurs are in a refugee camp in Albania and they give a news story complaining about Guantanamo, that you would fairly want to call them "returning to the fight."

Well, that drops the number from 30 to 25. And every time a public official uses the number 30, they are seriously damaging our ability to get people to cooperate. And the same thing is true about the Tipton Three.

Mr. ROHRABACHER. Just for the point that you just made, the State Department—Defense Department specifically states on the list that they gave us, this definition does not include—meaning going back to the fight—does not include listing a detainee as having "returned to the fight" if they have spoken critically of the government's detention policy.

That's part of—I don't know; maybe they are lying there, too, for all I know.

Mr. DENBEAUX. I am not saying that, but I have never believed press releases quite as much as the drafters thought.

But let me go back for a moment, because you may not have been here when I was speaking on this point before, so I would like to go slowly again.

Mr. ROHRABACHER. Yes.

Mr. DENBEAUX. I am working from the Department of Defense press release from July 2007, and that was following a long period of time in which I kept saying, "Who are the people?"

And there are a couple things about this July 2007 press release. First of all, at no time do they identify an internal security number for anybody. And, of course, I would like to think that if our Government is actually saying, this person, after being released, has returned to the fight and been killed or captured, they would know that person's name and they would know the number.

I would implore this committee to have the Defense Department identify the ISN number of every person—and I don't believe they are going to do that because of the definitional problem—if they are going to claim—

Mr. ROHRABACHER. Well, we have a document here where all those numbers are identified right here.

Mr. DENBEAUX. Could I see that, sir?

Mr. ROHRABACHER. We will make sure you get it. But every one of those numbers are there. The names and the numbers are right there.

Mr. DENBEAUX. May I ask, has that been published?

Mr. ROHRABACHER. We don't know if it has been published or not, but it was just given to us by the Department of Defense.

I have been looking for that for a very long time. And I have been asking various Congress people and Senators for it, and they said they couldn't get it from the government. Perhaps I have been lucky enough.

We will hand this to you at the end of this and you can let us know what that is and how that affects what you were just saying.

Mr. DENBEAUX. Okay.

Moving on beyond that one, let me make the point—

Mr. ROHRABACHER. By the way, I am not saying that everything somebody hands me in a press release I buy and take as gospel truth.

And I understand also—don't believe that I just discount everything that some of you folks are saying either, because I don't.

Mr. DENBEAUX. I would hope not, because we have gone to a lot of trouble to figure this out.

And let me say this: The 30 number from the press release I have, with or without ISN numbers, actually only refers to seven people having been released from Guantanamo and returned to the battlefield. So if you look at the 30, it is down to 7.

And my students took the names of each person, and they have the list of every person who has ever been detained in Guantanamo, and of those seven, two of the seven who were supposedly released and returned to the fight are on no lists as having ever been in Guantanamo. Two others have different names and sometimes double names, and it is possible they were.

But when it is all said and done, so far, under the press release I operated under, there were three people possibly who had returned to the fight, two of whom were neither captured nor killed on a battlefield; and there is an assumption that they returned to a fight, but I don't know that.

But our policy has been to accept the truth of the government's data where it is unequivocal. Where it is equivocal we have to act appropriately.

But the number 30 is a gross injustice to America, to the people who released them, and to our ability to find a way to return people to their homes.

Mr. ROHRABACHER. I find out this is a nonclassified document. So we will be very happy to give that to you. It has the names of 12 people that the Defense Department is claiming specifically, with all the numbers and the details.

Mr. DENBEAUX. So it is 12?

Mr. ROHRABACHER. There is 12 on this list. I haven't seen any other of—

Mr. DENBEAUX. One of the problems with my 30 number is, sometimes it is 12.

Mr. ROHRABACHER. Let me note that, even though there are problems with, whether it is 12 or 30 or 15—

Mr. DENBEAUX. Or three.

Mr. ROHRABACHER [continuing]. Or three, I would suggest that the people—many of the people, or most of the people, who ended up in Guantanamo were non-Afghans who were picked up at the time, at the time after—you know, after 9/11, and at a time of great turmoil.

It does seem to me that it would indicate that we are not talking about people who you just have to give the benefit of the doubt, that they were on a vacation trip or something into Afghanistan at that time, that something—that wouldn't be where a normal person would go.

Now, whether they are all guilty of terrorism—you know, were they part of the al-Qaeda legion—well, that remains to be seen, but a large number of these people were in Afghanistan and at a very questionable time. And anyone that was “recruited into the Taliban,” and I know a lot about what was going on there, these were not people who just were voluntarily there and just had some sort of religious epiphany that they should join the Taliban. Usually, it is because they were part of a committed anti-Western Islamic sect that was exemplified by al-Qaeda and its relationship to the Taliban.

Mr. DENBEAUX. I understand that.

I would ask you one favor. In light of Mr. Kurnaz's position and experience, I would ask that you, and no other government officials, give a number of the people who have left Guantanamo and been killed and captured on the battlefield, unless they know the actual number.

It seems to me we do ourselves a huge disservice by making up numbers that create horror stories. And if I were a European country and America wasn't willing to take them themselves and keeps saying, there are 30, there are 12, there are 16, there are 3, there are 8—I think we are tying our hands.

Mr. ROHRABACHER. It is very hard to verify this. The German Army had lots of files, and everybody wore a uniform, and it was very easy to determine who was an SS officer and who was a German Army officer. And that's the enemy we were fighting then.

The enemy we are fighting today, they don't wear uniforms, they have enormous sums of money coming to them, I might add, from some of our Arab friends who are using the oil money that we give them; and there are all sorts of, you know—

[Disturbance in the hearing room.]

Ms. JACKSON LEE [presiding]. We need order.

Mr. ROHRABACHER. And I will be done in 1 second.

And just to say, this is a different situation; it is not as definable as it was. And to be fair about it, I know—I try to give my country the benefit of the doubt. I try to give my Government and my military the benefit of the doubt, but I am fully aware that they make mistakes and that some people in those bodies do not incorporate in their soul the same standards of humanity that I would have.

So, anyway, with that said, thank you very much for your testimony. I think it has been a good discussion.

Ms. JACKSON LEE. Thank you.

The gentleman's time has expired.

Mr. ROHRABACHER. Or exceeded.

Ms. JACKSON LEE. We will never say that.

We know there is a great deal of passion around this issue, and I promise not to keep the witnesses, who have been very gracious with their time, an extensive amount of time. But thank you for your indulgence.

And I thank Chairman Delahunt for, again, a more than thoughtful hearing, if you will.

I always am overwhelmed about running out and getting the next action item or the action item that we should really take from this hearing. And I start, first of all—and I am going to try to be like I am cross-examining, because, in fact, I have an engagement myself that is shortly ending. But I think this hearing is crucial for us to get the framework or lay the framework, if not for this administration, for the forthcoming administration.

I frankly believe there has to be a solution to Guantanamo Bay. Many of us are on legislative initiatives that are demanding closing Guantanamo Bay. As I make that point, let me, for the record, be very clear, there are no non-patriots in this room. I would include the witnesses, as well, and those in the audience, and those of us who should, in our words of opposition to what is going on in Guantanamo Bay, be described as wanting to promote recidivism, to promote the terrorists that may, for a chance, have been released or have come into the system by any chance to denigrate the entire United States Military because we recognize it, as Mr. Abraham is here, there are those who want to see a system that works.

Now, as a Member of Congress, having gone to Guantanamo Bay at least three times, if my recollection serves me well, we did get to see play out—let me say, by way of instruction—this CSRT. And the thought was that they were giving us the suggestion that they were making it all right. Obviously, that is not the case.

So let me pose sort of a real bullet point—and don't take it literally—but focused questions that I would appreciate an abbreviated answer; and I start with Mr. Willett.

Let me just go across and give Mr. Sulmasy a chance, as well. Mr. Sulmasy, thank you. The term "enemy combatant," are you comfortable with it and should it be changed? And I really do need

“yes” or “no,” “not comfortable,” “should be changed” kind of answer.

Mr. SULMASY. Should be changed. “Illegal belligerent” would be the appropriate—better? Better?

Ms. JACKSON LEE. Try again. Put it closer. Is it green?

Mr. SULMASY. There we go. “Illegal belligerent” would be the better term in—

Ms. JACKSON LEE. Illegal—

Mr. SULMASY [continuing]. Belligerent.

Ms. JACKSON LEE. Belligerent.

Mr. SULMASY. In accordance with the laws of war, any combatants—

Ms. JACKSON LEE. Would you give them Fifth Amendment Due Process rights?

Mr. SULMASY. No.

Ms. JACKSON LEE. All right.

Mr. Willett.

Mr. WILLETT. The question? I am sorry, the first one or the second one?

Ms. JACKSON LEE. I only had one. What is your position on “enemy combatant” and should it be changed?

Mr. WILLETT. The term has to be abolished. It has no tether in military law.

“Illegal or unlawful belligerent” is the right way to look at it, yes.

Ms. JACKSON LEE. And abolished? Would you give the individuals postured as something due process rights?

Mr. WILLETT. Yes, I would give them habeas. That’s the simple answer.

Ms. JACKSON LEE. Thank you.

Mr. Smith.

Mr. STAFFORD SMITH. Yes. It certainly should be abolished. We should just comply with the Geneva Conventions; we signed them years ago. If, indeed, someone has committed a war crime, they get the same tribunal, at least that we give our own soldiers. That’s the law, and that’s fair enough.

Ms. JACKSON LEE. Thank you.

Mr.—and do I pronounce it Denbeaux?

Mr. DENBEAUX. Denbeaux.

Ms. JACKSON LEE. Professor Denbeaux, yes. Answer the question of should we abolish “enemy combatant” and should, however the person be postured, be given habeas and due process rights?

Mr. DENBEAUX. Yes. I think they should be given habeas and due process rights. And the term “enemy combatant” is just dust in the air that confuses the issue.

Ms. JACKSON LEE. And that’s why I was—I wanted to get the right terminology, Lieutenant Colonel, because they have you as Mr./Lieutenant Colonel who is retired, your position.

Colonel ABRAHAM. My position is that “enemy combatant” has never made sense as a term.

And as to due process, forgive me if I take just a few seconds. We can no more give them due process than we have the right or the power to take due process away. Either it exists for everyone or it doesn’t exist. I would expect due process in any way in which I am treated, and I can deny no one on this Earth that same right.

Ms. JACKSON LEE. Let me just follow up with you then, Lieutenant Colonel, because you have had some direct experience with Guantanamo Bay and, as well, the tribunals.

The representation, as I might imagine, those who may view this hearing, have listened to the intensity of the questioning, is that here is an array of individuals who want to jeopardize the integrity and security of the United States of America.

Let me pose this question to you. We have heard Mr. Sulmasy probably wants a hybrid, but I think his view is very important because maybe we can have a meeting of the minds on what the terminology would be and what rights the individuals would have.

I think you made a very gross mistake by suggesting to the world that we are willing to subordinate all of what we have argued for that this country represents. And I don't think anyone would be mistaken if they didn't think that this whole era, post-9/11, has impacted the standing of America in the world, but really the integrity of America as it relates to the concepts that people have, the one place you can go for rights that would be preserved for those who have a different opinion.

Obviously, these individuals are characterized as dangerous to the life and liberty of the United States. But we have been known to be the kind of country that can accept the restraining or retaining of individuals along with the underpinnings of our Constitution.

My question to you: Would we be less safe if we got rid of the "enemy combatant" and had a process, which you have seemingly adhered to, that included habeas, that included due process? What would be the protections that could be put in place that would suggest that we could be as safe?

Colonel ABRAHAM. Madam Chairwoman, we would be safer.

I was at the Supreme Court building a couple hours ago and heard the end of a tape. And in it was a discussion of what the Supreme Court is and what it means. And the importance was in the comment, "When the Supreme Court stops enforcing the understandings of our Constitution, and we as a people stop listening, that will be the end of our system of justice."

I think that there is absolutely no risk to our national security and our security as a nation if we very clearly, unequivocally state as to the 270-plus that are at Guantanamo: If there is no claim against you, the doors are open. If there is a claim against you, we will tell you what it is; we will tell you what it is in a transparent system.

It is when we act in a way inconsistent with that notion, that we bring not only greater disrespect upon ourselves as a nation, but greater risk to our citizens every day that we exist in this international community.

Ms. JACKSON LEE. I hope that the summarizations and the statements that the witnesses collectively have made are really studied. And if someone is viewing this tape, this hearing, reading this transcript, that they will understand the depth of the statement that you have made.

From the very beginning, many of us were both opposed, and I would argue, "confused," though it is terminology that you don't want to attribute to Members of Congress, where the term "enemy

combatant” even came from. What was the legitimacy of the definition? And I hope that Professor Denbeaux is researching the origins of it. I will get to you on that.

And I am going past my time, but let me do this. Let me get to Mr. Smith, Stafford Smith, on this young Gharani who was 14 years old when he was sold by the Pakistani military as a terrorist to the United States Military and then later taken to Guantanamo. Fourteen years old. It is likely he was there when Members of Congress visited.

Are there other minors or persons who were arrested as minors? And I can answer that question myself. I believe it is “yes,” because I know there were Afghans, who went in as minors, in custody in Guantanamo Bay.

His legal representative recently traveled to Chad to advocate on his behalf. Will the Chadian Government lobby for his release? What are his options if the Chadian Government refuses to get involved? And do you have the history of why he was sold by the Pakistanis as a terrorist to the United States Military?

And why would we go to such a level of taking taxpayer dollars to pay for a terrorist? Could we not surmise how old he might have been? And did we think that was a productive utilization? What did we think we were doing?

Maybe it was, you know, the day after 2000, 9/11, maybe we were so in an uproar, and concerned certainly about that enormous tragedy, that we thought we were acting, if you will, efficiently and effectively.

Mr. Stafford Smith, what possessed us to engage in that manner?

Mr. STAFFORD SMITH. Well, I think it all goes back to the crisis that we were facing. And we have got to face the fact that people were in a panic back then, and they were responding perhaps as they thought best. This notion of paying bounties was what some people thought was the best way to get the truth, but unfortunately, it led us to make a lot of mistakes.

And it led us to basically purchase Mohammed El Gharani, who certainly, because he is from Chad, and certainly because he faced discrimination in Saudi Arabia, was fully aware of the way he was basically being bought and sold.

Ms. JACKSON LEE. But he was 14.

Mr. STAFFORD SMITH. He was 14. I could give you a long history, and I would be glad to. I don’t want to.

Ms. JACKSON LEE. No. What is the result?

I asked a series of questions. What is his status now? Is the Chad Government going to get involved?

Mr. SMITH. He is still being held there. He hasn’t been cleared for release. He is no—in my personal opinion, he is no more a terrorist than my grandmother, but we just need to have a fair hearing to determine this.

He is not the only minor in Guantanamo Bay. We have identified potentially 64 people. We can’t be certain about all of them. A lot of them have been released now. But, for example, Omar Deghayes—not Omar Deghayes, Omar Khadr and Mohammed Jawad, two of the first three people to be charged in military commissions, were both concededly juveniles. So we have got plenty of

juveniles left in Guantanamo Bay, and we need to take very seriously our obligation to them.

Ms. JACKSON LEE. But you don't think these tribunals are the forum for trying to address the concerns of your client and the other minors?

Mr. STAFFORD SMITH. Certainly not with Mohammed El Gharani. He is not charged with anything and he never will be. We need to get him out of there. And I have had someone from my office go to Chad twice. They tell us that they have had no contact from the State Department about taking him back there at all. We have now tried to initiate that contact, but Chad is not a rich country. They don't have people that they run around as their lawyers.

And Chad's willing to take him. They are perfectly happy to take him. And we need to send this child home so he can get on with his education, which is what he should have been doing.

Ms. JACKSON LEE. He has been there how long?

Mr. SMITH. 6½ years.

Ms. JACKSON LEE. 6½ years. No charges?

Mr. STAFFORD SMITH. No charges.

Ms. JACKSON LEE. Lieutenant Colonel Abraham, is that befitting of the reputation, image, and the goals of the U.S. to fight terrorism, 64 youngsters, a 14-year-old?

Colonel ABRAHAM. I can't speak to everybody who has ever put on a uniform, but I know, in the time that I have served and the people with whom I have served, two observations.

The first is, as a second lieutenant, I raised my hand and stated an oath of office; and with each promotion I repeated it. And I find nothing befitting in what was done that matches the conduct that was expected of me, and that I expected of those with whom I worked and who worked under me in those 26 years.

And I will also tell you, Madam Chairwoman, that in the time since the declaration—the declaration was first written, I have received a number of letters from flag officers and from junior officers and from enlisted with far more time in the service than I ever had who have said, to a person, "Thank you, this is what we expected the military to be."

I take great honor in every one of those letters and those comments.

Ms. JACKSON LEE. And that was when you were pressing the envelope of justice or trying to ensure fairness?

Colonel ABRAHAM. That was when, as a lawyer from one of the firms representing a detainee said, Mr. Abraham has engaged in "career suicide."

Take that for what it's worth.

Ms. JACKSON LEE. That is unfortunate.

But let me pay tribute to you and the many others who stand for a sense of justice in this very difficult process.

Mr. Denbeaux, as a professor, can you give us the origins of "enemy combatant" in a very succinct—was this a singular decision of the Defense Department and the AG at that time?

I have no recollection of a congressional goal, so refresh my memory.

Mr. DENBEAUX. I suspect many people know how to answer that question better than me.

Ms. JACKSON LEE. I am sorry, I can't hear you.

Mr. DENBEAUX. I suspect many people on this panel can answer that question better than I can.

I would simply like to point out that the definition of "enemy combatant" doesn't require combat; that is, you can be an "enemy"—55 percent of the people in Guantanamo aren't accused of ever doing any hostile act. My students refer to them as "enemy civilians."

And the fact of the matter is that the definition of "enemy combatant" itself is what offends me. The origins of the term that created such a problem, I think perhaps almost everybody else here could explain better than I can.

Ms. JACKSON LEE. And I am going to ask Mr. Willett.

Let me finish with Mr. Denbeaux, just simply saying we would like to—I assume you have submitted your statement in the record, but I think it is important on this question of recidivism—that might be the tallest mountain to climb.

I recall a recent news article that cited an individual that had been released from Guantanamo Bay and was either in—my memory fails me; I don't know whether it was where—I don't want to call out a country's name—and, of course, had engaged in some act—whether they went back to Afghanistan. And so we have cited that over and over again.

I think your research on the question of misrepresentation and whether or not it is 2 or 3 or 12 or 30 is very, very important. Because in order to get us back on track, eliminating "enemy combatant," I think by legislative fix, if you will, in that terminology, assuring the American people that we are not opening the gates for terrorism to run from one end of this Nation to the next; and two, getting down to the core of what we need to do, that if we do have and have captured a terrorist who goes through this process, whether we have to build a site, we can hold them with the affirmation and approval of the world and fight terrorists with the affirmation and approval of the world, if they know we are fighting terrorists and are not fighting 14-year-olds.

So your recidivism information would be very important. And I don't know whether you have concluded it or not, but I would certainly like to see its conclusion as to whether or not we have a problem with recidivism or whether it has been misrepresented to us.

Mr. DENBEAUX. I hope that my statement and the previous reports that I have submitted as part of that are in the record, so you can have all that information.

Ms. JACKSON LEE. And your conclusion was—and forgive me for not hearing you.

Mr. DENBEAUX. My conclusion was that our Government actually can't figure out how many people have returned to the battlefield. But the number, giving them the benefit of the doubt, is tiny, two or three.

The person you are referring to now, we referred to as the detainee known as "ISN 220." That is a remarkable person. Because the biggest problem that the government has with that—remember, our methodology is to assume everything the government says is true, whether we don't know if it is or not.

But this is somebody the military said, “Please don’t release; this is somebody who will kill if he is released.” Somebody—and we don’t know who, why, or how, or for whatever reason—approved his release.

The Defense Department doesn’t follow people after they are released.

Three years later he apparently engaged in a suicide attack. One of the questions that my students keep asking me is, “Why was he released? Who decided to release him?” Because the missing part of this whole equation is, there is no accountability for our conduct.

Ms. JACKSON LEE. At any time.

And the other part of it is that we have already concluded that the tragedy of 9/11, besides the enormous loss of life, was the incoherence of our intelligence and our Intelligence Community from all sectors, including DoD, DOJ, and others to have intervened or been preventative. So in this instance, one hand didn’t know what the other hand—we released him against the wishes of the DoD, and then didn’t have the Intelligence Community prepared to consider him trackable.

You raise a very good point.

Let me, let Mr. Willett, and then I am going to close, thanking the witnesses for their indulgence.

Mr. Willett?

Mr. WILLETT. Congresswoman, I was going to come back to your question about “enemy combatant.”

Ms. JACKSON LEE. Yes, and its origins.

Mr. WILLETT. The origins of the term are long after the Guantanamo prison was populated. It began in 2002; they began bringing prisoners there. In 2004, the Supreme Court said these people are going to have some kind of process; and at that point, the Defense Department made up this phrase.

Ms. JACKSON LEE. I am glad you said that. So it was an administrative act?

Mr. WILLETT. It was an administrative act in July 2004. And what they endeavored to do was to conflate ideas from military law, where you can hold as a detainee the enemy soldier, but he is a person of honor; you don’t treat him with any dishonor.

They tried to conflate that idea with the idea of criminal law, where you have a wrongdoer. The problem is, in criminal law, the wrongdoer gets process. So by mashing the two together they came up with an idea where there is no process, and we can treat the person dishonorably and forever. And that’s what we have in Guantanamo today.

If you return to military law, as Mr. Stafford Smith said, if you return to the Geneva Conventions, the rules are already there. You can hold, during the pendency of active hostilities, the enemy soldier. You treat him just like you treat your own soldiers. A prisoner of war camp is not a place of dishonor; indeed, it is written right in the Army regulations that the commandant of the camp is obliged to return salute. Can you imagine somebody saluting a Guantanamo prisoner? I can’t.

Well, you treat him like an enemy soldier. And then if there is some suggestion that this person is engaged in crime—he is a ter-

rorist, for example—you try him. You court martial him. If he is convicted, you sentence him.

Those rules have been there for years. We don't need new rules.

Ms. JACKSON LEE. And the sentencing can be extreme, right?

Mr. WILLETT. Of course.

Ms. JACKSON LEE. There may be, though I may not promote this, they may possibly be sentenced to death. Is that possible?

Mr. WILLETT. Yes.

Ms. JACKSON LEE. So if the crime is heinous enough, if the alleged crime, if they determine that individual happened to have been a terrorist, happened to have been actually involved in terrorist acts, they could be subjected to the highest of penalty?

Mr. WILLETT. They could under military law.

We didn't need new rules. The rules are all there. And the new rules were invented in effect to avoid any kind of accountability. And now the Congress is left, trying to clean up the mess 7 years later.

Ms. JACKSON LEE. Well, let me thank each of the witnesses—Mr. Sulmasy, Mr. Willett.

Mr. Sulmasy, I just want to say you may not have gotten as many questions, I think the ranking member certainly queried you, but you gave a most important statement, as I questioned you, which is that there may be a light at the end of the tunnel for people who have different perspectives on this issue. You have at least acknowledged that the “enemy combatant” is certainly wrong thinking and wrongheaded. So I thank you. I know you have many other points that you have made eloquently, but I thank you for that.

Mr. SULMASY. Thank you.

Ms. JACKSON LEE. We might find common ground.

Mr. Willett, Mr. Stafford Smith, Mr. Denbeaux, and Lieutenant Colonel Abraham, again thank you for your service. Certainly, if the other gentlemen have served in their previous lives, we thank you for your service as well.

Chairman Delahunt called this hearing, “The City on the Hill or Prison on the Bay? The Mistakes of Guantanamo Bay and the Decline of America’s Image”; and frankly, I think you added an enormous perspective to this debate.

It is clear, from my perspective, that we went down the wrong trail, the wrong direction, under best intentions by declaring, one, Guantanamo Bay was the best approach, but then subsequently utilizing a terminology that has cost America a lot. And it certainly could be argued as to whether or not we have made America safer.

It would be my intent to work with this committee legislatively; and I know that much work is already ongoing. I frankly believe that we should rid ourselves of the terminology and the fractures of “enemy combatant”; this should be combined, however, with enhanced intelligence.

It should be combined with maybe—as Mr. Willett has said, don't reinvent the wheel, but go back to the International Convention or the convention that has been utilized, with some subsets dealing with those who may have been or are charged with criminal acts.

I think the gentleman from who is in Germany, Mr. Kurnaz, was a glaring example of the error of our ways. The 14-year-old, who

I understand is still of Chad by birth, who is still incarcerated—now 5, 6 years—and others are glaring evidences that we are doing ourselves no good. We are doing ourselves harm.

And I conclude by saying that we can secure America on the grounds of a constitutional premise that America has lived by for 400 years. That should give some credibility that democracy and freedoms actually work. We have survived 400 years, plus. Other nations have not.

And so I don't know why we are so frightened by mixing and recognizing we have to secure America, but that civil liberties, civil dignities, the basic premise of the Constitution, the rights of prisoners, the treatment of soldiers that we have adhered to for decades—for centuries, or at least for decades—cannot work in this instance.

And so your testimony has contributed to our resolve that this is a broken system. And as it gives us the resolve, let me counter by saying, it should not give terrorists, real terrorists, any comfort, because if we do our job right, if we work with the Intelligence Community, if we alter our missteps in Iraq, if we get back focused on what our true mission is as relates to terrorists, and fighting it.

For many of us—it is the war in Afghanistan for some, and others, it is retrenching back, but there are diverse opinions. But certainly we are not finding our safety in the cells of Guantanamo Bay with people being held without the right for addressing their grievances in the appropriate manner.

I think it is wrong. I think this hearing has highlighted it. And none of us today who have spoken in this context should be declared non-patriots. I hope that we will be declared, as history reports us, as people loving this country and true patriots who want to get it right.

With that, this hearing is adjourned. I thank the witnesses.

[Whereupon, at 7:32 p.m., the subcommittee was adjourned.]

A P P E N D I X



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THROWING AWAY GOODWILL IN GUANTÁNAMO BAY

**Briefing for House Committee on Foreign Affairs
Subcommittee on International Organizations,
Human Rights and Oversight**

**Written testimony of
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Introduction

When I was sworn in as a U.S. citizen several years ago, U.S. District Court Judge Helen G. Berrigan, who was conducting the ceremony, kindly remarked that I had for years been fulfilling my new oath of citizenship, performing civil rights work for indigent prisoners. This, she said, was what it meant to up-hold the U.S. Constitution and the American way of life.

I became involved in the litigation over Guantánamo Bay at the very beginning, in early 2002. I did so, at a time when it was rather unpopular to object to President Bush's 'War on Terror' policies, because I believed that the evisceration of the Rule of Law was contrary to everything that I swore to up-hold both as a U.S. citizen and as a member of the bar.

I believed then that Guantánamo Bay would make everyone a loser. Obviously the prisoners would be denied their legal and human rights; at the time, I had no idea whether they were guilty of crimes against the U.S., but the American way to sort this out was to provide them with some form of Due Process. I feared for the impact on the young American service men and woman required to act as jailors in a lawless enclave or serving overseas in war zones where their enemies could now argue that the Geneva Conventions did not apply. But most of all I feared that the U.S. would itself suffer if the rule of law became an early victim of the 'war on terror.'

The U.S. has been, in the latter half of the twentieth century, the steadfast enemy of torture and the advocate of Law with a capital "L". Yet hypocrisy is the yeast that ferments hatred, and I feared that if we in the U.S. succumbed to the temptation to

jettison our principles, it was inevitable that the world would become a less safe place for us all.

On September 12, 2001, as the victim of an unpardonable crime, the U.S. enjoyed a reservoir of goodwill unparalleled in our history. Sadly, that reservoir has long since drained away, sucked out by the ghastly pictures of Abu Ghraib, the images of Muslim men in their Guantánamo orange uniform, and by other tragic stumbles in U.S. foreign policy.

A reputation is often hard-won, but it is always easily lost. We in the West have tarnished our reputation in the past six years, yet we can and must regain it. We need to understand our mistakes, redress them, and move forward to the future that is promised by the American ideal.

The Cost of the Guantánamo Bay experiment to the United States

I have visited many foreign countries during my work for prisoners in Guantánamo Bay. I have travelled to Bahrain, France, Jordan, Mauritania, Morocco (twice), the Netherlands, Portugal, Qatar (three times), Sudan (twice), Switzerland, and Yemen (three times). Staff from my charitable law office have additionally visited Germany, Greece, Israel, Italy, Kenya, Pakistan, Russia, Somaliland, Spain, Sweden, and Tunisia. I have met prisoners, family members or media representatives from Afghanistan, Algeria, Belgium, Kuwait, Libya, Poland, Romania, Saudi Arabia, Syria, Uganda, U.A.E., and Uzbekistan – to name only those countries that are directly affected by the ‘War on Terror’ policies. The media all around the world have shown an interest in the sad story of Guantánamo Bay, and the interest has flowed in only one direction. This is not a case of opinion divided – criticism of Guantánamo Bay has been uniform and unceasing.

Everywhere I go in Europe and the Middle East, I meet the same question: What is the U.S. doing holding prisoners for year upon year in Guantánamo Bay, without any meaningful due process? There is a great deal of anger. There is sadness – that the U.S. has created a new word for inequity, and that word is Guantánamo.

There is hope amid the darkness: When I explain that American lawyers are here to offer *pro bono* help, family members of prisoners and even the former prisoners themselves tell me that they do not hate the American people; however, they are strongly opposed to what they view as the mistakes of the Bush Administration. They view Guantánamo as an aberration, an error from which the U.S. can recover.

Yet we cannot expect to recover our reputation without action. As one Guantánamo prisoner said to me: “If I receive just one act of kindness from an American I will forget the years of mistreatment.”

If, on the other hand, we are unwilling to admit our mistakes then the damage done to our reputation will never be repaired.

Explaining the errors: How could we have got it so wrong?

It is notoriously easy to play Quarterback on Monday morning. It is more helpful to analyze the setback, and help avoid a similar loss seven days later.

There are many explanations for the frequency of mistakes in Guantánamo Bay. However, perhaps the most obvious involves the bounty program that the U.S. has implemented in Pakistan and Afghanistan. The U.S. has distributed leaflets all across the region, offering large sums of money for “Taliban” or “Al Qaeda” prisoners. An typical example of these leaflets may be seen below:



*Sample Bounty Leaflet dropped in Pakistan Afghanistan
(\$5,000 for turning in alleged Taliban & Al Qaeda)*

Sometimes, the bounties have been far higher. Findings have recently been made by a Canadian judge confirming that the US paid Pakistan a bounty of \$500,000 for Abdullah Khadr, the older brother of the juvenile Guantánamo prisoner Omar Khadr.¹ Abdullah Khadr was detained for some 14 months before being sent back to Canada.

Indeed, the following flier promises a reward of \$5 million for information about the Taliban and al Qaeda:

¹ *Abdullah Khadr v. Attorney General of Canada*, 2008 FC 549 (2008).



General Pervez Musharraf has recently published memoirs entitled *In the Line of Fire*. President Musharraf describes how Pakistan sought and obtained bounties from the US for hundreds of stray Arabs. Many of these prisoners ended up in Guantánamo Bay.

“We have captured 689 and handed over 369 to the United States,” Musharraf writes. “We have earned bounties totalling millions of dollars. Those who habitually accuse us of ‘not doing enough’ in the war on terror should simply ask the CIA how much prize money it has paid to the Government of Pakistan.”

His revelations set people to arguing, and more truths came out. Rather than denying the existence of the bounty program, the U.S. Department of Justice complained about who received the money. “We didn’t know about this,” said a DOJ official. “It should not happen. These bounty payments are for private individuals who help to trace terrorists on the FBI’s most wanted list, not foreign governments.”

President Musharraf then denied official corruption, saying that the money was given directly to individuals rather than the government.

Even a \$5,000 bounty represents a great deal of money in this region. Indeed, when one compares the per capita income of the U.S. with Pakistan, it would translate to giving roughly a *quarter of a million dollars* to an American. Imagine the temptation that people faced in that impoverished region when offered such a sum, required only to finger a foreigner and suggest that he was in Tora Bora in the Fall of 2001.

‘Enhanced Interrogation Techniques’ were then injected into the mix, and the mistakes became even more inevitable. Those American personnel who used harsh interrogation tactics were not trying to force the innocent to confess; they had been told (often falsely) by their informants (often Pakistani) that the prisoner had been up to no good in Afghanistan. Thus, when they forced the prisoner to admit that he had been in Tora Bora, or example, the American personnel were bound to assume that it was the truth. Such a forced confession was a one-way ticket to Guantánamo, where

the prisoner had no meaningful way to contest his culpability.

Not everyone caught up in this web was innocent, of course. But without due process, there was no way to sort the guilty wheat from the innocent chaff. In significant part, this helps to explain the disaster that is Guantánamo Bay.

On-going injustice in Guantánamo Bay

It is not my purpose to canvass every injustice that has taken place in Guantánamo Bay. Unfortunately, however, the following three examples (selected from the prisoners who are represented by my office are reasonably typical.

All three were purchased for bounties in Pakistan; none was seized in Afghanistan. The first, Muhammad Abdallah, is a UNHCR refugee, a father of eleven children and a grandfather, who has long been cleared for release, but remains held in Guantánamo Bay. The second, Mohammed el Gharani, is a juvenile who was just *fourteen years old* when seized by the Pakistani forces, who is patently innocent yet has not been cleared for release to Chad. The third, Binyam Mohamed, is a British resident who was tortured in unspeakable ways when rendered on a CIA plane to Morocco, and who faces a potential trial in a military commission based on this torture evidence.

Muhammad Hussein Abdallah, UNHCR Refugee Cleared For Release From Guantánamo Bay

"First of all, you classified me as a terrorist or associated with this organization; that has no founding or truth to it at all. I am just a teacher. I teach orphans, seven or eight year old orphans. They came and picked me up at 2AM from my house ... if teaching orphan children who lost their father how to write is a terrorist act, [then] I am a terrorist."

*Muhammad Hussein Abdallah – statement to
Combatant Status Review Tribunal (CSRT) at
Guantánamo Bay*

Muhammad Hussein Abdallah is a teacher, a father of eleven, and a Somali refugee. He has spent the last six years held without charge by the U.S. military.

Of all the tragic and senseless tales to come out of Guantánamo Bay, Mr. Abdallah's is one of the saddest. He led his family out of Somalia years ago to protect them from escalating clan-based violence – the loud, early murmurs of a conflict that plagues Somalia to this day. The family settled in Pakistan in the early nineties; UNHCR granted Mr. Abdallah protected refugee status in 1993.

For the next several years, the Abdallahs lived quietly. Mr. Abdallah was the family provider; the family lived on his meagre teacher's income, supplemented somewhat by funds sent by married children in Canada and Saudi Arabia. In Mr. Abdallah's last post as a free man, he taught orphans at a Red Crescent school in Jalozai, a refugee camp outside Peshawar that housed thousands of displaced Afghans.

This simple life was disrupted when war broke out in Afghanistan. Like hundreds of other men in Peshawar at the time, Mr. Abdallah fell prey to the U.S. policy of offering bounties for captured Arabs. Pakistani soldiers staged a night-time raid on his home, took him away from his family, and sold him to American soldiers. He has been in military custody ever since.

Family reports indicate that, just three months after Mr. Abdallah's seizure, his house was raided again by both the ISI and U.S. forces. During that raid, a soldier reportedly stormed into the room where Mr. Abdallah's son-in-law was sleeping, unarmed. Startled, the son-in-law apparently reached for his glasses to see what was happening—and the soldier shot him. He was killed.

Mr. Abdallah's innocence has been proved, and has been conceded by U.S. forces, yet he remains in Guantánamo Bay. Other witnesses—including exonerated ex-Guantánamo prisoner Abu Mohammed—have corroborated Mr. Abdallah's story. Mr. Mohammed and Mr. Abdallah used to share the same Red Crescent bus to work. Mr. Mohammed was the sole witness allowed to testify at Mr. Abdallah's CSRT. He remembered Mr. Abdallah as “basically a family man”: someone with few outside contacts, a man who preferred to spend his free time at home with his wife and eleven kids.

Even the U.S. military fully recognizes Mr. Abdallah's innocence: he has been cleared for release from Guantánamo for years. Yet he remains in Guantánamo because the U.S. has, as yet, failed to find him somewhere to go.

Yet there is a refuge that would be suitable for Mr. Abdallah and the other two Somali prisoners in Guantánamo Bay: the small, stable, *de facto* independent region of northwest Somalia known as Somaliland. This region boasts its own police force and its own currency; it has its own president, parliament, and the rest of a functioning governmental apparatus.

The government of Somaliland is closely allied with the United States. Moreover, high-ranking members of this government—the Ministers of Interior and Foreign Affairs, the Speaker of the Parliament, and the leader of the chief opposition party—have all been alerted to the cases of Somali prisoners in Guantánamo Bay.² They have responded very positively to these initial queries. It strongly appears that they would be willing to welcome the three Somalis from Guantánamo Bay, were the U.S. to approach the President about doing so.

It should, in principle, be relatively straightforward for the U.S. to transfer Mr. Abdallah, a UNHCR refugee who is patently innocent of any crime, to a friendly regime. For Mr. Abdallah the matter is particularly urgent. He is an aging grandfather who never posed the slightest threat to the U.S. or its allies. It is no exaggeration to

² One of the other two Somalis is Mohammed Sulaymon Barre, the son-in-law of Muhammad Hussein Abdallah and also a UNHCR-recognized refugee. The other is Abdullah Sudi Arale, a later arrival to Guantánamo Bay who has not had a chance to see an attorney—nor has apparently been labelled an enemy combatant—in nearly a year of imprisonment at Guantánamo. Unclassified information and *Reprieve's* research in Somaliland suggests that Mr. Arale poses equally little threat to the U.S. The government of Somaliland is reportedly open to the possibility of accepting the three individuals jointly.

say he has little time left. His one wish now is to return to his family in Somaliland and live out his remaining years in peace with his loved ones.



Mohammed 'Yusuf' el Gharani, juvenile from Chad

Mohammed El Gharani is the second youngest prisoner in Guantánamo Bay today. Mohammed was 14 when he was seized in Pakistan. Today he is 21, having now spent six and a half years in United States custody.

Mohammed was born in Saudi Arabia in November 1986. He grew up in Medina, where he studied, loved playing football and earned money for his family working after school selling bottles of water or prayer beads. Though he was born in Saudi Arabia, he is a national of Chad. Both his parents are from Chad, and in Saudi Arabia citizenship follows that of the parents; Mohammed's birth in Medina is considered irrelevant.

Mohammed is a very intelligent young man. He dreamed of being a doctor, but the extreme discrimination in Saudi Arabia is reminiscent of the Deep South in the 1950s. His dark skin cut off his options, and Mohammed was forced to leave school at 14, and face a life selling odd items on the streets. A friend suggested he go to Pakistan to study English and computers. Although he was only 14 years old, he followed this advice.

Mohammed states that not long after his arrival in Karachi he went to a mosque at prayer time. Police surrounded the building and arrested everyone inside. Mohammed told the Pakistani police that he was there to study and had arrived only recently, but this did him no good. He was hung for hours by his wrists, so high that only the tips of his toes touched the ground – a torture technique called *strappado* by the Spanish Inquisition. He was beaten repeatedly. He was interrogated about the Taliban and al Qaeda, though he had never heard of either group.

After twenty days, the Pakistanis turned Mohammed over to the United States military for a bounty, and he was taken to Bagram Air Force Base in Afghanistan. While there, Mohammed was subject to persistent racial slurs. He was kept naked for several days. On some nights he had freezing water thrown on him as well. After more than two months in Afghanistan, the U.S. sent Mohammed to Guantánamo Bay.

It is a sad condemnation of the quality of some of the intelligence in Guantánamo that until we lawyers finally managed to obtain access to Mohammed, the U.S. military thought he was ten years older than his real age. Confirming his true date of birth was

simple: copies of his passport and birth certificate were obtained from Saudi Arabia, confirming that he was born in November 1986.

More than six years later, Mohammed has never been formally charged with any crime. The main allegation against him remains that he was a member of an Al Qaeda cell in London in 1998. The suggestion is ludicrous, and recently his interrogator has had the decency to apologize for the fact that the allegation has still not been dismissed: Mohammed would have been just 11 years old at the time – and had never been outside Saudi Arabia.

At no time in U.S. custody has Mohammed's status as a juvenile been respected. The U.S. military has subjected Mohammed to sleep deprivation, as well as freezing conditions, strobe lights and blasting music. Mohammed describes how soldiers slammed his head to the floor, knocking out two teeth. An interrogator allegedly stubbed out a cigarette on Mohammed's arm.

Today, Mohammed is kept in the maximum security Camp V. He is housed in a cell that is entirely made of steel. The neon lights are on 24 hours a day. He has nothing to do all day.

Mohammed has had many medical problems. He had a tooth removed erroneously due to an inept interpreter. He has been bitten twice by spiders, a wound that leaked green puss and made him very sick. His eyesight is failing due to the constant artificial light.

Mohammed has also faced emotional and mental abuse. At one point, interrogators painted red across his chest and chanted "Mohammed is a Terrorist." Perhaps most damaging, the racial abuse has continued throughout his incarceration.

Mohammed has been deeply depressed and has made several suicide attempts, including slashing his wrists, trying to hang himself and running head-first into the wall as hard as he could.

Saudi Arabia refuses to take responsibility for him, so Chad seems to be the only option for his release. However, until his volunteer legal representatives travelled to Chad, the Chad government reported that there had been no efforts by the U.S. to negotiate his release to the country of his nationality.

He remains in Guantánamo Bay.



Binyam Mohamed [al Habashi]: Tortured in Morocco

Binyam Mohamed was born on 24 July, 1978, in Ethiopia, and came to the U.K. on 9 March 1994, seeking political asylum. He is often called ‘Al Habashi’ simply because of his birthplace – the term means literally ‘from Ethiopia’. Binyam (referred to here by his first name, to avoid the confusion occasioned by his common last name) remained in the UK for the following seven years.

Binyam was seized by Pakistani authorities at Karachi airport on 10 April 2002, and detained for three months. During that time, Binyam was abused by the Pakistanis, and interrogated by both American and British officials. The British confirmed to the U.S. that he was a “nobody” – a janitor from London. Nevertheless, the U.S. decided that he knew more than he was saying.

On 21 July 2002 Binyam was taken to a military airport in Islamabad with two others. He was turned over to the U.S. Describing a routine that has come to be known as the U.S. “rendition methodology,” Binyam encountered special forces dressed in black, with masks, wearing what looked like Timberland boots. They stripped him naked, took photos, put fingers up his anus, and dressed him in a tracksuit. Binyam was then shackled, with ear-muffs, blindfolded, and put on board a plane.

This aircraft has been identified through official Eurocontrol flight data as a Gulfstream V N379P that left Islamabad, arriving in Rabat at 03.42.³ This aircraft was owned by a CIA front company called Premier Executive Transport, and is the plane “most frequently associated with known cases of rendition.”⁴ It has been dubbed “the torture taxi” by journalists and plane spotters around the world.⁵

Indeed, Binyam was to face torture in Morocco for 18 months. There was an initial “softening up” phase, a subsequent “cycle of torture”, and finally “heavy” psychological and physical abuse.⁶ He reports being starved of food, suffering sensory deprivation and sleep alteration.⁷ In the first few weeks, Binyam was repeatedly shackled, suspended from walls and ceilings, and beaten:

“They came in and cuffed my hands behind my back. Then three men came in with black ski masks that only showed their eyes...one stood on each of my shoulders and the third punched me in the stomach. The first punch...turned everything inside me upside down. I felt I was going to vomit. I was meant to stand, but I was in so much pain I’d fall to my knees. They’d pull me back up and hit me again. They’d kick me in the thighs as I got up. They just beat me up that night...I collapsed and they left. I stayed

³ Official Eurocontrol flight log at p21164.

⁴ Amnesty International, *USA: A case to answer, from Abu Ghraib to secret CIA custody: the case of Khaled al-Maqari*, AI Index: AMR 51/03/2008, at p15

⁵ This Gulfstream executive jet has been successively registered as N379P, N8068V and N44982. In February 2000, it was registered by the CIA front company Premier Executive Transport Services. At the beginning of 2004 it was re-registered as N44982, and in December 2004 it was re-registered again as N44982 by Bayard Foreign Marketing, described by Amnesty International as “a phantom company registered in Oregon state since August 2003.” The plane was sold in early 2006. Until August 2005, Premier Executive Transport planes were licensed to land at US bases world-wide.

⁶ Al-Habashi unclassified.

⁷ Al-Habashi unclassified.

on the ground for a long time before I lapsed into unconsciousness. My legs were dead. I could not move. I'd vomited and pissed on myself."⁸

Binyam describes being stripped naked and a doctor's scalpel being used to cut him all over his body, including his genitals:

*"One of them took my penis in his hand and began to make cuts. He did it once and they stood for a minute, watching my reaction. I was in agony, crying, trying desperately to suppress myself, but I was screaming. They must have done this 20 or 30 times, in maybe two hours. There was blood all over. They cut all over my private parts. One of them said it would be better just to cut it off, as I would only breed terrorists...there were even worse things, too horrible to remember, let alone talk about."*⁹

Morocco is a country well-known for its horrendous human rights record, and for its routine use of detention without charge and torture, and Binyam's account of his torture in Morocco is consistent with numerous NGO and government reports of torture methods routinely used by the Moroccans.

Binyam said what his torturers wanted to hear, in an effort to avoid further abuse:

*"They said, if you say this story as we read it, you will just go to court as a witness and all this torture will stop. I could not take any more... and I eventually repeated what they read out to me. They told me to say I was with Bin Laden five or six times. Of course that was false. They continued with two or three interrogations a month. They weren't really interrogations - more like trainings, training me what to say."*¹⁰

Another aspect of Binyam's torture in Morocco was the use of information obtained from the British. Binyam states that he was told details about his life in the U.K. that he had never mentioned during interrogations, and that could only have originated from collusion in the process by the U.K. security or intelligence services. The use of this shared intelligence to torture a British resident has been extremely embarrassing to the British, the closes of U.S. allies. The British Intelligence and Security Committee (ISC) report concludes:

"There is a reasonable probability that intelligence passed to the Americans was used in al-Habashi's subsequent interrogation."

The ISC has reviewed Binyam's rendition, and expressed its belief that no British agent could truly have predicted the torture that Binyam suffered, as nobody believed - in 2002 - that the U.S. would be a party to such medieval practices. The ISC has quoted a senior British intelligence official as expressing horror at what has been learned about this case and others:

⁸ Al-Habashi unclassified.

⁹ Al-Habashi unclassified.

¹⁰ Al-Habshi unclassified.

“the Director General of the [UK] Security Service said to us: I do not think we would know today if Congress and the Supreme Court had not pressed the American Government to move the way it did”¹¹

Sadly, the U.K. has now been forced to revise their opinion, and recognize that the U.S. does use torture.

After 18 months in Morocco, Binyam was rendered from Morocco on the night of 21 or 22 January 2004. Binyam reports that photographs were taken of his mutilated genitals by U.S. personnel (photographs that this Committee should seek to review):

“They did not talk to me. They cut off my clothes. There was a white female with glasses – she took the pictures. One of them held my penis and she took digital pictures. When she saw the injuries I had she gasped. She said, “Oh my God, look at that.”¹²

Official Eurocontrol flight data shows that in the early hours of 22 January 2004, the CIA Gulfstream V, another known rendition plane, flew from Rabat to Kabul.¹³

Again, this second rendition of the same European resident has caused great harm to U.S.-European relations. Senator Dick Marty has stated in a Council of Europe report:

“I regard this flight as an unlawful detainee transfer, transporting Binyam Mohamed from one secret facility to another. Two days later, as part of the same circuit, the same plane had flown back to Europe and was used in the rendition of Khaled El-Masri.”¹⁴

Binyam was rendered by the U.S. to the Dark Prison, Afghanistan. Conditions there were also horrific. He was held in the Dark Prison for five months, during which time he did not once see daylight. He was chained to the floor and routinely forced to use a bucket as a toilet in the dark. He was subject to forced stress positions, sleep alteration, starvation, sensory deprivation and other “enhanced interrogation techniques”. Binyam was hung up in the *strappado* position once more (with his hands suspended above his head), his head was repeatedly knocked against the wall, and he was subjected to ‘torture by music’ which involved being constantly played rap, heavy metal, thunder, the sounds of planes taking off, cackling laughter and horror sounds at a constant and high volume.¹⁵

Binyam describes almost constant interrogation in the Dark Prison:

“Interrogation was right from the start, and went on until the day I left there. The CIA worked on people, including me, day and night for the

¹¹ Intelligence and Security Committee Rendition Report, July 2007, at p34.

¹² Al-Habashi unclassified.

¹³ Official Eurocontrol flight data at p21165.

¹⁴ Council of Europe Draft Report – Part II, *Alleged Secret Detentions and Unlawful Interstate Transfers Explanatory Memorandum by Mr Dick Marty, Rapporteur* (7 June 2006), <http://assembly.coe.int> at 2.5 (52), 3.9 (193 – 214) and 11 (209).

¹⁵ Al-Habashi unclassified.

*months before I left. Plenty lost their minds. I could hear people knocking their heads against the walls and doors, screaming their heads off.*¹⁶

Binyam's description of the Dark Prison and his experience there matches the independent accounts of other prisoners held in the same facility. According to a study by Amnesty International, Binyam was held in "cell number 17" during his stay in the Dark Prison.¹⁷

After five months in the Dark Prison, Binyam Mohamed was taken to the US prison at Bagram Airforce Base, where he was held until the end of May 2004. Four months later, on 22 September 2004, Binyam was transferred to Guantánamo Bay by US military plane, crossing Greek, Italian, Spanish and Portuguese airspace en-route to Guantánamo. Again, this rendition through European jurisdiction has caused considerable embarrassment to America's allies.

Binyam Mohamed currently faces possible trial by Military Commission in Guantánamo Bay. He has already been charged once (in November 2005), but the charges were dismissed based on the U.S. Supreme Court's decision striking down the process. As his counsel, I have been informed that he is likely to be recharged.

The British government takes the position that the U.S. commissions process does not meet minimum standards of due process. These criticisms run parallel to similar statements made by Colonel Morris Davis, former chief military prosecutor in Guantánamo Bay, who has also condemned the process as political, and for permitting the use of evidence obtained by torture.

The entire history of this case is an on-going source of immense embarrassment to Britain. For example, in the past two weeks alone, the U.K. government has been sued in London to provide evidence in the possession of British intelligence that (a) the U.K. told the U.S. before Binyam's torture that he was a "nobody", a janitor from London; (b) the U.K. knew that he would be rendered before it happened; (c) the U.K. provided intelligence to the U.S. that was subsequently used in Binyam's U.S.-sponsored torture in Morocco. It will be very difficult for the U.K. to resist these demands, yet this litigation pits the U.K. intelligence services against the discredited U.S. military commission authorities in Guantánamo Bay.

The U.K. has asked that Binyam Mohamed be returned to the U.K., where he will face any legal proceedings that the U.K. chooses to initiate. The U.K. is willing to be responsible for his custody and control. The U.S. should repatriate him immediately rather than prolong and exacerbate the damage that this case has done both to the reputation of the U.S. and to Anglo-American relations.

Gross examples of injustice in Guantánamo Bay that leave a sore

Again, I do not mean to give an exhaustive account of the mistakes that have been made in the past in Guantánamo Bay. However, I will touch on the cases of three of

¹⁶ Al-Habashi unclassified.

¹⁷ Amnesty International, *USA: A Case to Answer. From Abu Ghraib to secret CIA custody* (March 2008); AI Index: AMR51/013/2008, p23.

my clients by way of illustration, and to help explain why Guantánamo has caused so much damage to the U.S. reputation for fair play.



Sami al Hajj – the al Jazeera cameraman

Sami al Hajj is an Al Jazeera cameraman, originally from the Sudan, who was detained by the U.S. for over six years without trial. He was seized whilst working as a cameraman on assignment reporting on the war in Afghanistan. He was finally released on May 1, 2008.

Born in Khartoum on February 15, 1969, Mr. al Hajj has a wife and a 7 year old son Mohammed, who was an infant when Mr. al Hajj left on his assignment. Mr. al Hajj's wife only found out where he was from the Red Cross 18 months after he had been seized, and had feared he might be dead.

Mr. al Hajj was originally seized at the border between Pakistan and Afghanistan, on December 15, 2001, apparently because the U.S. thought that he had been the cameraman at an Al Jazeera interview with Usama Bin Laden. The intelligence was flawed. It was another cameraman called Sami who filmed the interview (which was never shown by al Jazeera, but was used by their media partners CNN).

Despite this, the U.S. military flew him to Bagram Air Force Base on January 7, 2002. He reports that these were the longest days of his life. He was kept in a freezing hangar with other prisoners, in a cage, with an oil drum to use as a toilet. He was given one freezing cold meal a day. He was not allowed to talk, and he states that he was severely abused.

On January 23, 2002, Mr. al Hajj was taken to Kandahar. There, U.S. MPs pulled the hairs of his beard out one by one. He was forced him to kneel for long periods on cold concrete (he still has marks on his knees from this). He was beaten many times. An MP stuck a finger up his anus, and another said to Mr. al Hajj, "I want to f**k you." The Qu'ran was thrown in the toilet in front of him.

Mr. al Hajj was transferred to Guantánamo Bay on June 7, 2002. No formal charges were ever brought against him. Indeed, he was interrogated more than 100 times, and he had to ask to be interrogated about any allegations against him. The only interest that the interrogators showed was to get him to be a cooperating witness against Al Jazeera and say that Al Jazeera was partly funded and controlled by Al Qaeda. Mr. al Hajj refused to say this, even as the price of his freedom, since he said that it was false.

Mr. al Hajj suffered from serious health problems both incurred and exacerbated at the hands of the U.S. Military. Mr. al Hajj had throat cancer in 1998 and the Sudanese doctors put him on medication which he is meant to take daily for the rest of his life, but which has been denied him for over six years during his detention by American forces. Whilst at Bagram, Mr. al Hajj was stomped by guards and had his right knee-cap broken so that he has no lateral support. Mr. al Hajj did not receive a necessary operation for this. He was told by doctors at Guantánamo that he must have surgery, but that he could not expect the necessary therapy to recover the use of his knee there.

On January 7, 2007, the fifth anniversary of his transfer by the Pakistanis to U.S. custody, Mr. al Hajj began a hunger strike that would ultimately last for more than 470 days. His patience was exhausted. All he asked for was either to be given a fair trial, or to be released to rejoin his family – a request that has been supported by every major world leader outside the White House. On the twenty-first day of this peaceful, non-violent protest, the U.S. military began to force feed him. After this, each day the military inflicted the same torturous procedure on him. He was strapped into the ‘chair’, and a 110 cm tube was inserted up his nose. For the next hour and a half, doses of liquid nutrient were forced into him, and he was left in the chair to allow refeeding in the event that he vomited up what he had already been fed. Three times the tube was erroneously forced into his lung, and he choked when the liquid was forced in. All this was in violation of the *Tokyo Declaration*, which mandates that a competent hunger striker should not be force-fed. Yet above and beyond this, it appears that the regime adopted in late 2006 for hunger strikers was made intentionally painful, as a disincentive for them continuing their peaceful protest.

For taking this principled action, Mr. al Hajj was punished. All his ‘comfort items’ were taken away. He was left with just a thin isomat for sleeping, one blanket, his prison uniform and his Qur’an. Because his glasses had been confiscated, it was difficult for him even to read that.

Towards the end of his detention he was told that he might be suffering from another form of cancer, but that he would not be able to see the relevant expert for six months. This caused Mr. al Hajj, and his many sympathizers, great disquiet.

“Food is not enough for life,” Mr. al Hajj said recently. “If there is no air, could you live on food alone? Freedom is just as important as food or air. Every day they [the U.S. Military] ask me, when will I eat. Every day, I say, ‘Tomorrow.’ It’s what Scarlett O’Hara says at the end of *Gone With the Wind*: ‘Tomorrow is another day.’ Give me a fair trial or freedom, and I’ll eat.”

Mr. al Hajj received an enormous amount of support during his time in detention. In addition to his own government, he received backing from the Qatari government, acting on behalf of his Al Jazeera employers. A strap line about Mr. al Hajj’s plight would run along the Al Jazeera screen, and the station ran regular updates projected to millions of viewers. Western media outlets, including AP, Reporters Without Borders, the Committee for the Protection of Journalists, and the New York Times called for his release from Guantánamo. His unfair detention caused immeasurable damage to the U.S. reputation for fairness and free speech.

His final indignity came on the 20 hour flight back to Sudan, when he was shackled and blindfolded for the entire trip, did not once use the toilet, and had neither water nor food. He was taken urgently to hospital on his arrival. His release came without apology or comment from the U.S. authorities.



Ahmed Errachidi – London Chef who was erroneously thought to be “The General” of al Qaeda

Ahmed Errachidi, originally from Morocco, is a chef who suffers from bipolar disorder (manic depression) and has a history of mental breakdowns. He lived in the UK for 17 years, working in hotels and restaurants. However, in September 2001, with an impetuosity that is a hallmark of those suffering from this illness, he set off for Pakistan on a hare-brained mission to buy silver jewellery to sell in Morocco to raise money for an essential heart operation for one of his two young sons.

He, too, was seized by Pakistanis and sold to the U.S. military for a bounty. For the next five years and five months, Mr. Errachidi was held without due process. While he was held in Bagram and at Kandahar airbase, he was interrogated by a senior U.S. interrogator who used the pseudonym Chris Mackey. Mackey later wrote a book about his experiences (*The Interrogator's War*, with the journalist Greg Miller), and his book betrays his own mistake, believing that Mr. Errachidi's claims of mental illness were a ruse. Years later, when Mr. Errachidi would finally receive lawyers, they would readily secure proof that he had been committed to a mental hospital in the U.K. for his psychosis.

Someone – presumably an informant – claimed that Mr. Errachidi had been training at the Khaldan camp in Afghanistan in July and August 2001. He was transferred to Guantánamo, where his supposed military training, his mastery of English, and his refusal to remain silent in the face of injustice led the prison authorities to dub him “The General.” The U.S. military publicly identified him to the media as the supposed leader of the Al Qaeda military wing in the prison.

If this had been true, he would have been a valuable prisoner. It was false. Held in isolation for two of his five years in Guantánamo, Mr. Errachidi was repeatedly interrogated about his alleged training in Afghanistan, even while suffering mental breakdowns. During February and March 2004, he became psychotic and was prescribed anti-psychotic drugs, but his interrogations continued, even though there was nothing to be gained from his claims that he was Jesus Christ, that Osama bin Laden was his student, and that a giant snowball was about to envelop the earth. He was only cleared for release after his lawyers produced documentation to prove that he had been working as a chef in London when the informant said he was performing military training in Afghanistan.

"The cook has become the General," Mr. Errachidi later said. "In the minds of the American military, the crack of an egg has become the explosion of a bomb."

Mr. Errachidi was repatriated to Morocco in March 2007, and reunited with his wife and family after a short investigation by the Moroccan authorities. He receives no treatment for his mental illness, exacerbated though it is by the tragic experience of his incarceration.



Omar Deghayes – mistaken for a Chechen rebel, blinded in Guantánamo Bay

Omar Deghayes lived in Britain for many years as a refugee from Libya. His father, a notable lawyer, had been tortured and killed by Colonel Gaddafi. Eventually the family escaped and were granted asylum. Omar studied law in University and trained towards qualification as a solicitor (the U.K. equivalent of an attorney at law).

After taking his exams, he planned to travel to Afghanistan prior to taking up his profession. However, while there, the country descended into war and he left for Pakistan. He, like so many others, was seized by the Pakistanis and turned over to the U.S.

In Guantánamo Bay, the main allegation against Mr. Deghayes was that he was "suspected of appearing in a confiscated Islamic extremist military training video showing atrocities in Chechnya." This allegation continued to be levelled at Mr. Deghayes long after it was proven false.

The facts are as follows: For more than three years, the U.S. military refused to provide a copy of this video to Mr. Deghayes; neither could his counsel secure one. Mr. Deghayes was held based on this false information that could have been refuted if only the U.S. military had allowed someone with the most basic knowledge to see it.

Finally the BBC (British television) managed to obtain a copy. It was a tape provided to the Spanish authorities by the Russians in 2000. The Spanish had apparently shown it to unknown informants who falsely identified one person on the tape as being Mr. Deghayes. Anyone who knew Mr. Deghayes could have corrected the error. However, the tape was subtitled with the name "Mr. Deghayes" under the image of a bearded man brandishing a rifle in Chechnya.

The Spanish then apparently passed the tape along to the U.S. authorities, who seized Mr. Deghayes in Pakistan and based his detention in large part upon the false intelligence. Despite Mr. Deghayes' insistence that he had never been to Chechnya, neither he nor anyone associated with his defense was allowed to see it.

When shown the tape by the BBC, counsel (who had met Mr. Deghayes in person) was able to state with total certainty that the person depicted was not Mr. Deghayes. To ensure reliability of this opinion, an independent expert was consulted, Dr. Timothy Valentine. He compared the images on the videotape with known pictures of Mr. Deghayes, and concluded:

I conclude that comparison of four passport photographs of Omar Deghayes with the facial image from the video supplied provides no support for the contention that the video is of the same person as the passport photographs.

(emphasis in original).

When the tape was played on British television, the person depicted on it was positively identified as one Abu Walid, a well-known Chechen rebel who was killed in April 2004. Someone who was apparently an employee of British intelligence watched the program and immediately knew who it was.

Despite this irrefutable evidence of innocence, which was all passed along to the U.S. military, Mr. Deghayes remained in detention for over two years, and the U.S. continued to allege that the tape was evidence of guilt.

Meanwhile, Mr. Deghayes was on the receiving end of a large amount of abuse in Guantánamo Bay. This came about in part because Mr. Deghayes stood up for the rights of other prisoners. As a person trained in British common law, and someone who spoke fluent English, he was pressed into the position of a go-between for the guards and the prisoners. When matters did not proceed as the authorities liked, very often Mr. Deghayes was on the receiving end of physical mistreatment.

The worst example of this came in March 2004, when Mr. Deghayes was blinded in his right eye by the ERF team in Guantánamo Bay. It is important to recognize that the public statements that the U.S. military has made about this incident have been false, and demonstrably so – which is all the more reason why the conditions of the camp need to be supervised in a transparent and public manner.

Mr. Deghayes was being held in Oscar Isolation camp in Camp Delta. The MPs there were going to be sent to Iraq shortly afterwards, and they were being trained. They came around the cells with dogs for a search. They did a full body search on Mr. Deghayes. They took him to the showers and inserted a finger in his anus.

People in the block were angry, and some simply refused to have it done to them. The prisoners, including Mr. Deghayes, were then maced. The officer standing behind the MPs kept urging them to spray more mace at Mr. Deghayes' face. One of the MPs pushed his fingers into Mr. Deghayes's eyes.

Mr. Deghayes could not see from either eye for several days, but he gradually got sight back in one eye. He has always had problems with his right eye, since he got injured by another child brandishing a stick in a sword fight, but repeated operations had preserved his vision. Now, because of this incident, Mr. Deghayes is totally blind in that eye.

Mr. Deghayes received repeated abuse in Guantánamo. Anger at his treatment swelled in Brighton, England, where Mr. Deghayes had lived. A 'Save Omar' campaign attracted hundreds of supporters, and fifty members of the city council voted without dissent to insist on his return. The British government requested his release.

Mr. Deghayes was ultimately cleared by the U.S. military and repatriated in December 2007 and he was not charged with any crime on his return. Fortunately, his case reflects the possibility that the U.S. can rehabilitate its image. Just two weeks ago, on May 6, 2008, he spoke to a large crowd at the Brighton Literary Festival insisting that he does not hate Americans for what was done to him. He insists, however, that he will pursue his legal training to ensure that others like him are not denied the benefits of law.

Conclusion

The opinions expressed in this submission are purely my own. I am saddened by the actions taken against some of the prisoners who I represent by representatives of my own government. It is important to focus on the future. However, we cannot expect to rehabilitate our own reputation unless we recognize the errors of the past, seek to make amends as best we can, and avoid similar mistakes in the future.