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

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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 Kurnaz 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

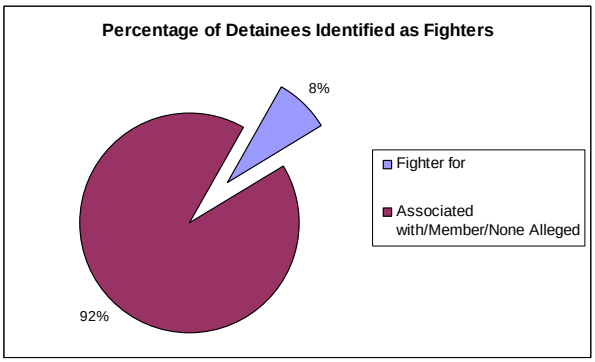
As is the standard procedure, The Seton Hall Center for Policy and Research accepted as truth everything that the government said about any of the detainees at Guantanamo. So, for example, if the government identified a detainee as a "fighter for" the Taliban, then it is accepted, for the purpose of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

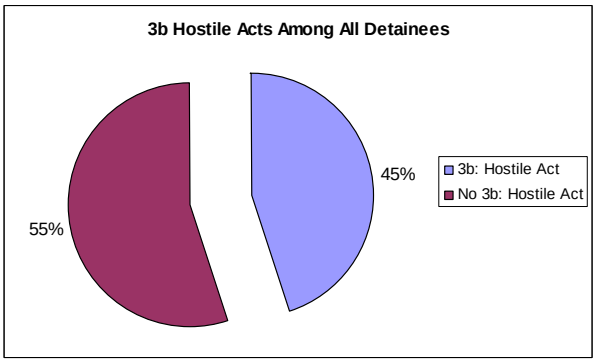
Who has been detained in Guantanamo?

A review of all of the unclassified Combat Status Review Tribunal summaries of the classified evidence[1] 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.

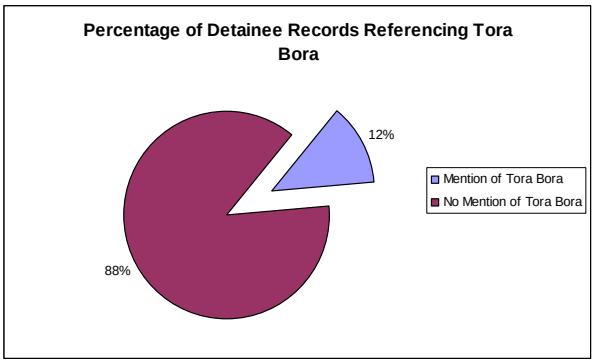
That profile, which has never been disputed by the Department of Defense, revealed that:

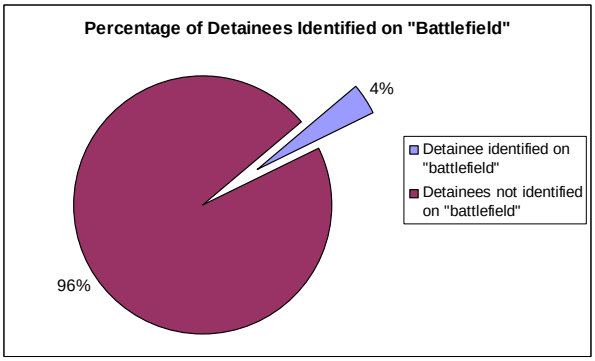
1. Ninety two percent of the detainees at Guantanamo were specifically *not* accused of being "fighters for" anyone.
2. Fifty five percent were not accused of having committed any hostile acts against United States or coalition forces.
3. Ninety five percent were not captured by United States forces;
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.



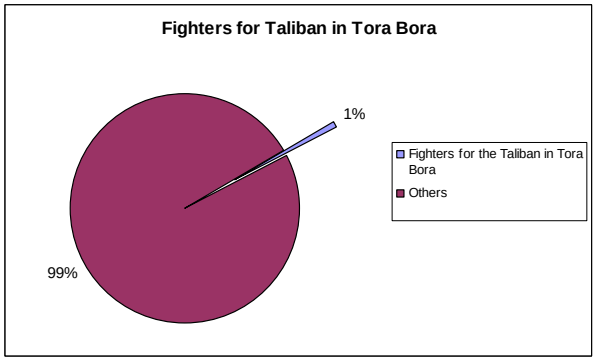


[1] First report





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 CRST 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 declaims 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.

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[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 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. 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 I, "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-Jazeerah 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

29 JUL 03 ~~7~~ 12

1. Under the provisions of the Department of the Navy Memorandum, dated ~~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 R1

APPENDIX 3

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

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.

(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]

(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]

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

APPENDIX 4

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