# 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% are 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.

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[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

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[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. Stufflebeem, 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.

[4] The files reviewed are available at the Seton Hall Law School library, Newark, NJ.

[5] There 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, is in fact, an enemy combatant.

Each summary of evidence has four numbered paragraphs. The first[6] and fourth[7] are jurisdictional. The second[8] 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

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[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. In 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' there." 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 clothes, by 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 orders, 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.

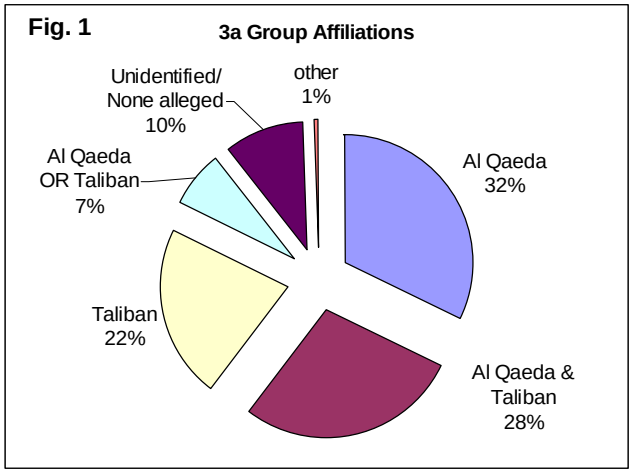
### 1. ¶3(a): Enemy Combatant because of Nexus with Prohibited Organization

*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%)

**Fig. 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"

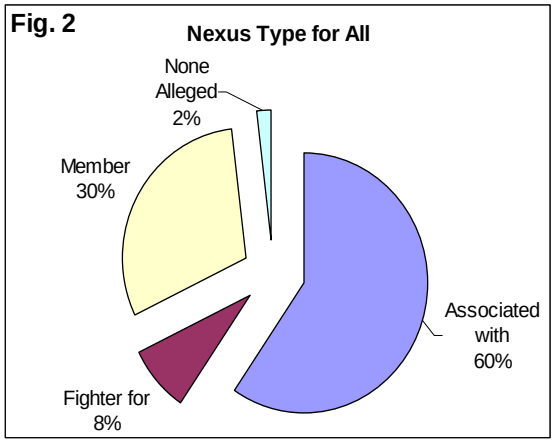



Figure 2 illustrates that of the nexus type for all the prisoners, regardless of the group to which they are "connected," by far the greatest number of prisoners are identified only as being "associated with" one group or another. A much smaller percentage – 30% – is identified as "members of." Only 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-Quaeda training camp, nor have they actually met, say, Osama bin Ladin.[12]

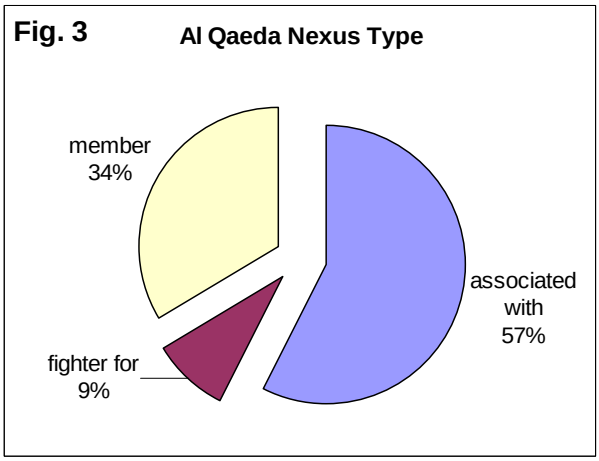
This expansive definition of membership in al Qaeda could thus be applied to anyone who the Government believed ever spoke to an al Qaeda member. Even under this broad framework, the Government concluded that a full 60% of the detainees do not have even that minimum level of contact with an al Qaeda member.

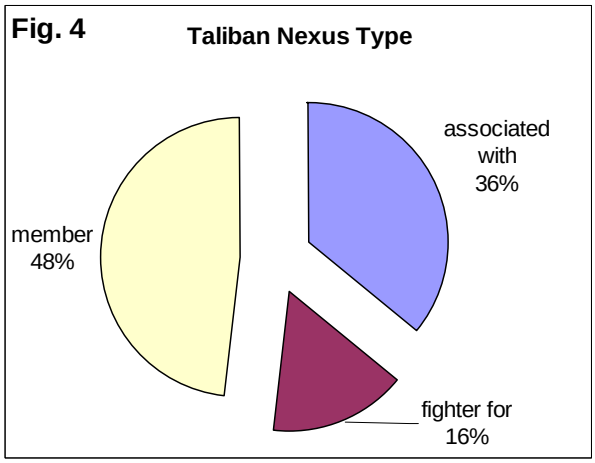
[11] While more than 95% of the summaries of the evidence used one of these three categories, approximately 4% used other nexus descriptions. Most notably, 2% used a "supported" descriptor which was re-categorized as "associated with." See Appendix C for a full account of re-categorizations of data.

[12] *US vs. Pachir*, Dkt. No., T113.

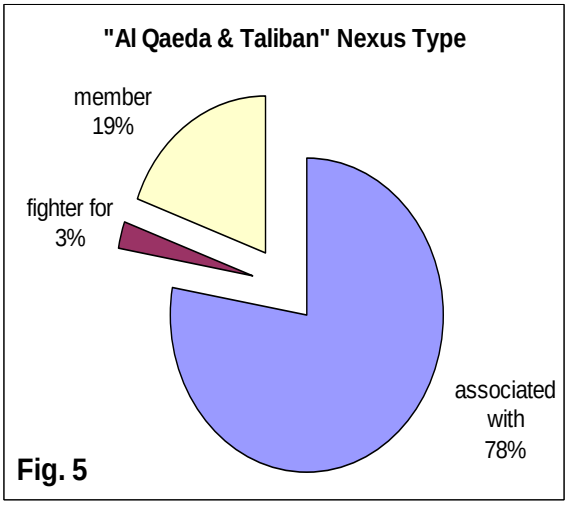
Membership in the Taliban is different and also not clearly defined. According to the Government, one can be a conscripted (and therefore presumably unwilling) member of the Taliban and still be an enemy combatant.

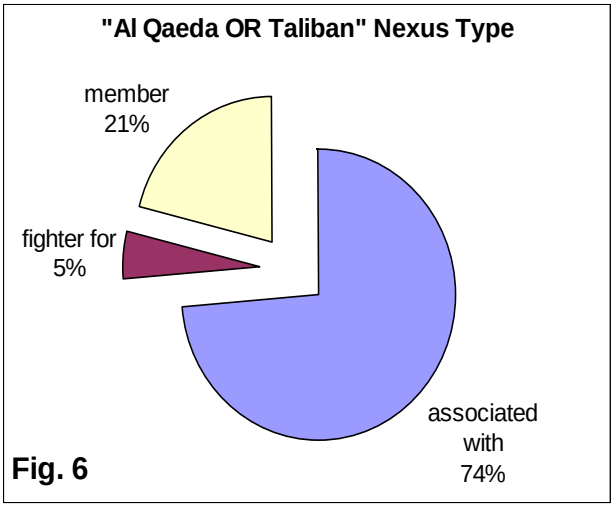
Figures 3 and 4 compare the nexus between enemy combatants with Al Qaeda and the Taliban. In contrast to the "al Qaeda only" category, the "Taliban only" category shows that a significantly higher percentage of the prisoners are designated "members of" and "fighters for" with a reduced number being "associated 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," s*ee 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.

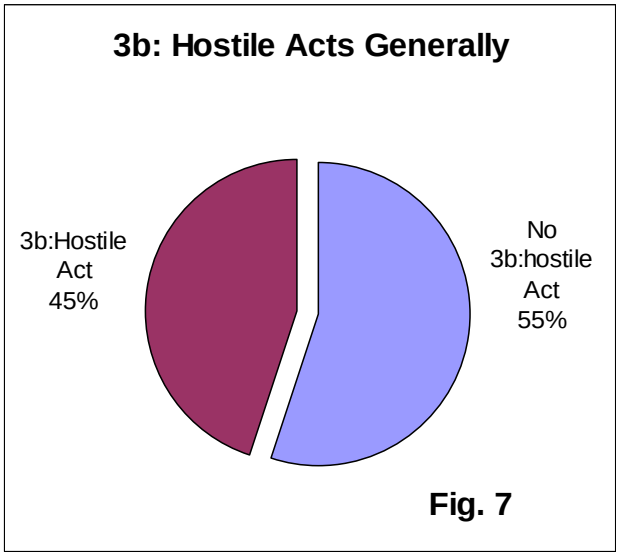



Fig. 7

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]

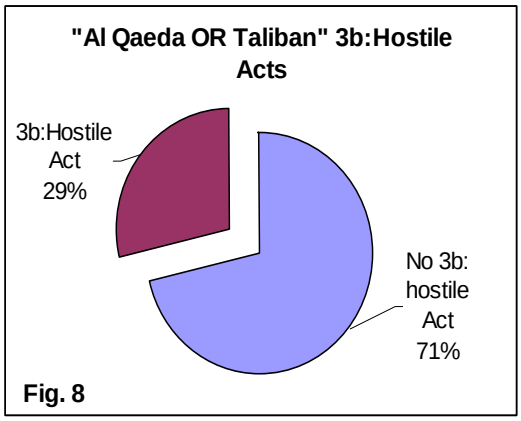
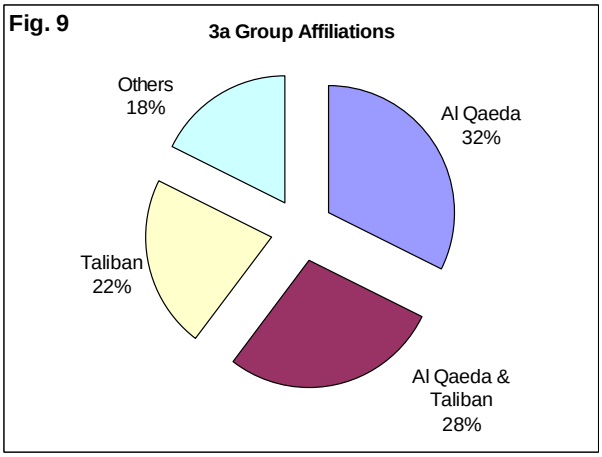


Fig. 8

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 <u>not</u> 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)

Fig. 9



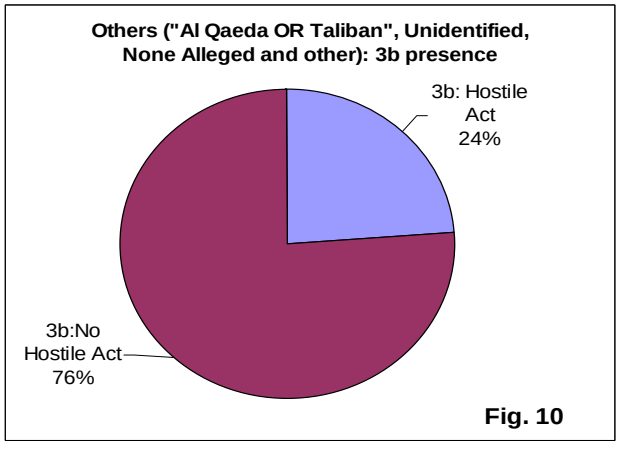



Fig. 10

[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.

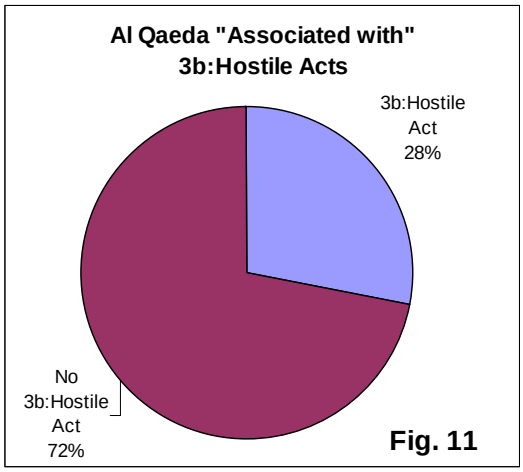


Fig. 11

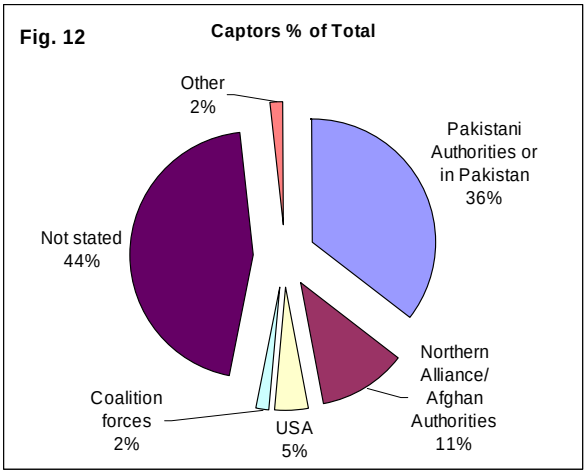
[14] See Fig 1: "3(a) Group Affiliations" supra, p. 7: the sum of "al Qaeda OR Taliban" (7%); Unidentified/"None alleged" (10%); and "Other" (1%) equals 18%. This is the 18% that is represented as "Others" in Fig. 9.

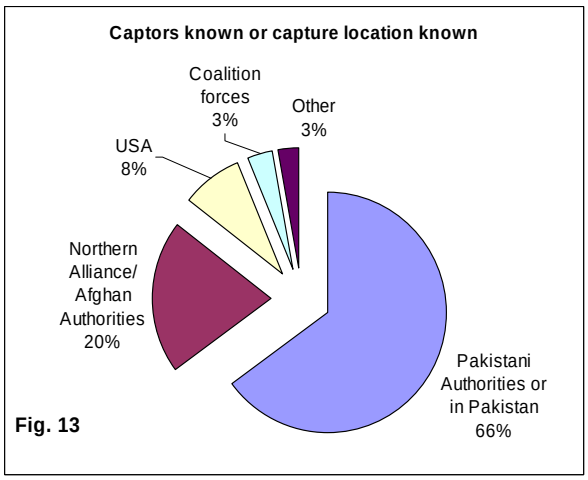
## III. THE GOVERNMENT'S EVIDENCE THAT THE DETAINEES ARE ENEMY COMBATANTS

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,

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[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]

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[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.

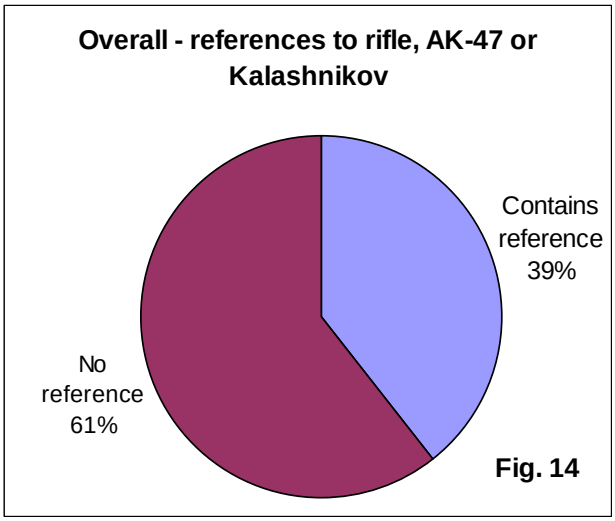
Comparing the Combatant Status Review Board's list of 72 organizations that evidence the detainee's link to al Qaeda and/or the Taliban, only 22% of those organizations are included in the Terrorist Organization Reference Guide. Further, the Reference Guide describes each organization, quantifies its 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 <u>any</u> 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]

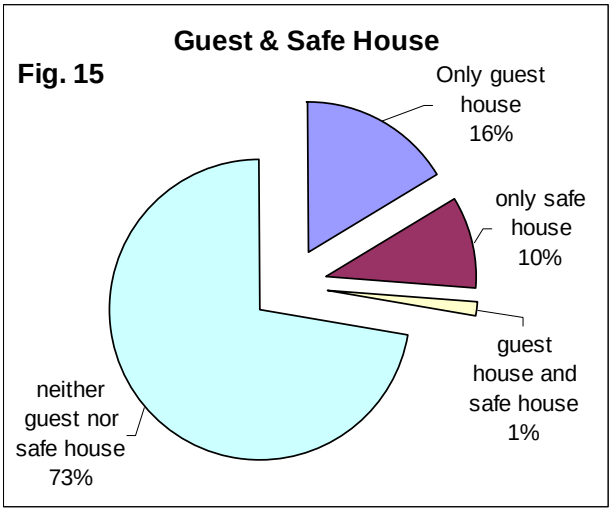
This is recognized not merely by the Pakistani Foreign minister but by American college students touring Afghanistan. "There is a big Kalashnikov-rifle culture in Afghanistan: …I was somewhat bemused when I walked into a restaurant this afternoon to find Kalashnikovs hanging in the place of coats on 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 here 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://neahin.org/programs/schoolsafety/september11/materials/nmneapos.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 e 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 Mahboba 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. Perman, 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/accomodation.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 Uighers[35] 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 parallel's 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.

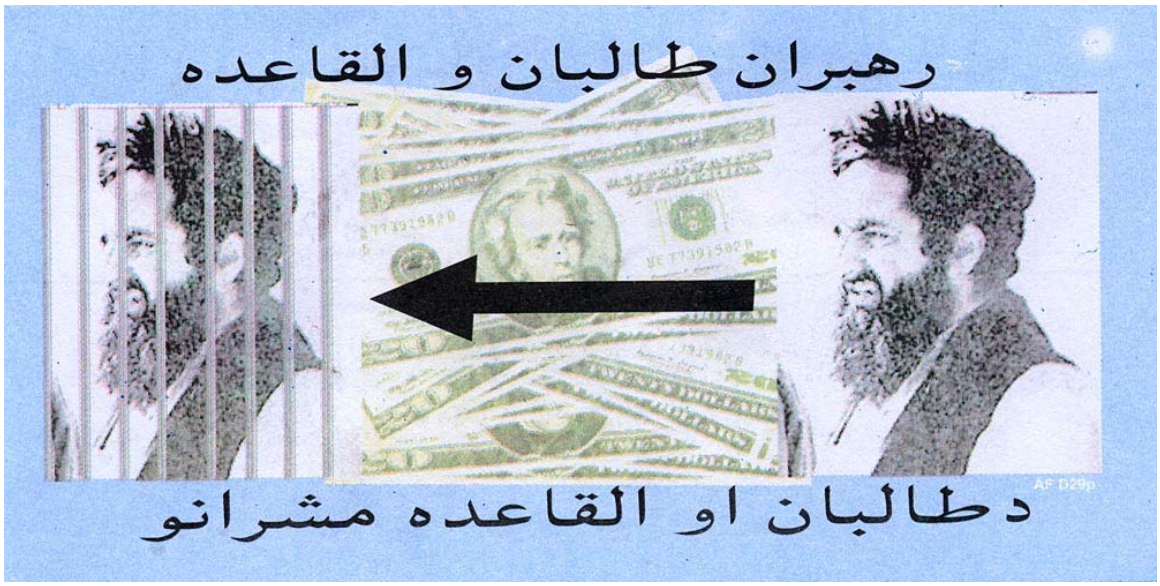
## APPENDIX A


Image from http://www.psywar.org/apddetailsdb.php?detail=2002NC02

"Dear countrymen: The al Qaeda terrorists are our enemy. They are the enemy of your independence and freedom. Come on. Let us find their most secret hiding places. Search them out and inform the intelligence service of the province and get the big prize." (taken from AP article, http://afgha.com/?af=article&sid=12975

**"The reward, about $4,285, would be paid to any citizen who aided in the capture of Taliban or al-Qaida fighters."**
**Text on the back of the imitation banknote is "Dear countrymen: The al-Qaida terrorists are our enemy. They are the enemy of your independence and freedom. Come on. Let us find their most secret hiding places. Search them out and inform the intelligence service of the province and get the big prize."**

http://www.psywarrior.com/Herbafghan02.html



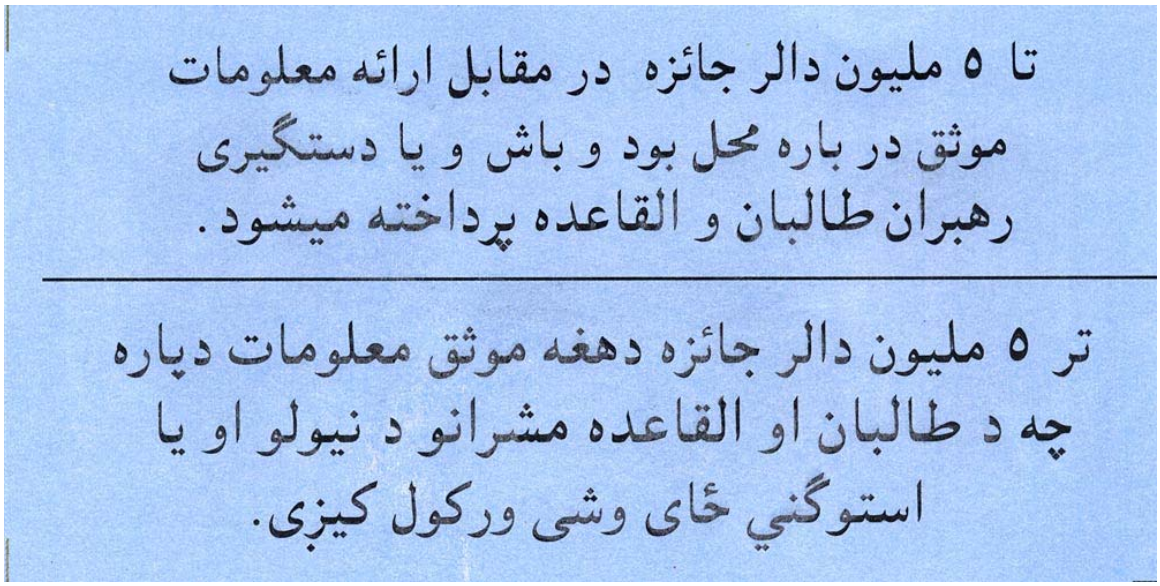



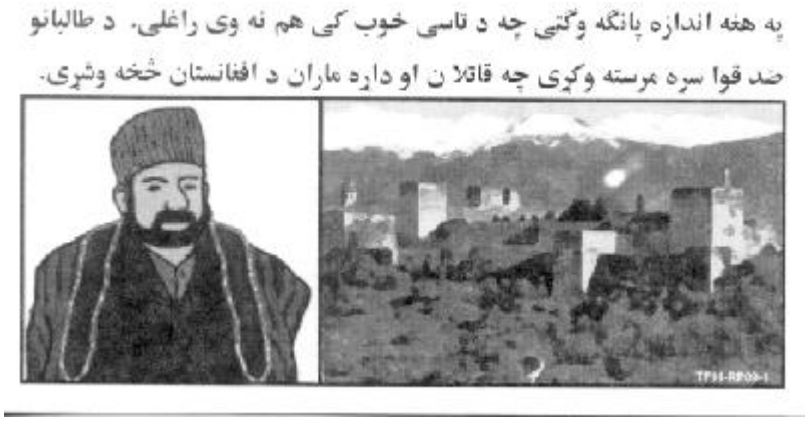

Image from http://www.psywar.org/apddetailsdb.php?detail=2002AFD029P

**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




## 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'ntl Islamic Relief Org |
| Al-Islah Reform Party in Yemen |
| Al-Itiihad al Islami (AIAI) |
| Ariana Airlines |
| Armed Islamic Group of Algeria |
| Bahrain Defense Organization |
| Chechen rebels |
| Dawa wa Irshad |
| 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 lslamiya |
| 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'Iang Province of China |
| Nahzat-Islami |
| Pacha Khan |
| Revival of Islamic Heritage Society |
| Salafist group for call and combat |
| Sami Essid Network |
| Samoud |
| 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 Afghanis”

“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

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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 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.

## 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 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 Guantánamo 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.

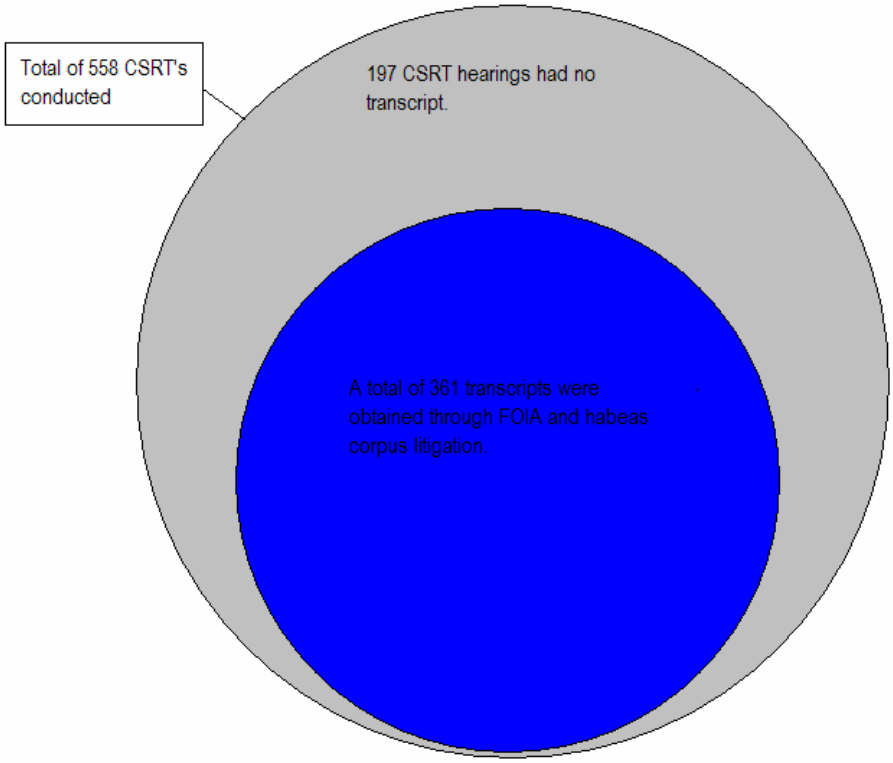
Each detainee was provided the right to appear before the CSRT Tribunal. At least 361 detainees chose to participate, and a Summarized Detainee Statement was prepared from their testimony in each case. This report refers to these Summarized Detainee Statements as "transcripts," although they are not 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 I.

[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.

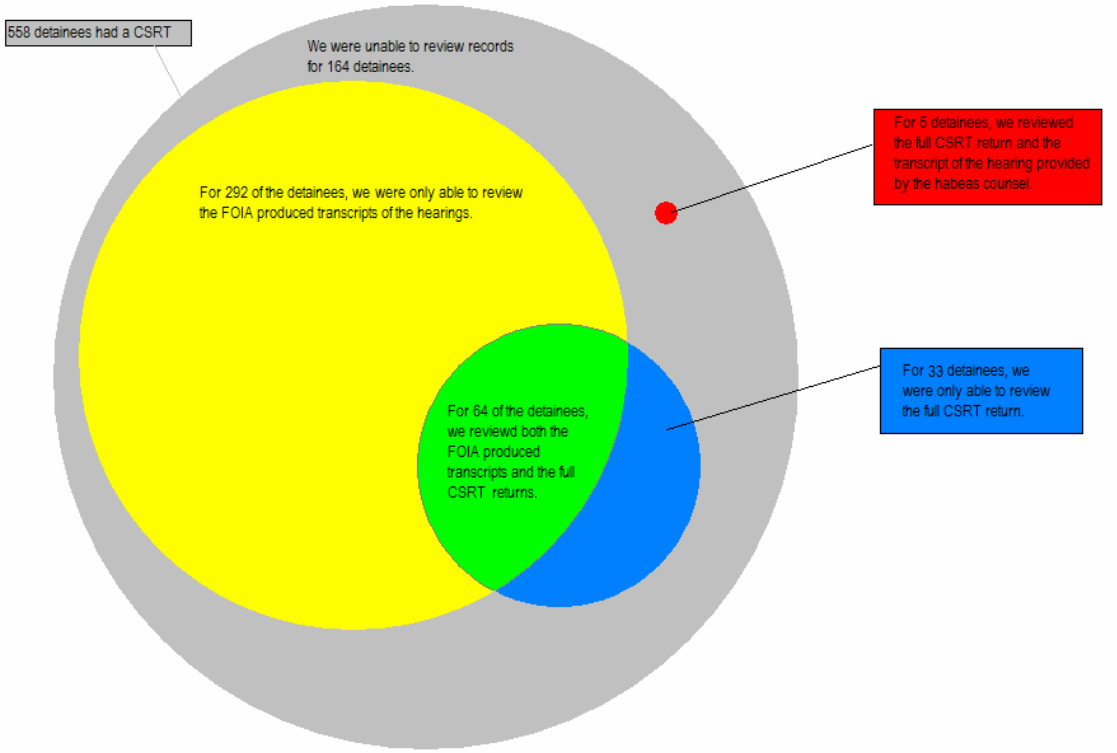
**DIAGRAM I**




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 Guantánamo, 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 #220[7] 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

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previously analyzed and the data considered in this report is very strong. That correlation is presented in Appendix 1.

[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**

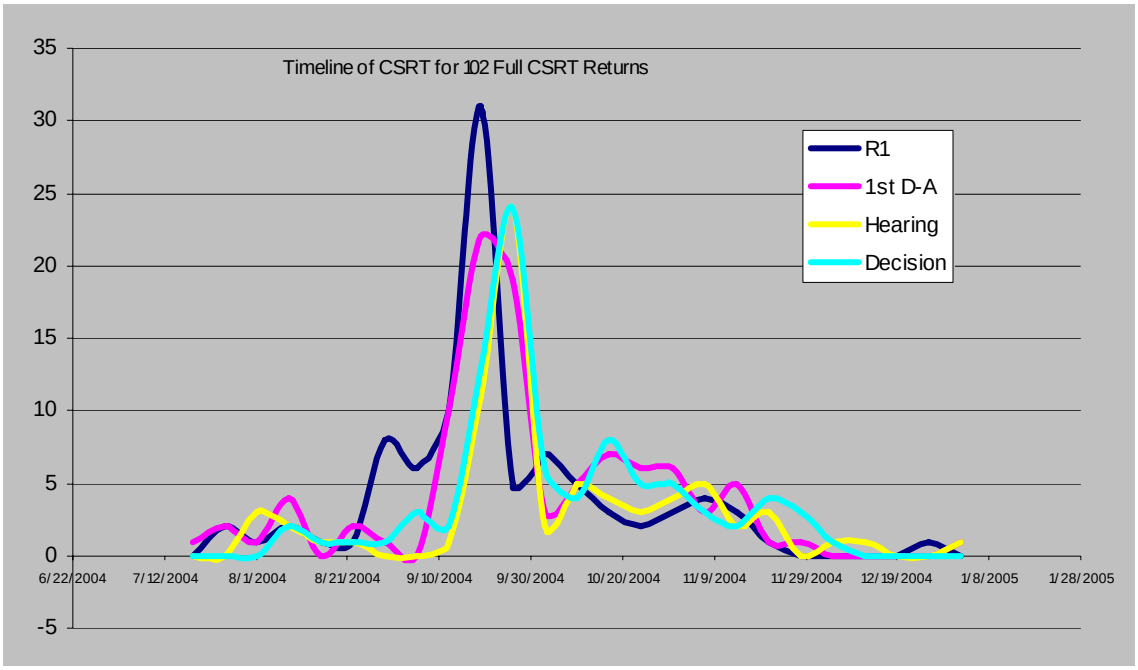
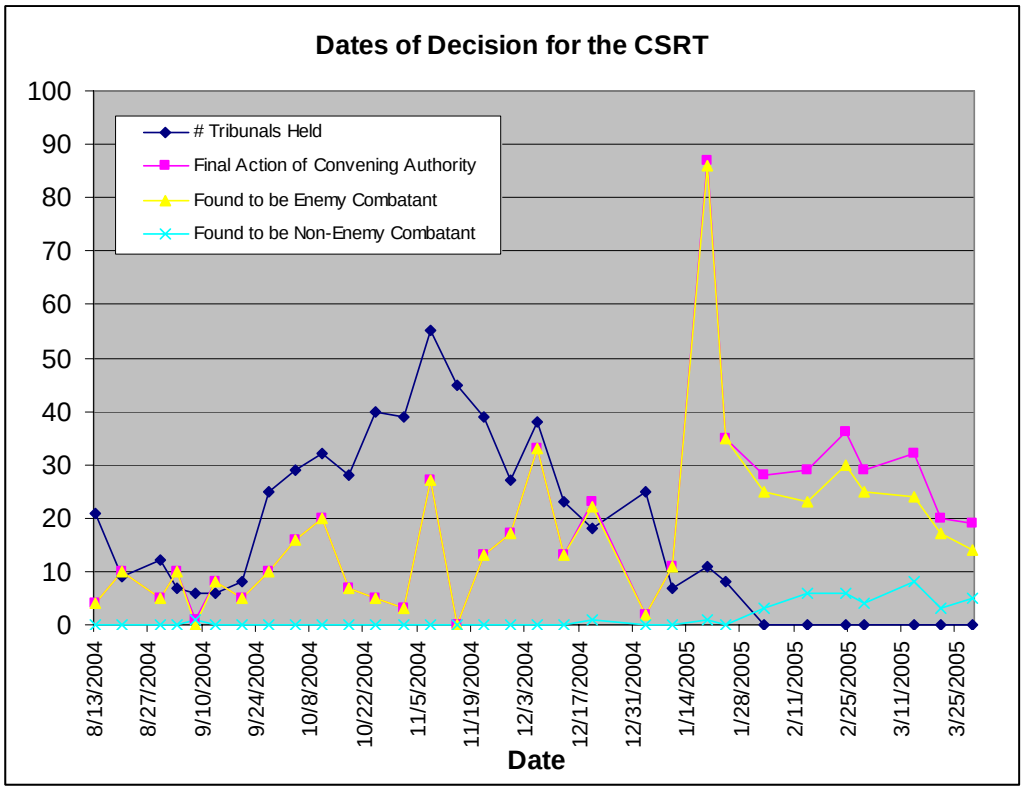



Chart I can be profitably compared with Chart II, the "Dates of Decision for the CSRT," which presents the pattern of decision making of the CSRT's for all of the detainees as published by the Department of Defense in March 29, 2005. Chart II chart

[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.


[9]

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.

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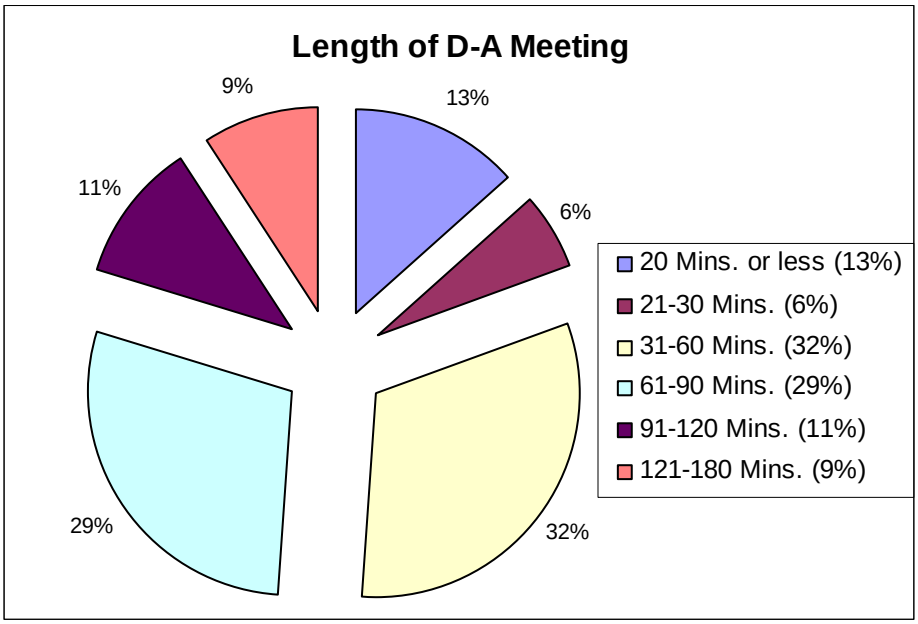
[10] Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf, (emphasis added).
[11] *Id.*

**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.

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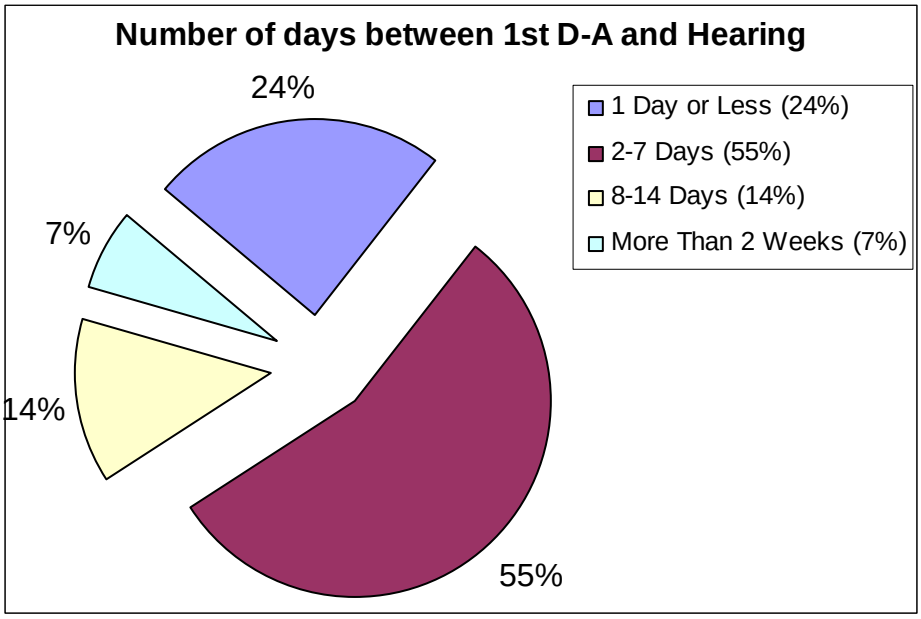
[12] Gordon England, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Jul. 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf, (emphasis added).

**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 the 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:

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[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.defenselink.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 accurate[16]

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 irrebutable one.

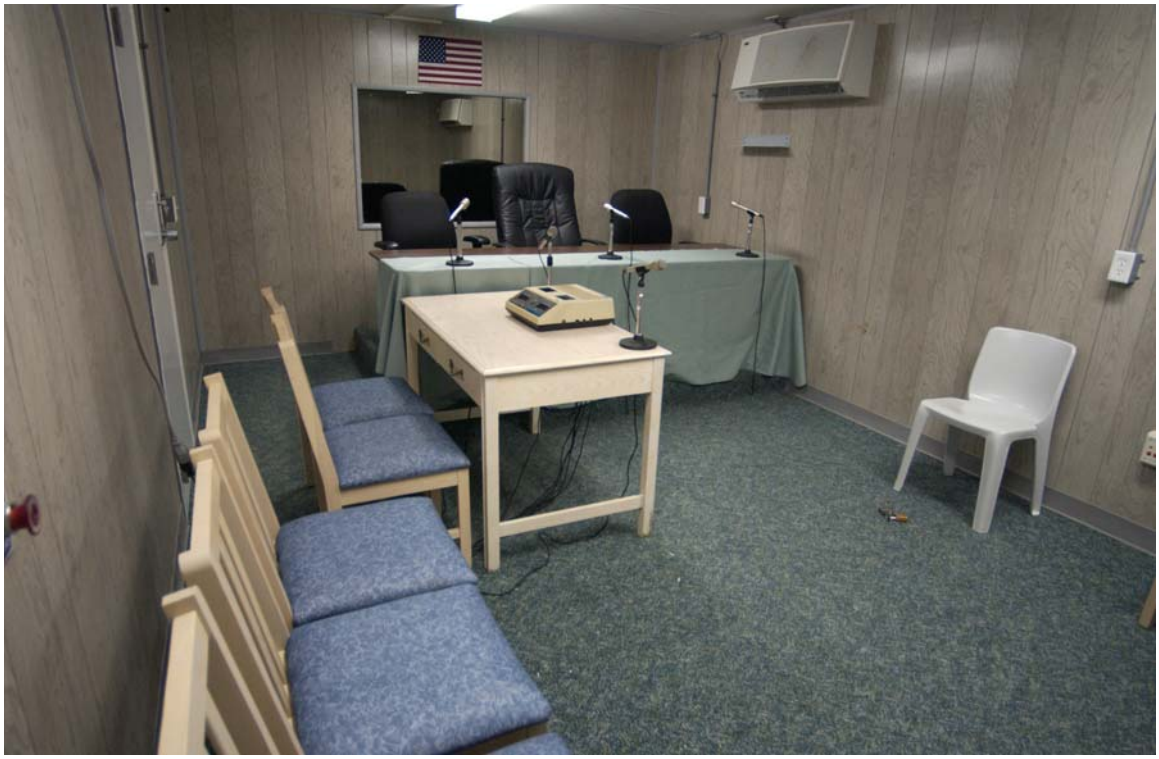
This explains why, although the burden of proof was supposedly on the Government, the Government never felt the need to present a single witness at any of the 393 CSRT hearings. Instead, it relied almost exclusively on the secret, and

[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 record 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:

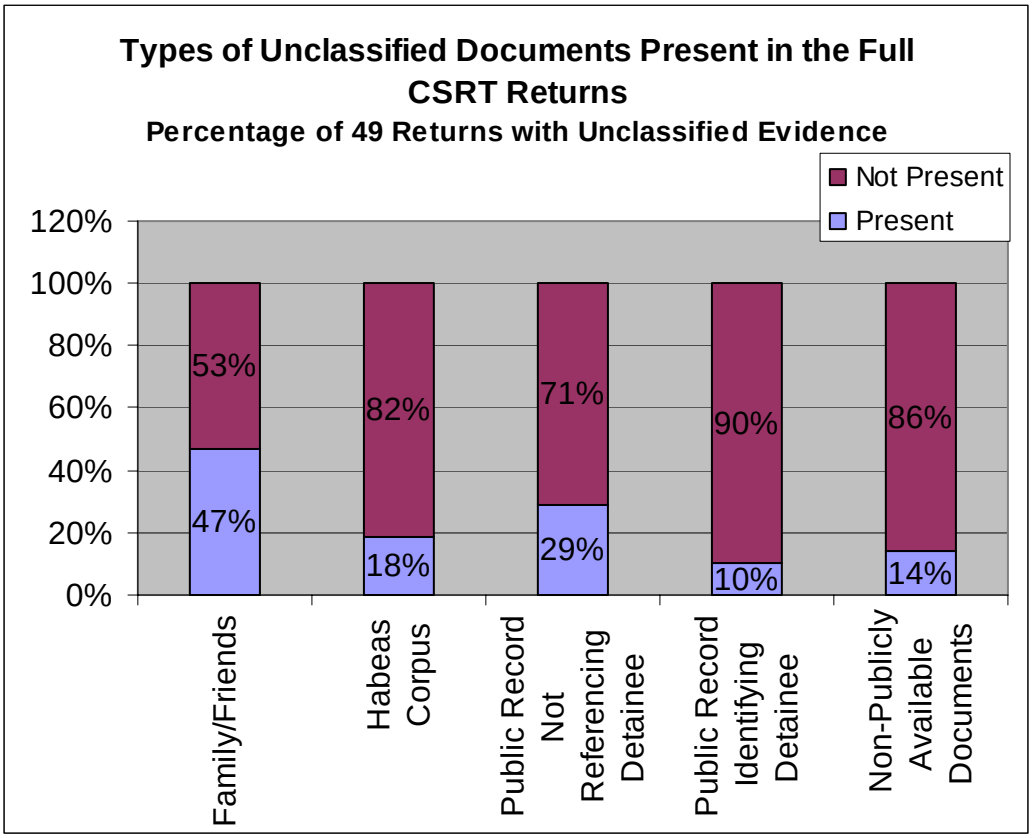
1. Documents from friends and family
2. Submissions from habeas corpus litigation
3. Publicly available documents either released by the Government or published by the press that name the detainee at issue

[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.

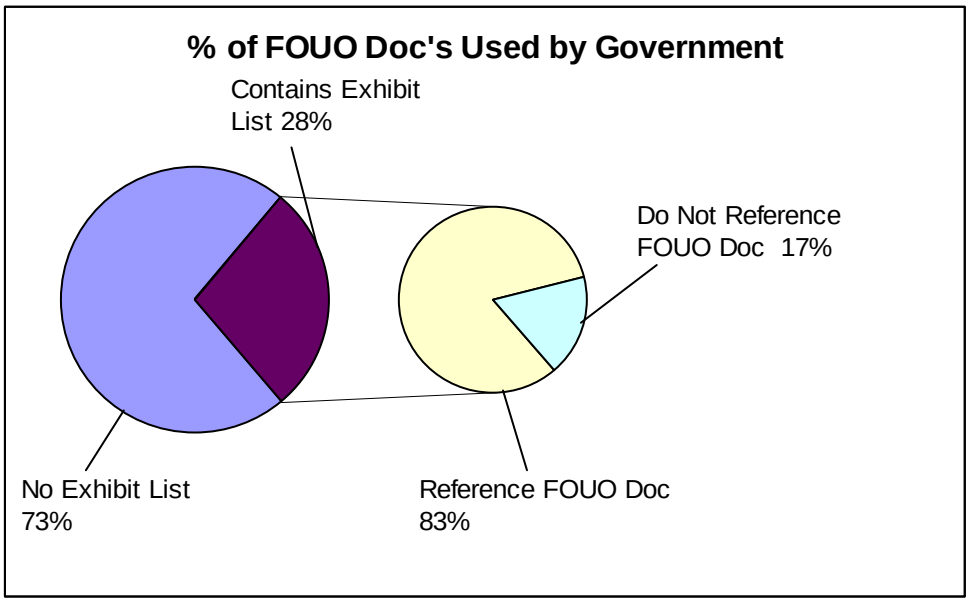
**2. Unclassified FOUO Evidence Withheld from Detainee**

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.

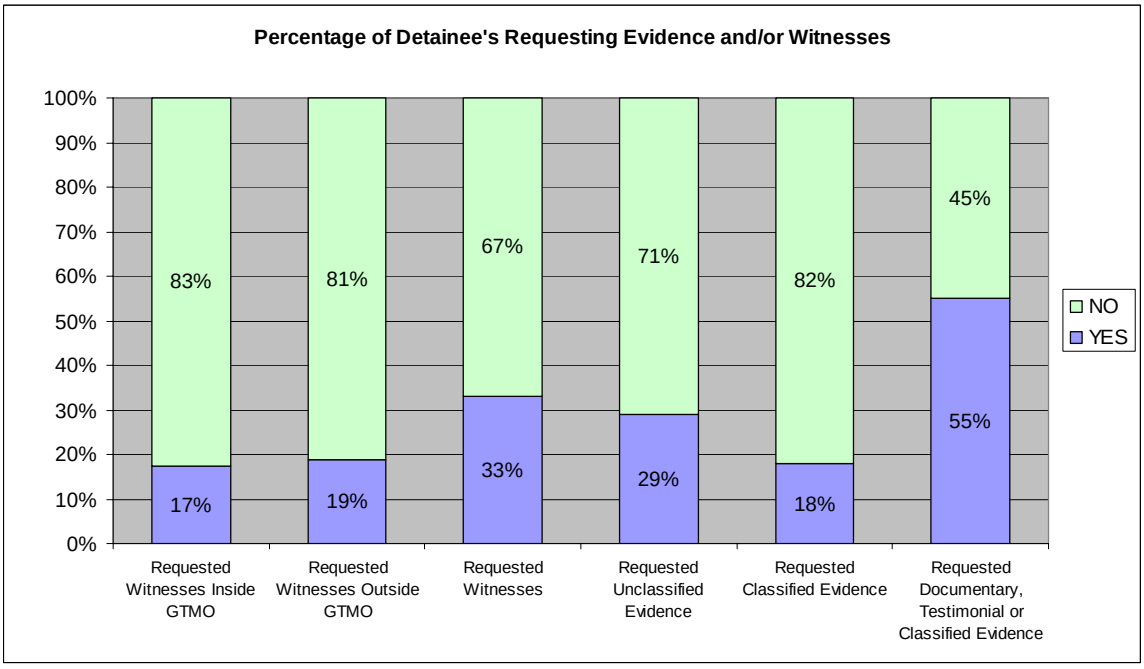
The CSRT procedures provided that each detainee would have the right to present his evidence to the Tribunal. The CSRT procedures provide that:

> (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 half[21] (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**




## 1. 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.

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[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**

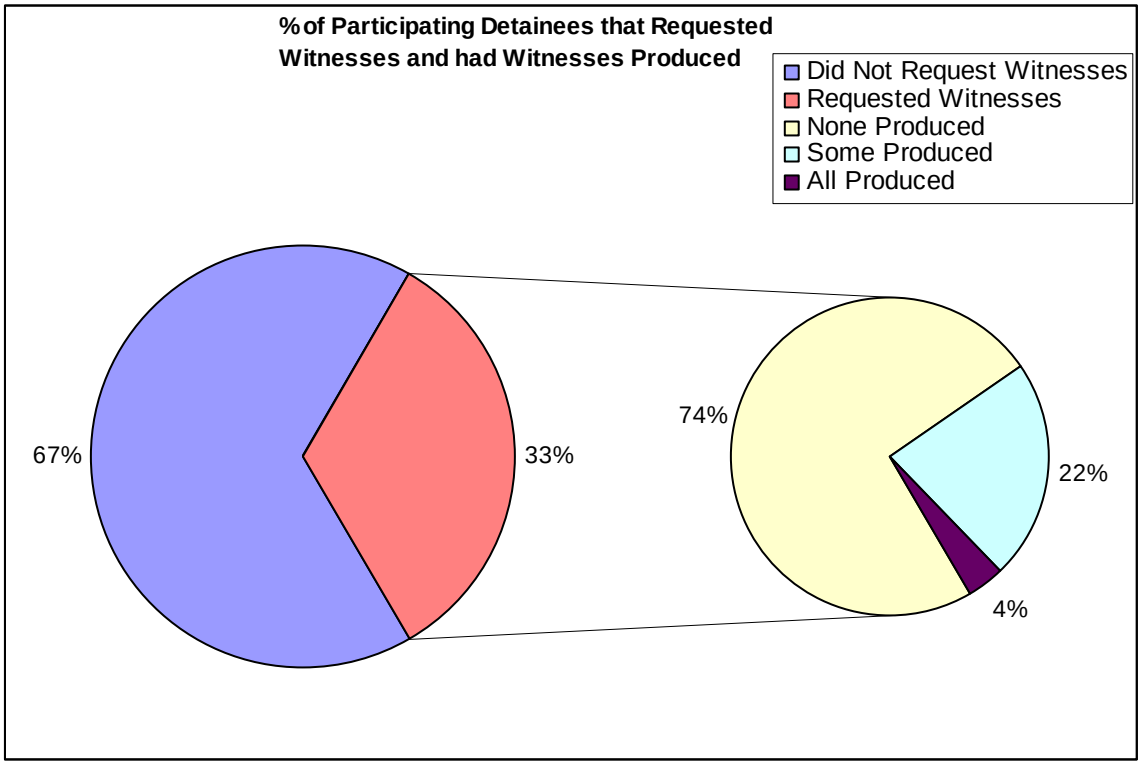
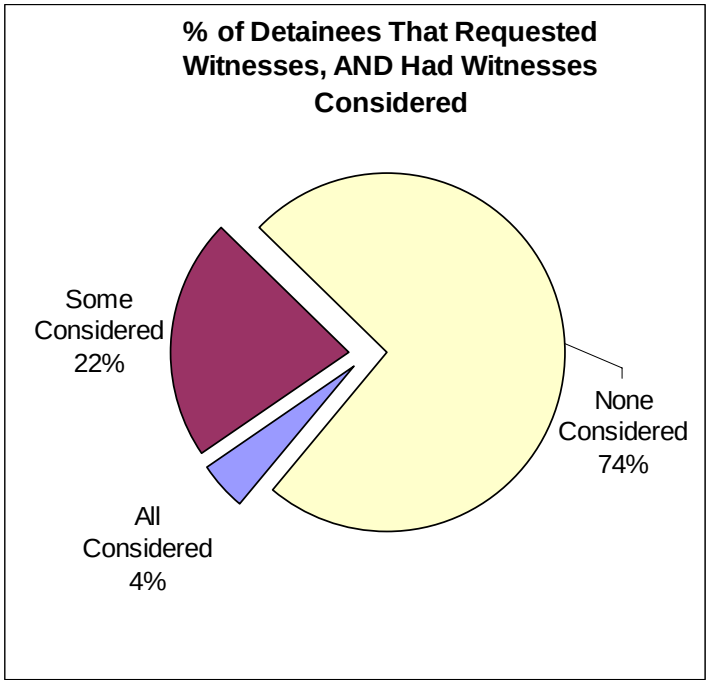


Chart VII further breaks down the data by showing that only 4% of these detainees were able to obtain *all* of their witnesses, and 22% of these detainees were able to have only *some* of their witnesses produced. Fully 74% of the detainees who requested witnesses were denied the production of all witnesses 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.

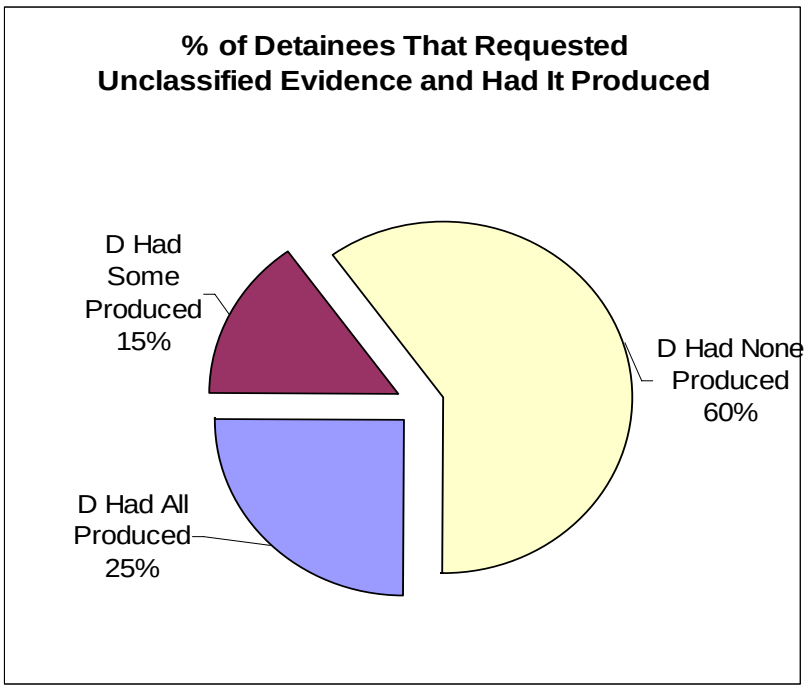
The Unclassified Summary of the Basis for Decision lists the evidence that it considered and the evidence that the Tribunal did not consider. The data shows that only 26% of the detainees who requested witnesses had witnesses whose testimony was considered by the Tribunal. Broken down further, only 4% 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**



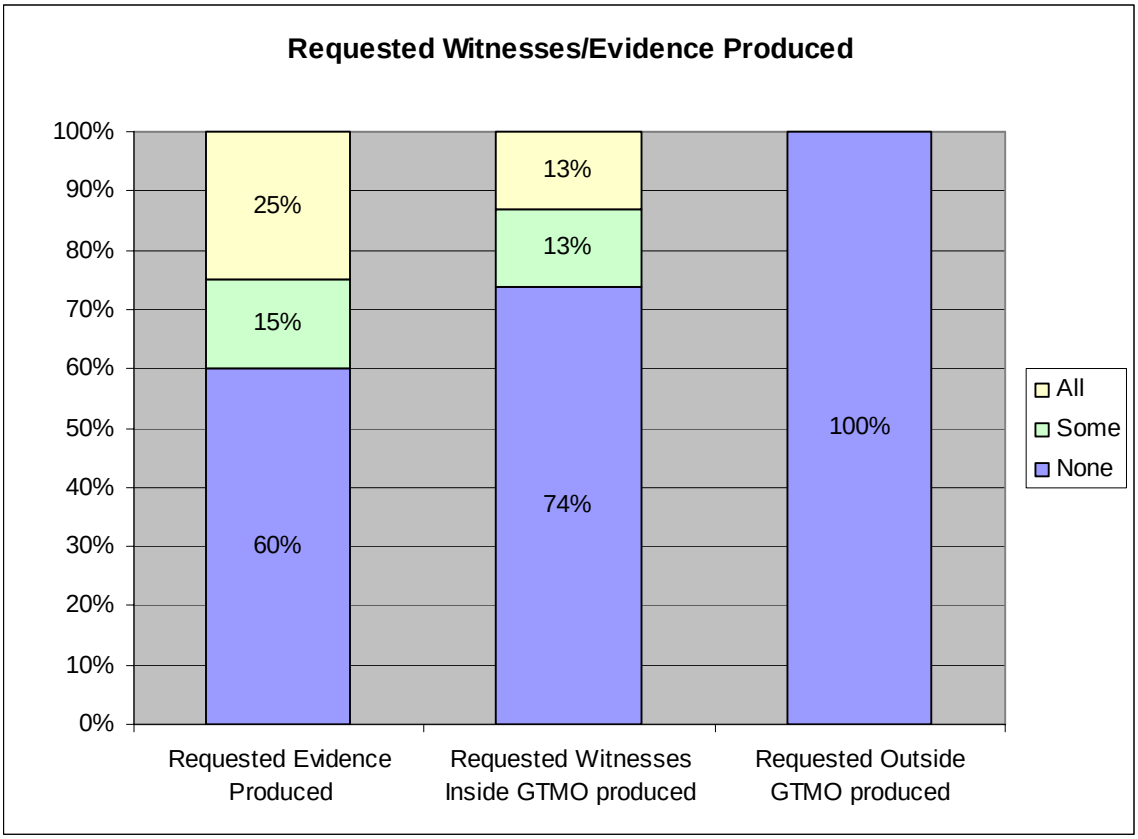
### 3. Requests to See Classified Evidence

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 proceedings[25]

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).

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*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. If 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 the 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.

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[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 Guantanamo 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 conduced 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 abstentia* — 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. synopsizes 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 | | % variation | Original 517 Records | | % variation | Return Sample Set | |
|---|---|---|---|---|---|---|---|
| associated with Total | 58% | -2% | associated with Total | 60% | -1% | associated with Total | 59% |
| fighter for Total | 7% | -1% | fighter for Total | 8% | 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 | | % variation | Original 517 Records | | % variation | Return Sample Set | |
|---|---|---|---|---|---|---|---|
| Al Qaeda Total | 31% | -1% | Al Qaeda Total | 32% | 22% | Al Qaeda Total | 54% |
| Al Qaeda & Taliban Total | 26% | -2% | Al Qaeda & Taliban Total | 28% | -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 | | % variation | Original 517 Records | | % variation | Return Sample Set | |
|---|---|---|---|---|---|---|---|
| 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

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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 summaries[1] 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 (ISN[5] 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 bounty[7]—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—

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[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.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

[2] Available at http://law.shu.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/200602u/nj_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/200602u/nj_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.

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"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.

"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.

[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 Guantanamo Detainees who have returned to the fight" Department of Defense (July 12, 2007). Retrieved November 10, 2007 at http://www.defenselink.mil/news/d20070712formergtmo.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" 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 detainee 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. If 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.

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[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 detainee 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]

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[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.roadtoguantanamomovie.com/reviews/nytimes/nyt_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."

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[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 Finer, "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 detainees[36]; neither does the name "Noor Alam"—another name that has been associated with Abdullah Mehsud[37]—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

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[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/3745962.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]

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[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/wguan08.xml.
[44] *Supra* note 14.
[45] The discrepancy is also noted at by the anti- death penalty organization, Reprieve. Retrieved December 3, 2007 at http://ejp.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 Anatolivich Odijev"—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 Guantánamo[51]—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.

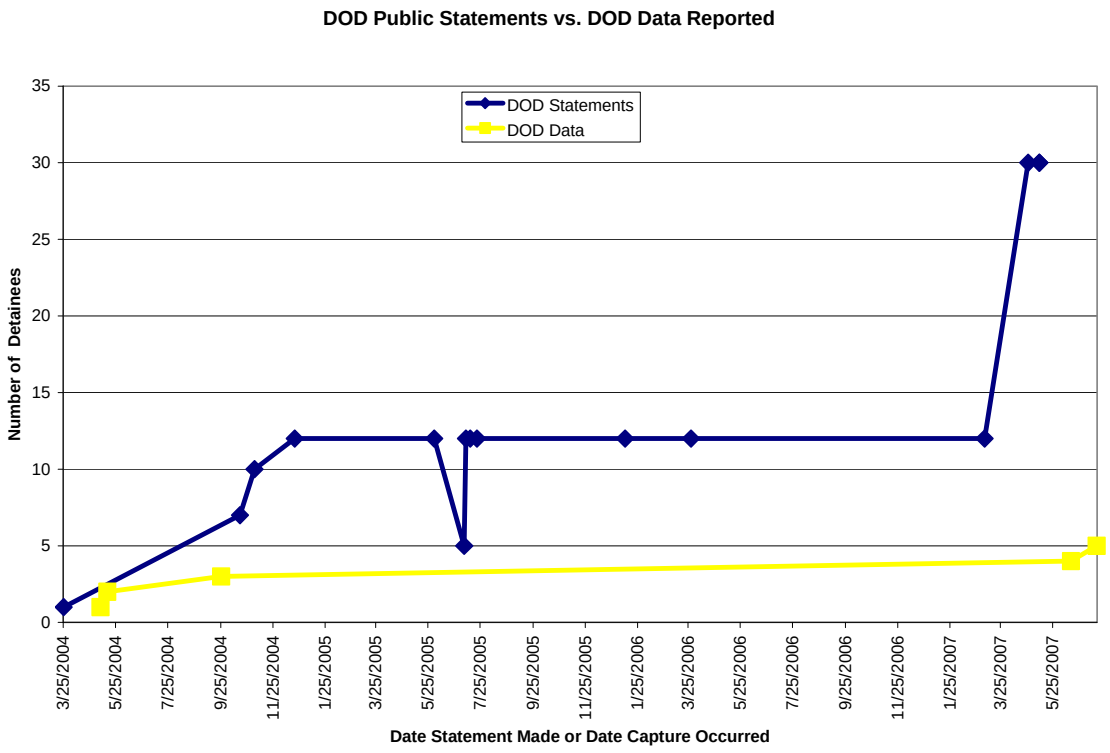
[48] Id.
[49] "Russian Agents Kill Ex-Gitmo Detainee" CBS News. June 27, 2007. Retrieved November 26, 2007 at http://www.cbsnews.com/stories/2007/06/27/world/printable2987393.shtml.
[50] Id.
[51] "Detainee Transfer Announced," Department of Defense (September 29,2007), Retrieved on December 8, 2007 at 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.

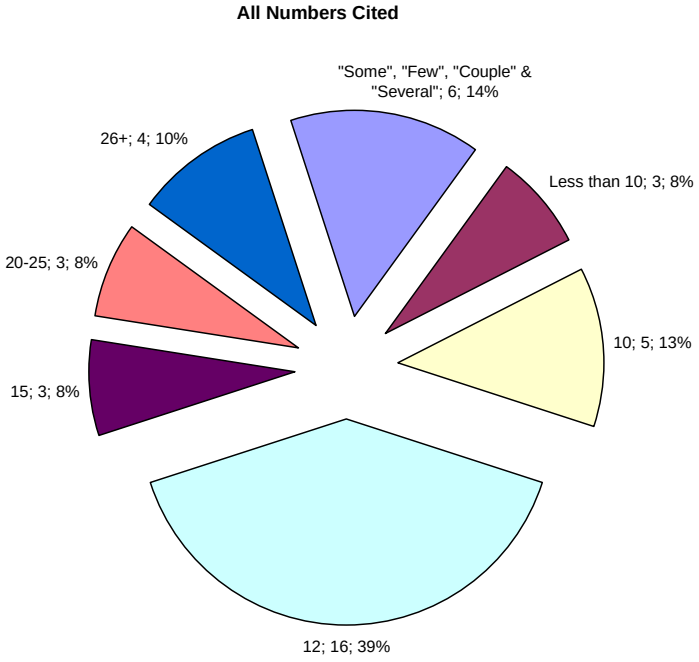
Such incorrect representations include not only statements made by Mr. Dell'Orto to the Senate Armed Services Committee, but also statements made by former Secretary of Defense Donald Rumsfeld, who stated on January 10, 2006 that twelve (12) detainees who had been released from Guantánamo had returned 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.[52]

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

[52] 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/tran script.aspx?transcriptid=3171 (July 8, 2005).
[64] Donna 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 Faryar 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/xarchives/display.html?p=washfile-english&y=2004&m=March&x=20040316162613maduobba0.2819483 (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/d20070712formergtmo.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 1

## 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**"<br><br>"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 |

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| | | | 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 |

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| 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 |

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| 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 |

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| 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 |

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| | | | 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 |

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|---|---|---|---|---|
| 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 | H.R. Subcomm. on Def. of the Comm. On Appropriations, *Rep. John P. Murtha Holds a Hearing of the Military Detention Center at Guantánamo Bay, Cuba*, 110th Cong. (May, 9, 2007). |
| 2 | H.R. Subcomm. on Def. of the Comm. On Appropriations, *Rep. John P. Murtha Holds a Hearing of the Military Detention Center at Guantánamo Bay, Cuba*, 110th Cong. (May, 9, 2007). |
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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-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 4

Unclassified

**Combatant Status Review Board**

TO: Personal Representative

FROM: OIC, 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 Ghardez. 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.

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