AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. HRG. 110–900

THE LEGAL RIGHTS OF GUANTÁNAMO DETAINEES: WHAT ARE THEY, SHOULD THEY BE CHANGED, AND IS AN END IN SIGHT?

HEARING

BEFORE THE

SUBCOMMITTEE ON TERRORISM,
TECHNOLOGY AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

DECEMBER 11, 2007

Serial No. J–110–66

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
53–355 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00001 Fmt 5011 Sfmt 5011 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

COMMITTEE ON THE JUDICIARY

PATRICK J. LEAHY, Vermont, *Chairman*

EDWARD M. KENNEDY, Massachusetts	ARLEN SPECTER, Pennsylvania
JOSEPH R. BIDEN, JR., Delaware	ORRIN G. HATCH, Utah
HERB KOHL, Wisconsin	CHARLES E. GRASSLEY, Iowa
DIANNE FEINSTEIN, California	JON KYL, Arizona
RUSSELL D. FEINGOLD, Wisconsin	JEFF SESSIONS, Alabama
CHARLES E. SCHUMER, New York	LINDSEY O. GRAHAM, South Carolina
RICHARD J. DURBIN, Illinois	JOHN CORNYN, Texas
BENJAMIN L. CARDIN, Maryland	SAM BROWNBACK, Kansas
SHELDON WHITEHOUSE, Rhode Island	TOM COBURN, Oklahoma

BRUCE A. COHEN, *Chief Counsel and Staff Director*
MICHAEL O'NEILL, *Republican Chief Counsel and Staff Director*

SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND HOMELAND SECURITY

DIANNE FEINSTEIN, California, *Chairman*

EDWARD M. KENNEDY, Massachusetts	JON KYL, Arizona
JOSEPH R. BIDEN, JR., Delaware	ORRIN G. HATCH, Utah
HERB KOHL, Wisconsin	JEFF SESSIONS, Alabama
CHARLES E. SCHUMER, New York	JOHN CORNYN, Texas
RICHARD J. DURBIN, Illinois	SAM BROWNBACK, Kansas
BENJAMIN L. CARDIN, Maryland	TOM COBURN, Oklahoma

JENNIFER DUCK, *Chief Counsel*
STEPHEN HIGGINS, *Republican Chief Counsel*

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00002 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

WITNESS

QUESTIONS AND ANSWERS

SUBMISSION FOR THE RECORD

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00003 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00004 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

THE LEGAL RIGHTS OF GUANTÁNAMO DETAINEES: WHAT ARE THEY, SHOULD THEY BE CHANGED, AND IS AN END IN SIGHT?

TUESDAY, DECEMBER 11, 2007

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND HOMELAND SECURITY
Washington, D.C.

The Committee met, pursuant to notice, at 10:03 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Dianne Feinstein, Chairman of the Committee, presiding.

Present: Senators Feinstein, Durbin, Cardin, Graham, Sessions, and Kyl.

OPENING STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Chairman FEINSTEIN. The meeting will come to order.

I know there are people in this room that have very strong feelings on a number of different subjects. I would request that you be respectful, that signs not block anyone's view, and that there be no comments made. We would appreciate that.

This is a serious hearing and we are dealing with a very serious subject, and so we would appreciate everybody's cooperation. You're welcome to attend. We are delighted that you care, but please be respectful.

And I'll begin with a brief statement, call on my ranking member, and then we will proceed.

Thirteen hundred miles south of Washington, in Guantánamo Bay, Cuba, the United States has built a detention facility to hold and interrogate suspected terrorists and other enemy combatants.

Detainees were brought to Guantánamo beginning in January of 2002. Seven hundred and fifty-nine detainees have been held there. About 454 have been released or have died, four from apparent suicides. As of last week, 305 detainees remain.

Of those, we understand approximately 60 to 80 have been cleared for release, but are still being held because of difficulties of sending them elsewhere. Only four detainees have been formally charged and it is reported that the Defense Department plans to prosecute another 60 to 80 detainees.

The administration has repeatedly called those individuals at Guantánamo "the worst of the worst," and there are bad people there. However, one of today's witnesses, Professor Denbeaux, has issued reports that challenge this assertion.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00005 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

This facility was established following a December 2001 Office of Legal Counsel memo co-written by John Yoo that examined whether Guantánamo might be turned into a legal hybrid, wholly under United States control, but beyond the reach of the United States courts.

The administration lawyers' theory was that since Guantánamo is not part of the territorial United States, the normal legal strictures could be avoided. However, once turned into a reality, this new facility has come under criticism, been the subject of many court challenges, and has harmed our nation's standing abroad.

For a period of more than 30 months, the Bush administration continued to hold these detainees at Guantánamo, without providing them with any additional judicial or administrative review of their detentions.

In June 2004, in *Rasul* v. *Bush*, the Supreme Court ruled that the reach of the U.S. courts did extend to Guantánamo and the prisoners held there. After that ruling, the executive branch granted the detainees some administrative review, although this process, too, has been criticized.

All detainees were given a combatant status review tribunal or a CSRT hearing. This was a one-time hearing to evaluate whether they were properly classified as an enemy combatant. Detainees were also given an annual review before an administrative review board, but this did not examine if their detention was lawful.

Instead, the validity of each detention was assumed and the review process only allowed each detainee to argue that he no longer constitutes a threat.

For the remaining limited number of detainees, they were to be tried by military commissions. However, the procedures initially put in place for those commissions by the administration were eventually struck down as inadequate by the Supreme Court in the Hamdan decision. The court ruled that the trials at Guantánamo had to be based on statute.

This led the Congress to pass, last fall, the Military Commissions Act. I voted against this legislation because it allowed hearsay evidence, created a separate and lesser system of justice, and also eliminated the right of habeas corpus for all of Guantánamo's detainees.

The 60 to 80 detainees that the department intends to try will be put through the military commission process, although when those hearings will take place is unknown.

Now, it is six years after the first detainees were brought to Guantánamo and the administration still has not yet tried a single detainee, not in any U.S. criminal court and not by the military commissions, and only one detainee, David Hicks, has pled guilty.

In addition, new concerns have been raised about the legal rights given to Guantánamo detainees, not just by outside scholars, but by the very military officers who personally participated in the process.

In fact, over the last few months, several military officers have publicly raised concerns about the procedures now in place. First, Lieutenant Colonel Stephen Abraham, who served on the review board in the CSRT process, has said the DOD pressured him and others on the CSRT review boards to rehear a case and explain,

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00006 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

"what went wrong," when the CSRT issued a decision that one of the detainees should not be classified as an enemy combatant.

Lieutenant Colonel Abraham also complained about the evidence being presented to the CSRT in order to determine detainee status. He said it was often generic, outdated, incomplete, and that no controls were in place to ensure that evidence of innocence was being disclosed; and second, the Defense Department's chief prosecutor, Colonel Morris Davis, has recently resigned over his concerns about how the military commissions process has been politicized.

Colonel Davis was previously one of the staunchest defenders of Guantánamo. Colonel Davis has written a op-ed in the "New York Times" and an article for the Yale law journal this year arguing that he and his prosecutorial staff at DOD could prove the critics wrong by holding full and fair trials at Guantánamo that would live up to the standards of American and international justice.

But on October 4 of this year, Colonel Davis resigned from his position, after concluding that full, fair and open trials were unlikely at Guantánamo. Colonel Davis has stated to me yesterday that the convening authority, which is supposed to be independent and perform certain evaluations, has been compromised and politicized.

Colonel Davis has stated to DOD and publicly that the prosecution process has been politicized, that the convening authority and its legal advisor would direct the prosecutions' pre-trial preparation, including directing the office about what evidence to use, what charges to file, and that his efforts to ensure that the military commissions would be open and fair were being overridden by administration officials who believed it was more important to get convictions before the 2008 elections.

As Colonel Davis told the Washington Post on October 20, this is a quote, "There was a big concern that the election of 2008 is coming up. There was a rush to get high interest cases into court at the expense of openness."

I invited Colonel Davis to testify at this hearing. However, the Defense Department has ordered him not to appear. That, indeed, is very disappointing.

We assured the administration that Colonel Davis would not be asked about pending and open cases, but we were told simply that Colonel Davis was active duty military and because he was active duty military, they could issue an order that he had to follow.

I think this is a real shame that we will not have Colonel Davis as a witness today. I think he has an important perspective. I wish the administration would allow him to appear.

Unfortunately, I have to conclude that by prohibiting Colonel Davis from testifying, the administration is trying to stop a fair and open discussion about the legal rights of detainees at Guantánamo.

Clearly, the concerns that have been raised by Lieutenant Colonel Stephen Abraham and Colonel Morris Davis need to be discussed and evaluated. I believe there also needs to be an examination of what is happening at Guantánamo, why cases are not being prosecuted, what needs to be done with detainees who can't be charged and what legal rights should all detainees be afforded.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00007 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

That is the purpose of this hearing. I look forward to hearing from the witnesses and am very pleased that my ranking member, somebody I've worked with on this committee now for about 12 years, is that fair to say?

Senator KYL. Yes, 13.

Chairman FEINSTEIN.—13 years, is here today and I turn it over to you, Senator Kyl.

STATEMENT OF HON. JON KYL, A SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you very much, Madam Chairman, and I appreciate your interest and the questions that you posed and hope and trust that some light will be shed on them in today's hearing.

At least 30 detainees who have been released from the Guantánamo Bay detention facility have since returned to waging war against the United States and its allies. A dozen released detainees have been killed in battle by U.S. forces, while others have been recaptured.

Two released detainees later became regional commanders for Taliban forces. One released Guantánamo detainee later attacked U.S. and allied soldiers in Afghanistan, killing three Afghan soldiers. Another has killed an Afghan judge. One led a terrorist attack on a hotel in Pakistan and also led to a kidnapping raid that resulted in the death of a Chinese civilian.

This former detainee recently told Pakistani journalists that he plans, and I'm quoting now, "to fight America and its allies until the very end."

The reality is that this nation needs to be able to detain those active members of Al Qaida and related groups whom it captures. Releasing committed terrorists has already resulted in the deaths of allied soldiers and innocent civilians and may very well someday result in the deaths of U.S. servicemen. Such a result would be unacceptable and the possibility of such result must always be kept in mind when we consider the kinds of rights that should be extended to these detainees.

A detention regime for terrorists whom we intend to detain until the end of hostilities should seek to weed out mistakes, but it must also be designed in a way that also protects our nation's legitimate interests. Extending the civilian habeas litigation regime to unlawful war prisoners is problematic, among other things, because detainees will demand access to classified evidence.

In the civilian habeas system, a detainee would have a presumptive right of access to such evidence. The government could seek to redact portions of the evidence or summarize it, but in the end, it must provide the defendant with the substance of the evidence. If it can't do so, if revealing the substance of the evidence compromises a unique source, then the government simply can't use the evidence.

As difficult as the problems with classified evidence have occasionally proven in criminal trials, they would be greatly exacerbated in proceedings involving Al Qaida detainees. Much of the information that we obtain about Al Qaida and its members comes from our most sensitive sources of intelligence.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00008 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

For example, much information has been provided to the U.S. by various Middle Eastern governments. These governments are often afraid of Al Qaida or radicalized elements of their own populations, and they don't want anybody to know that they're helping us fight Al Qaida.

Often, these governments provide information to the U.S. only on the condition that it not be disseminated outside of the U.S. intelligence community. If we suddenly were required in a detainee litigation proceeding to reveal to a detainee and his lawyer that we had obtained particular information from one of these governments, we would badly damage our relations with that government and could lose access to an invaluable source of intelligence about Al Qaida.

The same problems arise with certain technological sources of intelligence or with regard to particular human sources and there is no simple solution to redaction or summarization of the evidence.

Oft times, the most important types of intelligence are sui generis and revealing the nature of the evidence reveals its source. These types of problems would arise again and again in enemy combat litigation and would repeatedly present the United States with a Hobson's choice—either damage a valuable intelligence source that could provide information about future Al Qaida attacks or release a committed Al Qaida member.

This is not a choice that the United States should be forced to make.

Another question that immediately arises when contemplating the extension of litigation rights to Al Qaida detainees is where does it end. The United States is holding 800 detainees at Bagram airbase in Afghanistan and tens of thousands in Iraq. If the Guantánamo detainees can sue, why shouldn't these detainees be allowed to sue, as well? After all, the U.S. military's absolute control over Guantánamo is really no greater than its control over any other U.S. military base anywhere in the world.

If this is a matter of principle, it should have applied in past wars. The U.S. detained over two million enemy war prisoners during World War II, including 400,000 who were held inside the United States. Should they have been allowed to sue in U.S. courts? Would there have been enough lawyers in the United States to handle the litigation?

At the very least, we should be able to agree that we should not extend greater rights and privileges to combatants who violate the rules of—the laws of war, including terrorists, than we do to those who obey the laws of war.

The Guantánamo debate poses many difficult questions, questions that remain unresolved in light of the Supreme Court's most recent foray into the area.

I look forward to testimony from today's witnesses and hope that, as the chairwoman said, it can shed light on some of these important questions.

Chairman FEINSTEIN. Thank you very much, Senator Kyl.

Senator Cardin, it's my understanding you'd like to make an opening statement.

STATEMENT OF HON. BENJAMIN CARDIN, A SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. Thank you, Madam Chair. And I'm going to ask that my entire written statement be made part of the record.

Chairman FEINSTEIN. So ordered.

Senator CARDIN. And just let me summarize very quickly.

The original purpose for why detainees were transferred to Guantánamo Bay from Afghanistan over five years ago was for us to be able to obtain intelligence information from the detainees that would be very important to protect the safety of the people of our nation. That was its original purpose.

In doing this, we made major mistakes. The first was that we did not, the administration would not allow those that were sent to Guantánamo Bay to challenge their status. Ultimately, the courts intervened and that was changed.

We never reached out to the international community to seek their understanding as to what we were trying to do in Guantánamo Bay. That was also a mistake.

It's hard to understand that after five years, that the people at Guantánamo Bay that are being detained have significant intelligence value as far as what we can obtain through interrogation.

They should be brought to justice. They should be brought to justice consistent with the values embedded in our criminal justice system that we're so proud about.

Madam Chair, I must tell you that I wear another hat and that is the co-chair of the Helsinki Commission and in that capacity, I represent the Congress at international meetings, and there has been no issue, no issue that's been brought up more in, I guess, disappointment in the United States and the manner in which Guantánamo Bay has been handled and the total disregard for the international community in that respect.

I want to thank you for conducting this hearing, because as the courts have said, the Congress has a responsibility to determine the framework in which the detainees at Guantánamo Bay are to be brought to our criminal justice system and I thank you for holding this hearing and I hope that we will be able to get some answers.

I am disappointed that we were not able to get the full cooperation of the administration on the witnesses before our committee. I think that's wrong, it's disappointing. And I look forward to working with you as we try to craft a proper response to the current situation that we find ourselves in.

Thank you.

Chairman FEINSTEIN. Thank you very much, Senator Cardin.

Senator SESSIONS. Madam Chairman.

Chairman FEINSTEIN. Yes, Senator Sessions.

Senator SESSIONS. Just briefly. When you say they should be brought to justice, if that means that captured prisoners of war have to be tried, then I don't agree. Prisoners of war are not tried. They are detained until hostilities end.

We know that a number of those that have been improvidently released, as Senator Kyl has noted, have attacked us again. These are people who are dedicated to the destruction of America. Many of them are.

I wish it were not so. I wish it were not so. I wish that we could release these people. I wish that we could not have to have detention of those who are waging war against the United States and our allies, but we must do so, unfortunately, and we cannot create that—transform military detention of prisoners of war, even unlawful combatants who don't comply with the war, into trials.

I think it's appropriate that the military pick and choose what are the appropriate cases to try first. I don't see anything wrong with that.

Thank you, Madam Chairman. I look forward to the hearing.

Chairman FEINSTEIN. Thank you, Senator Sessions.

We'll now turn to the panel, the two witnesses.

Brigadier General Thomas W. Hartmann has served since July of 2007 as the legal advisor to the convening authority of the Department of Defense Office of Military Commissions. He is responsible for providing legal advice to the convening authority regarding referral of charges, questions that arise during trial, and other legal matters concerning military commissions. His duties also include supervising the convening authority legal staff.

Steven Engel, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, is the second witness. Since February of 2007, Mr. Engel has served as a deputy assistant attorney general in the Office of Legal Counsel, where he has provided legal advice to the executive branch on a variety of matters, including the detention and prosecution of enemy combatants, treaties and congressional oversight. Mr. Engel also serves as co-chair of the President's Task Force on Puerto Rico's Status.

Gentlemen, we welcome you and we'll begin with General Hartmann.

STATEMENT OF BRIGADIER GENERAL THOMAS W. HARTMANN, LEGAL ADVISER TO THE CONVENING AUTHORITY, OFFICE OF MILITARY COMMISSIONS

Mr. HARTMANN. Good morning, Senator Feinstein.

Chairman FEINSTEIN. General, before you proceed, I'm going to have seven-minute rounds. So if you could confine your testimony to that period of time, and we will do the same.

Mr. HARTMANN. Okay.

Chairman FEINSTEIN. Thank you.

Mr. HARTMANN. Thank you, Senator Feinstein, Senator Kyl, Senator Sessions, Senator Cardin.

I'll ask that my testimony just be made part of the record and I won't read that into the record, but I thought that it would be useful for the subcommittee to see the rights that are described in the testimony in a reality.

And if you had been at Guantánamo Bay on the 5th and 6th of December, during the continuation of the *United States* v. *Hamdan* case, you would have seen the following when you walked into the courtroom on Guantánamo Bay.

You would have seen an accused who was in a tie and a coat and he had headphones on his head as he was listening to a live translation of his testimony—not his testimony, but the testimony and the statements of the court during his continued trial. So he was hearing it in his native language.

Sitting next to him was a translator, between him and five counsel who were at his table. He had a detailed military defense counsel, a detailed civilian defense counsel, two counsel from a distinguished law firm in the United States, and a counsel who is a professor at Emory University. Five counsel at his table.

Behind him was a U.N. observer, Mr. Scheinin, as well as five members of the press and five nongovernmental organizations, the ACLU, the American Bar Association, Human Rights Watch, Human Rights First, among others.

The press were limited to five in the courtroom. There's an overflow building that we have for the press. So there were other press, domestic and international press in that location, as well.

In the Khadr hearing that had occurred approximately a month before that, there were 30 members of the press and, over the period of times that we've handled the commissions in the last several months, more than 100 press people have attended these hearings.

Also present in the courtroom were military prosecutors, a Navy officer, an Army officer, and a member of the Department of Justice. Pivotal to that process was a uniformed officer, a military judge, who has more than approximately 30 years of service in the United States Navy.

The judges come from all the uniformed services. This judge was from the Navy. He wore a black robe and he presided over the hearing.

The accused was allowed to remain silent, because that's his right. The accused and his counsel were allowed to cross-examine witnesses presented by the government, because that is his right.

The accused was allowed to call witnesses for the first time in this hearing, because that is his right. The accused was allowed discovery and the accused was allowed to seek witnesses who he said were exculpatory, even to the point that the convening authority, at 10 o'clock on the night of the first hearing, granted immunity to that witness so that that exculpatory evidence, whatever it was, could be given.

Those are the rights you would have seen in that courtroom.

If the accused is found guilty, he will have a right that no one else has in the United States or in any other court, and that is a right of automatic appeal to the Court of Military Commission Review. That is a right that is similar to the rights that we give to our uniformed soldiers, but no other civilian has that right.

He will also have the right to have his findings, if he's found guilty, and his sentence reviewed by the convening authority, impartially, impartially, and she alone will be able to reduce the sentence or adjust the findings downward, not upward, downward, a right that doesn't exist anywhere on earth except in the Uniform Code of Military Justice and in this system.

If you had risen early in the morning that day, you would have seen a silhouette of a military member from the Air National Guard of Puerto Rico with a dog, walking across the top of the building, protecting our soldiers, sailors, airmen and the members of that tribunal from bombs.

There were approximately 60 members of the Puerto Rican National Guard defending and protecting that proceeding. And the

place that I saw that silhouette from was what we call Tent City or Camp Justice, which is the location of the new expeditionary legal conference, and that complex is being built by the Indiana Air National Guard and several other Air National Guard units from around the country.

That complex is designed to be ready about March 1 to deal with classified information and other things and your soldiers, sailors and airmen are doing a magnificent job in not simply describing the rights that are in the manual for military commissions or in the Military Commission Act, but effectuating them and bringing them to reality for alleged war criminals.

Thank you, ma'am.

Chairman FEINSTEIN. You've concluded?

Mr. HARTMANN. Yes, ma'am.

Chairman FEINSTEIN. Thank you very much. Appreciate it.

Mr. Engel.

STATEMENT OF STEVEN ENGEL, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. ENGEL. Thank you, Chairwoman Feinstein, Ranking Member Kyl, Senator Sessions, Senator Cardin. I appreciate the opportunity to appear here today to discuss the legal rights of the enemy combatants detained at Guantánamo Bay.

General Hartmann outlined a series of the rights that the accused in the military commission is enjoying and will enjoy as those prosecutions go forward.

I'd like to take this time with remarks to talk about the legal rights with respect to detention, because these are issues that have been developed over the course of a number of years that represent the joint action of the executive branch and Congress with the guidance of the Supreme Court, and, of course, that guidance we expect will continue with the Boumediene decision.

As the subcommittee is well aware, the United States is currently engaged in an armed conflict with little precedent in our history. Like past enemies, the attacks of September 11 demonstrated that Al Qaida and its allies possess both the intention and the ability to inflict catastrophic harm on this nation.

These terrorist enemies, however, show no respect for the law of war. They do not wear uniforms and they seek to achieve their goals through covert and brutal attacks on civilians rather than by directly engaging our armed forces.

Although the law of war is based fundamentally upon reciprocity, the unconventional nature of our enemies, including their refusal to distinguish themselves from the civilian population, has perhaps paradoxically resulted in our providing the Guantánamo detainees with an ever increasing set of rights so as to assure ourselves that those detained at Guantánamo, in fact, pose a continuing threat.

And, again, to be clear, this is a strength of our system. This reflects our commitment to the rule of law. But it is a strength that must be reconciled with the need to vigorously prosecute this armed conflict and defend our nation against future attacks.

The Subcommittee conducts this hearing less than one week after the Supreme Court heard oral argument in the Boumediene

case. That case, again, will no doubt shed considerable light on the scope of the detainees' rights.

In Boumediene, the D.C. Circuit upheld Congress' authority to restrict the availability of habeas corpus, as it had done under both the Detainee Treatment Act and the Military Commissions Act passed last year.

There is no doubt that the writ of habeas corpus represents a fundamental protection under our law, but the writ is fundamentally tailored for peacetime circumstances. The Constitution specifically grants Congress the authority to suspend the writ, even for American citizens, during times of rebellion or invasion.

In the nearly 800 years of the writ's existence, no English or American court has ever granted habeas relief to an alien prisoner of war.

Although the Detainee Treatment Act restricted the availability of habeas, it did not leave the detainees without a day in court. Rather, the act provides that the detainees, after receiving fair hearings before the Combatant Status Review Tribunals that the Department of Defense has set up, can further seek review of those decisions at the D.C. circuit.

These CSRT procedures, as we call them, were themselves established to go beyond the requirements of the Geneva Conventions, the requirements owed to lawful prisoners of war, and, as well, to provide the Guantánamo detainees with the due process that the Supreme Court, in *Hamdi* v. *Rumsfeld*, held appropriate for American citizens who choose to fight for the enemy and are subsequently detained.

The Detainee Treatment Act, though, goes even further than those procedures and provides the D.C. Circuit with jurisdiction to review those CSRT decisions. This is a right of civilian judicial review that is virtually unprecedented during wartime.

The D.C. Circuit can consider all available constitutional and statutory arguments and it can ensure that the CSRT followed its own procedures, including the requirement that a preponderance of evidence supports the CSRT decision. The DTA review process would constitute an adequate and effective alternative to habeas corpus, even if the detainees could claim such a right under our Constitution.

Still, the DTA procedures are more properly adapted than habeas corpus to the circumstances surrounding military detentions. As I noted, extending habeas to Guantánamo would be unprecedented and, lacking precedent, it would raise a host of serious questions as to how habeas might apply.

For example, would we be required to bring the detainees into the United States to participate in habeas hearings? What rules of discovery would govern such proceedings? Could the detainees, for example, compel a United States soldier to return from Afghanistan or Iraq in order to appear and testify at such a hearing? And perhaps most seriously, would the detainee have the right to review classified evidence such that the United States might be forced to choose between disclosing vital intelligence to the enemy or actually releasing members of Al Qaida?

The Department of Justice, no doubt, would argue for answers in any of these cases that would minimize their intrusion on our war

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00014 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

fighting effort, but we can be equally assured that detainees' counsel would argue zealously on the other side.

It is our hope that we will not need to answer these questions about how to apply habeas to a wartime situation, because the DTA procedures themselves provide a robust process that would be a constitutionally adequate alternative to habeas corpus, should the detainees be entitled to such rights.

In sum, the existing system reflects a careful and appropriate compromise between the needs of military operations and our commitment to the rights of the detainees. This system has been worked out between the political branches, fully consistent with existing judicial precedent, and we hope will be upheld by the Supreme Court in its decision in Boumediene.

Thank you, Senator Feinstein, Ranking Member Kyl and members of the subcommittee, and I look forward to answering your questions.

Chairman FEINSTEIN. Recognizing Senators, it will be myself, Senators Kyl, Cardin, Sessions and Durbin.

Colonel Davis, General Hartmann, has also said that he directed his office not to use evidence obtained from or in connection with enhanced coercive interrogation techniques, specifically water boarding.

What is the current status of this issue?

Mr. HARTMANN. Ma'am, with regard to that, as a general matter, a prosecutor is not authorized and should not discuss matters of deliberation and how he's going to proceed with a trial in public.

However, since Colonel Davis brought this matter to the public, the issue is very clear. As a matter of policy and as a matter of law, torture is prohibited under U.S. law. Statements obtained by torture are prohibited from being used in these commission proceedings.

As to other enhanced techniques and coercive techniques that might be used in connection with gathering evidence, that is the purpose for which the Military Commissions Act was created. That's why we have a judge in the courtroom. That's why the accused has the right to a defense counsel. That's why there are prosecutors, ma'am, and discovery.

Those people will assess the facts and apply them to the law as it exists in the United States and as it applies to the commissions, and that's the rule of law, not for me to make a decision about that in abstraction.

Trials, commission proceedings are 90 to 95 percent facts and you apply the law to those facts. So to answer that in abstract is, number one, inappropriate and anything dealing with the discretion of a prosecutor is inappropriate to be dealt with in public.

Chairman FEINSTEIN. So I understand from the answer to the question that evidence obtained from water boarding is not being used to prepare cases.

Mr. HARTMANN. No, ma'am, I didn't say that.

Chairman FEINSTEIN. Well, will you repeat what you did say?

Mr. HARTMANN. Yes, ma'am, I will say that. The evidence that we are gathering is the evidence that we are gathering. Whatever the methods that have been used to gather that evidence will be evaluated in connection with the law and in the trials.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00015 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

It can't be defined in an abstract way like that, ma'am.

Chairman FEINSTEIN. All right. So I understand it's a non-answer to my question.

Is evidence from other enhanced coercive interrogation techniques being used?

Mr. HARTMANN. Ma'am, I can't answer that either, because these are ongoing trials and it's completely inappropriate for anyone associated with the preparation of cases or any kind of prosecution to prejudge those or to discuss those in the public.

It's very critical that those involved in a prosecution effort have the ability to discuss those behind closed doors so that they can give unvarnished, unbiased, bark-off-the-tree opinions about the right answer.

Chairman FEINSTEIN. One last question on that subject.

Do you agree that evidence obtained from water boarding is unreliable and should not be used?

Mr. HARTMANN. Ma'am, again, the issues that deal with that are fundamentally based on reliability and probativeness of evidence and the question that will be before the judge when that comes up is whether the evidence is reliable and probative and whether it's in the best interest of justice to introduce the evidence.

That is the rule of law, ma'am. That is the rule of evidence. That is the rule of law and the rule of evidence that is supported by the Military Commission Act that the legislature passed.

Chairman FEINSTEIN. So in other words, if you believe you can prove something from evidence derived from water boarding, it will be used.

Mr. HARTMANN. If the evidence is reliable and probative and the judge concludes that it is in the best interest of justice to introduce that evidence, ma'am, those are the rules we will follow. Those are the rules we must follow.

Chairman FEINSTEIN. How is that presented to the judge?

Mr. HARTMANN. How is?

Chairman FEINSTEIN. How is that issue presented to the judge in the—

Mr. HARTMANN. Well, the prosecution—

Chairman FEINSTEIN. —course of the trial?

Mr. HARTMANN. I'm sorry. The prosecution will raise the issue, because the prosecution will be presenting the evidence or the defense will file a motion to exclude the evidence, and then the parties will deal with that motion and debate it.

Chairman FEINSTEIN. I see. Did you, the convening authority or anyone discuss the need to move quickly on cases because of upcoming elections?

Mr. HARTMANN. No, ma'am, I did not.

Chairman FEINSTEIN. That was never discussed.

Mr. HARTMANN. Absolutely not, ma'am.

Chairman FEINSTEIN. Would you agree that military commission trials should be open, if possible?

Mr. HARTMANN. Yes, ma'am, absolutely. I fully support, and so does everyone on the commission process fully support the value of having open trials and open presentations. We have moved mountains to try to get the press there, the nongovernmental organizations there, and we endeavor to do that.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00016 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

However, there will be circumstances in which classified evidence must be used to move forward on the cases and in those limited sets of circumstances, it will be necessary to close the trial to allow the evidence to come in.

Let me make one clarification, which often gets in the newspaper, which is inaccurate and that refers to the word "secret" trials. There will be no secret trials. There is no mechanism for a secret trial.

Every piece of evidence, every form of evidence, every type of evidence that will go before the jury will be seen by the accused and his counsel, subject to cross-examination, subject to review.

There will be no evidence that is used on a finding of guilt or innocence or a sentence that the accused does not have the right to see, object to and challenge.

Chairman FEINSTEIN. Thank you. I think that's helpful.

In April 2004, DOD issued a press release saying that it was taking the general counsel out of the chain of command over the chief prosecutor to help ensure independence of the military commissions process.

That was an important gesture, because it took any political aspect out of the chain of command. This was done under Military Commission Instruction No. 6.

Then on October 3, 2007, this position was reversed and new orders were issued, putting the chief prosecutor under the legal advisor to the appointing authority, the deputy general counsel and the general counsel.

So in just a few months, you took out any opportunity for there to be civilian political influence and then, three months later, you put that back.

Why was this change made?

Mr. HARTMANN. Ma'am, the fundamental principle of law in this country with regard to the military is civilian control over the military. So that's no surprise and it is fundamental.

With regard to the change that you refer to as occurring on October 4, the chief prosecutor always reported to the legal advisor. That's no change.

The change was with regard to where I reported. I had no reporting official at that time and one of the recommendations of the Tate investigative group was that that be clarified. And so the formal designation of my supervisor became one of the deputy general counsel within the Office of the General Counsel.

That didn't change anything, in reality, ma'am, and this is important. The person that was the deputy general counsel before that was the person who was also the deputy general counsel after that. I talked to that person regularly, every day. So did Colonel Davis. It was a very common form of association, a very common source of getting information and an understanding of the law and counsel.

There was no change, ma'am, before October 3 or after October 3 and there has been no political influence on this effort.

If there has been an effort to increase the speed of the trials, the effort to improve the performance, an effort to improve the execution in the trials process, it has been my effort and no one has directed me in that regard.

Chairman FEINSTEIN. Thank you very much. My time is up.

Senator Kyl.

Senator KYL. Thank you, Senator Feinstein.

First, General Hartmann, are you aware of any war crimes tribunal ever, any U.N. tribunal, the Nuremberg tribunals, or any other past or present U.S. or international war crimes tribunal that has ever provided as much due process to alleged war criminals as has the current U.S. Military Commission Act trials?

Mr. HARTMANN. Senator, the rights that are provided under the Military Commissions Act and the Manual for Military Commissions are absolutely unprecedented in their generosity and benevolence to the accused.

Senator KYL. Mr. Engel, I understand that Professor Denbeaux, one of the witnesses on the second panel at today's hearing, will release a study today that discounts or downplays the evidence that some Guantánamo detainees whom we've released have again taken up arms against the United States. You might have heard me detail a whole series of cases in which that has occurred.

What unclassified information can you provide about released detainees who have returned to waging war against the United States?

Mr. ENGEL. Sure. Thank you, Senator.

I haven't had the chance, obviously, to closely review the study of Professor Denbeaux, which I understand relies upon only the materials that have been publicly released and not the extensive classified information that the Department of Defense has.

I understand, in terms of publicly, the Department of Defense has said that upwards of 30 detainees who have been released from Guantánamo Bay have returned to various theaters in order to continue to wage jihad, often against American forces or our allies in Afghanistan or Pakistan.

Among these individuals, the individual the department disclosed, a man named Mullah Shahzada, who assumed control of Taliban operations in southern Afghanistan after he was released. Another was Abdullah Mehsud, who became a militant leader in southern Waziristan.

Taliban regional commander, another individual who was reported by Al Jazeera, he appeared and asserted that he was the deputy defense minister of the Taliban and he discussed defensive positions of the mujahideen and claimed that he had recently been involved in the downing of an airplane.

DOD has specifically discussed upwards of seven detainees and they've sorted asserted that there are 30 others that are out there and this just shows that we have to be very careful with respect to the individuals detained at Guantánamo Bay.

Contrary to popular myth, the ticket to Cuba is not a one-way ticket. We have released over half of the folks who have ever been there and the United States continues, where possible, consistent with our national security, consistent with our obligations to ensure that detainees who are released will be humanely treated in the country to which they are returned.

We have continually been releasing detainees throughout the process and no process is perfect and these folks are evidence that sometimes we make mistakes and these mistakes can be costly.

Senator KYL. Just in round numbers, the number of people who have been released who were originally taken, held for a period and then released, what is that number, approximately?

Mr. ENGEL. Well, with respect to Guantánamo, the United States has detained upwards of 10,000 detainees in Iraq and Afghanistan over time. About 755, I believe the chairwoman quoted 759, have been brought to Guantánamo and something like 455 or so have been released. We currently have about 305 there.

Senator KYL. General Hartmann, back to the question I asked you originally. Let's go down some of the specific kinds of rights.

Did the Nuremberg tribunals apply a presumption of innocence to the Nazi war criminals who were tried before those tribunals?

Mr. HARTMANN. No such presumption existed, Senator.

Senator KYL. Did those tribunals limit the types of evidence, like hearsay evidence or evidence obtained in coercive circumstances, that it could consider when it found a particular piece of evidence to be probative and otherwise inclined to consider it?

Mr. HARTMANN. There were no rules of evidence and virtually any evidence was freely admitted.

Senator KYL. Did those tribunals allow any judicial review whatsoever of their verdicts?

Mr. HARTMANN. No, sir. And that was painfully apparent to those who were found guilty and received the death penalty. They were hung within hours and days of the completion of the sentence announcement.

Senator KYL. Mr. Engel, let me ask you what effect the initial Rasul decision had on interrogation of Al Qaida detainees held at Guantánamo? This, of course, permitted a statutory habeas type of litigation.

Mr. ENGEL. Sure. Well, I mean, I think we have often quoted statements of Michael Ratner from the Center for Constitutional Rights, who is an attorney for the detainees, who boasted that interrogation and any kind of effective interrogation is impossible once the detainee has regular access to a lawyer.

Any expert on interrogation will tell you that one of the keys to successful interrogation is a rapport between the interrogator and the subject. Any good attorney who is able to come in and represent a client is going to come in and shut that down as soon as possible.

So, again, the access to attorneys, which, of course, there is access to attorneys in many of the existing processes, but they do come at real costs to the effectiveness of our interrogations.

Senator KYL. If habeas rights were extended to Guantánamo detainees, would they be allowed to subpoena U.S. soldiers and potentially recall them from the battlefield so that they could be cross-examined by the detainee's lawyers?

Mr. ENGEL. Well, I think that would be a very serious question. As I mentioned in my opening statement, extending the peacetime notions of habeas corpus to military prisoners is unprecedented and there would be serious concerns that the detainee, asserting a right to compulsory process, would be able to require a soldier to come back from the battlefield.

We, of course, in the Department of Justice, would argue that that should not be required, but I'm sure there would be a vigorous debate over it.

Senator KYL. That, of course, is one of the things Justice Jackson warned about in the decision, at least up to now, that had been the primary U.S. decision in the matter.

Incidentally, I understand you clerked for Justice Kennedy. I'm tempted to ask you what you think he might do in the Boumediene case, but I'll refrain from doing that.

Mr. ENGEL. I appreciate that.

Senator KYL. I don't think that would be prudent.

Let me just ask one final question here. If litigation rights were extended to these detainees and they were given a right of—well, would they be given potentially access to classified materials?

What kind of problems would that create or would the request by their lawyers to gain access to that classified evidence create?

Mr. ENGEL. I think that's a big question and a big issue and really one of the biggest issues and the greatest difficulties that we have faced with respect to detaining individuals, with respect to the CSRT process, the DTA review process, the potential for habeas, and the military commissions process is how do we deal with the wealth of classified information that we have and we rely on and must protect in order to wage a war and, at the same time, provide some kind of adversarial process at times in which the detainees have the opportunity to confront the evidence against them.

And the CSRT process, with the DTA review, has developed what we think is a workable and a fair system, one grounded in familiar law of war principles.

As to alternatives as to something like traditional habeas, again, we would argue vociferously for limits on detainees' access to classified information. But CIPA rules require alternatives if you're not going to give individuals the actual evidence and it's not always easy to come by those alternatives.

So we would be very concerned over precisely that issue.

Senator KYL. I want to thank both of you for being here today and apologize in advance. I have a meeting at 11. I'm going to have to leave about five minutes before that and I wish I could be here for the remainder of your comments.

Thank you, Madam Chair.

Mr. ENGEL. Thank you, Senator.

Chairman FEINSTEIN. Thank you, Senator Kyl.

Senator Cardin.

Senator CARDIN. Thank you, Madam Chair.

General Hartmann, let me first make it very clear about the service of our people down at Guantánamo Bay. I've been to Guantánamo Bay and the men and women who are serving our nation there are serving with great distinction and protecting our country and in the methods that they are using in carrying out their responsibilities, and I have nothing but praise for the men and women who serve our nation.

My concern is that why we never sought the advice of the international community in the manner in which detainees were treated and decided to go to Guantánamo Bay.

This is unprecedented. It's the unlawful combatant circumstances. And, yet, we chose to do this on our own, without really working with the international community and but for the courts, there would have been no opportunity for those who were determined to go to Guantánamo Bay to have any type of a transparent process to decide whether they were appropriate to be at Guantánamo Bay or not.

I want to just, first, in regards to Senator Kyl's point, those who have been charged at Guantánamo Bay, are any of them charged with war crimes?

Mr. HARTMANN. They are charged with war crimes as defined in the Military Commissions Act.

Senator CARDIN. But not charged with international— Nuremberg, those were created under the auspices of the international community.

Is there any effort here to use the international community's definitions? My understanding is that David Hicks pled guilty to material support, that Mohammed Jawad is charged with attempted murder.

Am I wrong on those assumptions?

Mr. HARTMANN. You are correct in those.

Senator CARDIN. Thank you.

And, Mr. Engel, your point about wartime powers of the president and wartime powers generally that we have, my concern with that as relates to habeas corpus, and I disagree with your analysis on the habeas corpus burdens, I think that these individuals are basically criminals and that criminals have the right to habeas corpus.

But under the president's definitions of wartime powers, we're going to be at war during all of our lifetime. The war against terror is unlikely to have a definitive end.

I think that's just a dangerous interpretation of powers to say that we're going to deny those who are now entering our criminal justice system the ability at early stages, at this point, it's already very late, to have basic rights and I disagree with you on that.

I want to get back, though, to Chairman Feinstein's point on how cases are prepared.

General Hartmann, you raised a point in regards to how evidence will be determined. You point out, and rightly so, that evidence that is obtained by illegal means cannot be used in the trial, should be excluded, and you have acknowledged that torture is illegal under U.S. law.

My question to you is what process, if any, do you have in the development of a case to take a look at the methods that were being used to obtain evidence, to make an independent judgment, as a prosecutor, as to whether that evidence has been obtained lawfully or not?

Any competent state's attorney preparing a case will take a look at the evidence and see whether it is permissible to be used or not. What process have you developed within the military commissions to evaluate the legality of the information that's been obtained?

Mr. HARTMANN. Senator, that's an important question and it's a question that every prosecutor must ask himself or herself and it's a process through which they must go.

I am not going to describe that process to you in public. It's a process and it's a matter of judicial and prosecutorial discretion. They must have the privacy. They must have the behind-the-doors ability to evaluate the evidence and to look at it in an unvarnished way.

But for me to tell you in public, on the record, the process that they use would be completely inappropriate.

Senator CARDIN. Are you telling—

Mr. HARTMANN. But I assure you there is a process.

Senator CARDIN. And are you telling us that that process will exclude certain information because of the concerns about it being challenged?

Mr. HARTMANN. No, sir, I'm not telling you that. I am telling you that there is a process and that the obligation of the prosecution is to take the evidence through that process and to try to determine if they think it will be admissible or not and the reasons for which they think any particular piece of evidence will be admissible.

And if they intend to proceed with that, that issue will then be resolved in public in front of the court, in front of the judge, the defense counsel, the accused, and the prosecutor.

Senator CARDIN. And explain to me why the process that you use cannot be discussed in a public forum.

Mr. HARTMANN. Because there's no particular— there's no defined one-step, two-step-three process that anyone uses, Senator. There's a process that you use. You take the evidence that you've got, which is unique in every single case, and you evaluate that against the law and the rules of evidence.

So to say that you follow a specific process would be completely inaccurate, in the first place.

Any prosecutor, even if you're not a prosecutor, if you're a trial lawyer, you understand that the focus of your attention has to be on the facts, not on generalities, not on even the broad outlines of the rules, but the facts and then you figure out how to admit that evidence—

Senator CARDIN. You've acknowledged—

Mr. HARTMANN.—or the challenges that you will face in trying to admit that evidence.

Senator CARDIN. You've acknowledged, and properly so, that information obtained or facts—information obtained through coercion will not be—should not be used and is unreliable.

We had a hearing yesterday in College Park on the Helsinki Commission on torture and it was interesting as to one subject that came up, and that is the reliability of information that's obtained through torture or similar procedures and that during the times of witchcraft, we had confessions that people were witches.

So the reliability of this information is very questionable and I think we would all feel more comfortable if you would be more forthcoming in telling us the process, not talking about a specific technique that may or may not have been used, but a process, so that we have a little more confidence that our government is, in fact, evaluating, as they prepare for criminal trials, the quality of the information that they have obtained.

Mr. HARTMANN. Senator, the key to your answer will be found in the well of the courtroom. That's where—

Senator CARDIN. I disagree with that. I disagree. I think there's an obligation on the government in preparing a case to make sure it's done properly.

Mr. HARTMANN. It will be done properly, Senator, and that's where you—you will learn about that in the well of the courtroom. The prosecutor's obligation, his fundamental obligation is to ensure justice in the military commissions process and in the Uniform Code of Military Justice process.

That is his fundamental obligation or her fundamental obligation. So it's their duty to take the evidence, to assess the evidence, to determine its admissibility, to determine the risks of non-admissibility, to determine the law that applies to the admissibility of that evidence, and then they make a decision whether they're going to try to use it in the case.

And once they try to use it in the case, in the American system, the defense counsel, a right that this Congress gave to these accused, will challenge that evidence and the military judge who will be present and who has experience will be able to challenge it and will be able to evaluate it, and the press that we bring down to these hearings will be able to see that and report that to the world, and the nongovernmental organizations that we allow to sit in the courtroom will see that and bring that to the attention of the world.

You will be very proud, Senator, of what your uniformed service members are doing. They are following the rule of law. They are following the rule of law.

I am not going to presume on them what that is. They know the law. They know the evidence. These rules of evidence are quite similar to the things that they follow in the military court-martial process, which is renowned by some of our greatest trial advocates as an outstanding system.

Those are the same people who take an oath to protect the Constitution, the same oath they are using in the desert—

Senator CARDIN. I don't challenge anything you've said about the dedication of the people who are doing their job.

I just come back to a point that I expect those who prosecute the criminal cases will also try to help us improve the system. That's been done at the local levels, at the federal levels, and I would feel more confident if I knew that there was some evaluation being done by those who are preparing the case as to the methods that were used to obtain information.

Mr. HARTMANN. It is being done, Senator.

Chairman FEINSTEIN. Thank you very much, Senator Cardin.

Senator Sessions is next. Senator, you're up.

Senator SESSIONS. Thank you, Madam Chairman. And I thank the panelists.

This concern—I remember reading in the paper, I think, about the selection process of what cases to try first. As a former United States attorney and attorney general of Alabama, I think good prosecutors always try to pick the cases they feel, in a series of cases, that have the greatest appeal, maybe the strongest evidence, and, to me, that's just good prosecutorial strategy.

Apparently, Colonel Davis objected to that.

Explain to me what that disagreement is all about, General Hartmann.

Mr. HARTMANN. Senator, the focus, my focus has been to move the process with intensity and with focus and with prepared counsel and my concentration has been to ask the counsel and encourage the counsel to identify those cases which have the most material evidence, the most important evidence, the most significant evidence among the roughly 80 to 90 or so cases they intend to try to bring those forward rapidly, as rapidly as possible, in light of their evaluation of the evidence.

So I agree with exactly what you said, Senator, that we needed to focus on the most material cases and bring those forward as rapidly as possible.

Senator SESSIONS. I think it's almost prosecutorially incompetent not to think in those terms. It's important that you do so.

Well, let me ask you this. We had this long list of people that have been released. I would suggest that if those had been released had killed a United States Senator instead of an American military person, we'd have a lot different attitude about it.

But my question to you, General Hartmann, why are these people being released?

We have some of them, you say, Mr. Engel, that they were Al Qaida leaders and this sort of thing. What kind of process allows us to take persons who it appears are dedicated to their cause to the point that some will blow themselves up to kill men, women and children, why do we release these persons, that could result in the death of American servicemen?

Mr. ENGEL. Well, Senator, I think it's a very good question. I think what it shows is that no process is perfect and these are individuals who were detained initially and managed to convince the United States, over a period of weeks, months, even, in some cases, maybe years, that they were innocent or they were minor players and that all they were looking to do was to go back home and be with their families and return to whatever agricultural or otherwise activity that they do.

And, frankly, they tricked us and any process in which we are releasing individuals is a process with risk, and we understand this risk, but it is a risk that we are committed to, because we're not looking simply to being an indefinite jailer of all the individuals at Guantánamo.

We are trying to work hard to make sure that the individuals who can be released without a threat to our national security, in fact, are released and that what these cases reflect, though, is that no release is going to be a risk-free proposition, even if we believe that these individuals are no longer a threat.

Senator SESSIONS. Well, I just thought if you captured somebody in the course of a military conflict, they were detained, because any good soldier, while they're being detained, know their rights and that sort of thing.

But when they get out of jail, they go back and join the forces that they used to be a part of. I mean, that's what every—people who escaped from prison went back to their American units and fought against the enemy and continued to do so.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00024 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

So that's why you hold them until the war is over. And, frankly, I think this committee and this Congress needs to focus a little bit more on trying to protect our soldiers, protect our homeland, make sure that murders, killers who are dedicated to the destruction of America are detained rather than trying to see how many we can release.

And I suspect some of those are released because there is a feeling that Congress is on your necks and you had to demonstrate that you were going to release a lot of prisoners so you would get less criticism at a hearing like this, and now we've got people dead as a result of it.

General Hartmann, with regard to the trials that you've referred to, just if you can clarify for the American people and me, because I tend to get confused about it, are you trying to people to ascertain—are these trials to ascertain whether they should be continued to be held in custody or are these trials to ascertain whether they deserve punishment for committing acts unlawfully under the rules of war?

Mr. HARTMANN. It's the latter, Senator. We are focusing these trials on violations of the law of war and based upon a finding of guilty, they would be sentenced to confinement.

The other people are detainees, as Mr. Engel has described. These are people who are going to be tried under the Military Commission Act for violations of the law of war and they will be sentenced upon a finding of guilt.

Senator SESSIONS. Well, I remember what happened in Oklahoma City after those people were tried for bombing American citizens. At least one of them was executed.

Is it possible some of these who've murdered innocent men and women and children and American personnel could be executed?

Mr. HARTMANN. It's an option that's available under the Military Commission Act and, again, Senator, I won't prejudge any case or any charging.

Senator SESSIONS. Well, I would just hope that if that kind of punishment is good enough for an American who kills Americans, that it ought to be good enough for a terrorist who kills Americans.

Mr. Engel, is there any judicial decision in the 800-year history of Anglo-American jurisprudence in which habeas corpus relief has been extended to someone who's been declared a prisoner of war?

Mr. ENGEL. I'm not aware of one.

Senator SESSIONS. I'm not either.

Mr. ENGEL. And the Supreme Court, in considering, this last week, I think it became clear in oral argument, no one at that court was able to find one that was directly on point, as you've said, Senator.

Senator SESSIONS. I think it has grave implications for our ability to be successful as a nation in the defense of this republic if we capture people on the battlefield and then start treating them as American citizens who are being tried for a drug crime. It just does not make sense to me.

Now, how do we get to the point that prisoners of war are now being entitled to personal attorneys? This is a step that's unusual in the history of war, it seems to me.

General, my time is up, so if you'll briefly respond to how we got to this point. Is this consistent with the history of the way we treated prisoners of war in the past?

Because as you noted, Mr. Engel, when an attorney talks with a client, the first thing they tell them is to quit talking.

Mr. ENGEL. That's right. With respect to detention issues, the use of lawyers is virtually unprecedented in the annals of war and conflict. With respect to prosecution, I think in order to have prosecutions, there have been, of course, defense lawyers in those cases, but we grant an unprecedented degree of process here, including review by the federal court of appeals in the D.C. Circuit.

Mr. HARTMANN. I can't add anything to that, Your Honor [sic], but as I said, Mr. Hamdan had five defense counsel at his table last week.

Senator SESSIONS. Well, it's a dangerous group of prisoners that you're dealing with. I visited, in Alabama, a German prisoner of war camp in Pickens County. The people were given a great deal of freedom. They still have many items that they have there and it was a different kind of prisoner than we have today.

Thank you.

Chairman FEINSTEIN. Thank you, Senator Sessions.

Senator Durbin.

Senator DURBIN. Thank you, Madam Chair.

Mr. Engel, many of us were troubled to learn that CIA officials destroyed videotapes of detainees being subject to the so-called interrogation techniques.

These techniques reportedly included forms of torture like water boarding. According to some media reports, the Justice Department attorneys advised the CIA not to destroy these videos.

Was the Department of Justice aware of the existence of these tapes prior to their destruction?

Mr. ENGEL. Well, let me tell you what I can say. The Department of Justice, as you know, has initiated a preliminary inquiry, which is being run by Ken Wainstein of the National Security Division in conjunction with the CIA's inspector general's office, and I also know that General Hayden is going to be testifying this afternoon.

I am not aware of my office being involved in providing legal advice on the subject. But I've seen the press reports which suggest that some of these issues may have been discussed years ago and I think Mr. Wainstein's investigation or the preliminary inquiry will bring a lot of these facts to light.

Senator DURBIN. Specific question. Was the Department of Justice aware of the existence of these tapes before they were destroyed?

Mr. ENGEL. Sitting here, I don't have an answer for that, Senator.

Senator DURBIN. Did the Department of Justice advise the CIA not to destroy these tapes?

Mr. ENGEL. Again, likewise, I've seen what's in the press reports, but sitting here, I don't have an answer, though—

Senator DURBIN. When General Hayden said the destruction was in line with the law, do you have any indication or knowledge of the law as it was given to him or the standards that he was asked to follow in destroying these tapes?

Mr. ENGEL. Again, sitting here, I'm not aware.

Senator DURBIN. General Hartmann, you said that the military commissions are transparent, provide a window through which the world can view military justice in action.

You also claim military commission defendants have the right to review and respond to all evidence.

In the pending case of Omar Khadr, defense lawyers have been ordered not to tell the defendant or anyone else who the witnesses are against him.

How can you call a system that relies on secret evidence transparent?

Mr. HARTMANN. We don't rely on secret evidence, Senator. Every piece of evidence that will go to the finder of fact, to the jury, will be reviewed by the accused and his counsel.

Senator DURBIN. You're a graduate of law school and you know that confronting your accuser is part of our system of justice. In this situation, Mr. Khadr is not even given the identity of the witnesses who are testifying against him.

Mr. HARTMANN. There may be some limited cases in which that applies, Senator. However, the order to which you are referring says, below it, "except as provided below."

In that order, it specifically says that 21 days before trial, the prosecution has the burden of explaining why that part of the order that you're focused on is to continue and if the prosecution does not do that, then all the witnesses are made available to the counsel and to the accused.

Senator DURBIN. The presumption is just the opposite, as I understand it. The presumption is that the prosecution, the government, can withhold the identity of the witness.

Mr. HARTMANN. No. I would say the presumption is just the opposite, that unless the prosecution makes an affirmative effort, these witnesses will be disclosed to the accused.

Senator DURBIN. And has that happened?

Mr. HARTMANN. We haven't gotten to 21 days before trial, sir.

Senator DURBIN. I see. Well, let me ask you this. In the six years that Guantánamo has been in operation for this purpose, how many convictions have taken place of the 775 people who have been detained there?

Mr. HARTMANN. One.

Senator DURBIN. Would you repeat that for the record?

Mr. HARTMANN. One.

Senator DURBIN. And was that not a plea bargain?

Mr. HARTMANN. It was a pretrial agreement, yes, sir.

Senator DURBIN. And it involved a sentence of what duration?

Mr. HARTMANN. I believe it was a sentence of seven years, with everything above nine months deferred.

Senator DURBIN. So it ended up nine months detention, correct?

Mr. HARTMANN. That may be the case, sir.

Senator DURBIN. And this gentleman, Mr. Hicks, I believe, was a low level operative.

Mr. HARTMANN. I wouldn't categorize it, sir.

Senator DURBIN. Isn't it interesting that in six years, with 775 detainees who have been characterized here as war criminals,

blood thirsty killers, that only one conviction has taken place? How do you explain that?

Mr. HARTMANN. I cannot explain it. There are reasons with regard to various legal delays. However, I am as disappointed in that as you are and I am, with the various members of the Office of Military Commission, trying to move the process much more rapidly, Senator.

Senator DURBIN. Somewhere in your heart of hearts, in those dark moments at night when you reflect on what you do, have you thought perhaps we're doing this the wrong way? Maybe we don't have the people who are most threatening to the United States?

Isn't the fact that we've released 470 of these detainees an indication that maybe we got it wrong in over half the cases in bringing them to Guantánamo?

Mr. HARTMANN. In my heart of hearts, Senator, I'm convinced we've got the right process with the military commissions. It is literally unprecedented the rights that we are making available to people we call alleged terrorists, unprecedented.

Senator DURBIN. Well, let me talk to you about some of those rights. Four hundred and seventy of these people were arrested, transported, detained and interrogated for months and years and then released because we couldn't charge them with one single crime or one thing that they had done wrong. Is that not correct?

Mr. HARTMANN. I don't know, Senator. My focus is on the 80 to 90 people we intend to try to war crimes trials in the military commissions process.

Senator DURBIN. Well, that's a good focus. But I still wonder what happened to 470 people who took a little tour through Guantánamo for years and now go home to explain to the rest of the world what American justice is all about.

Isn't that part of your concern, as well?

Mr. HARTMANN. The entire process is part of my concern, but my almost entire focus is on the trials and moving them, which was the beginning of your comment, Senator, that we have only tried one person.

I want to change that record.

Senator DURBIN. So Senator Kyl talked about having to call in American soldiers as witnesses, take them off the battleground, he said. So just how many of the people, those 775, that have been detained at Guantánamo were, in fact, picked up off the battlefield?

Mr. HARTMANN. Senator, that's outside of my area. That's in—

Senator DURBIN. Well, I'll tell you what Professor Denbeaux tells us. He tells us, according to his report, when President Bush says these people from Guantánamo have been picked up off the battlefield, the Defense Department has accused only 21 detainees of having ever been on the battlefield, 21 out of 775.

He'll testify, as well, the Department of Defense has alleged that only one, only one detained in Guantánamo was captured on a battlefield.

Do you have any evidence otherwise?

Mr. ENGEL. Senator, I think it's important for the United States to be able to detain members of Al Qaida, members of the Taliban, whether we get them on a literal battlefield outside of Tora Bora or whether we get them in a city thereafter.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00028 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

Senator DURBIN. I don't argue with that premise. I think your premise is correct. But this notion that somehow we're going to devastate our military by calling our soldiers off the battlefield to show up at these commissions to testify on behalf of the government is, frankly, not supported by the clear evidence here that these are not battlefield combatants that are under arrest.

Mr. ENGEL. Again, and I would defer to General Hartmann, I mean, if we look only at the hearing last week in the Khadr case, we did have military officers appearing and testifying about the circumstances under which Mr. Khadr was apprehended.

Senator DURBIN. Is there anything wrong with that?

Mr. ENGEL. There's nothing wrong with that and the military commissions—

Senator DURBIN. Isn't that part of a system of justice?

Mr. ENGEL. Well, but we're talking here about two different things. We're talking about the military commissions process and when we prosecute people, we do believe, if feasible, that we should be able to get the witnesses into the court, which will not always be feasible.

If we're talking about the detention of hundreds of enemy combatants and if we're asking federal habeas corpus in the United States or to conduct these hearings, these are quite significant burdens that raise serious questions.

Senator DURBIN. My last question.

Mr. HARTMANN. Senator, of course, just to add to that, we did bring people off the battlefield last week to testify and to allow the accused to witness them in the courtroom, to confront them and to cross-examine them.

Senator DURBIN. Senator Kyl suggests that that's an unreasonable burden on our government. Do you believe it is?

Mr. HARTMANN. We were happy to do it, Your Honor [sic].

Senator DURBIN. I'm glad you were.

General Hartmann, former Secretary of State Colin Powell has stated, "We have shaken the belief the world had in America's justice system by keeping a place like Guantánamo open and creating things like military commissions. We don't need it and it's causing us far more damage than any good we get for it."

That was his statement, quote, from General Colin Powell. What is your opinion with regard to that statement?

Mr. HARTMANN. With regard to that statement, I would say that the military commissions are an honor to the American justice system. You should be very proud of what was written in the Military Commission Act, what is the Manual for Military Commissions, what is in the regulation, and about those people I described at the beginning of my testimony, Senator, those people who enforce the right, five defense counsel at the table of Hamdan.

Senator DURBIN. I would just say to you—

Mr. HARTMANN. He was given access to counsel. He was given—

Senator DURBIN. General Hartmann.

Mr. HARTMANN [continuing]. The right to cross-examine.

Senator DURBIN. Please.

Mr. HARTMANN. Those are the basic rights that are made—

Senator DURBIN. Every time—

Mr. HARTMANN [continuing]. Available through the American justice system.

Senator DURBIN [continuing]. We question Guantánamo and its use, you and others say we are somehow questioning the integrity of the men and women in uniform. That is not a fact. None of us have and none of us will.

They are good and brave soldiers and they are doing their duty for their country.

But the policymakers have to be held accountable for a situation in Guantánamo which has become an embarrassment for the United States around the world, as General Powell stated very, very clearly.

Mr. HARTMANN. Senator—

Senator DURBIN. I respect him, as well, as a man who served his country.

Mr. HARTMANN. Yes, sir. The rights that are available are written down. The rights that are available are written down. They are rules of evidence that virtually mirror the military rules of evidence.

The people that are enforcing those rights, the judge, the prosecutor, the defense counsel, are the same people who take the oath of office on other things. They are—

Senator DURBIN. But one of the most—

Mr. HARTMANN [continuing]. Very similar.

Senator DURBIN [continuing]. Fundamental right under justice, of habeas corpus, to know why you're being detained, to know what you're charged with and to confront your accusers, you can't argue to me that that is being protected.

Mr. HARTMANN. What I will argue to you—

Chairman FEINSTEIN. Senator, you are doing a Schumer. You are 2.5 minutes over your time.

Mr. HARTMANN. I will say in response to that, Senator—I keep calling you Your Honor—the process in the courtroom is extraordinarily fair. The appellate process is unprecedented.

Chairman FEINSTEIN. Senator Graham, welcome.

Senator GRAHAM. Thank you, General. I would agree that we're finally getting this right, but I hope you don't ignore the fact that we had to pull teeth to get here.

One reason we hadn't prosecuted anybody is because we had some pretty really weird theories that the courts kept knocking down and now we're back to a more traditional way of doing business, and I want to applaud the fact that we do have dedicated men and women who are serving their country well as prosecutors, defense attorneys and military jurors.

But I'm not going to sit here and just ignore 3.5 years of trying to sell things that nobody would buy. Well, now we've about got it right and I'm willing to make it better, if we can.

Bottom line for me is that the big distinction between us and anyone else in the world, Mr. Engel, is that we consider the people we're fighting enemy combatants, not common criminals. Is that correct?

Mr. ENGEL. I think that's right.

Senator GRAHAM. I don't think there's another jurisdiction in the world that takes Al Qaida suspects and tries them under the theories of laws on conflict.

We do. The reason we do is because of September 11, 2001. This country has to reconcile itself as to how we want to proceed.

Did the people who attacked us—were they a group of common criminals, afforded due process of law under domestic criminal law? If that's the case, nothing we do at Guantánamo Bay can move forward, you're right, Senator Durbin.

That is not my theory. My theory is that we've been in an undeclared state of war without uniformed combatants who wish to kill us all if they could. And when we capture one of them, we have the obligation of a great nation to follow the law of armed conflict, which is very robust, has a rich history, which I have played a small role in. Insignificant as it may be, I am proud of it.

And we've tried to bastardize that and we've tried to change it and we've tried to cut corners and we've paid a price.

Now, as I understand military law, that once you capture somebody and their status is to be determined, that's a military decision, not a federal judge's decision under the Geneva Convention. Is that correct, General Hartmann? Either one of you.

Mr. ENGEL. I think that's exactly right, Senator.

Senator GRAHAM. Under Article 5 of the Geneva Convention, it requires, if there's a question of status, whether or not you're an unlawful enemy combatant, a traditional prisoner of war or an innocent civilian, a competent tribunal will be impaneled to make that decision.

Is that not what the Geneva Convention says?

Mr. ENGEL. That's exactly right.

Senator Graham: Now, based on that, we have taken Regulation 190–1, I believe it is, the Army regulation.

Mr. ENGEL. Dash-8.

Senator GRAHAM. Dash-8, and we've enhanced it. Now, the question for people like me is should you provide military lawyers at the combat status review tribunals, something I wanted to do three years ago.

I wish I had done it now, because the reason I wish I had done is, even though it's unprecedented, in traditional wars, we assumed the war would be over when the powers met and declared an end to it.

Do either one of you believe there will be a surrender ceremony in your lifetime regarding the war on terror?

Mr. HARTMANN. I'm unable to answer that.

Senator GRAHAM. I will answer it for you. No. Never in my lifetime will some politician declare this war over and let everybody at Guantánamo Bay go. That's not going to happen.

So what we need, I think, gentlemen, is an understanding we're at war, but it's a different kind of war. And to Senator Sessions' comments, how did we let these people go?

Well, what we have at Guantánamo Bay is an initial decision-making process by the military, "You're an enemy combatant, unlawful enemy combatant." And every year, Senator, we look at the case anew.

We look for three things. Is there any new evidence to change your status? Do you still have intelligence value that would be useful to the war? And, third, are you a threat?

And a board of officers meets every year and you can have new input from the detainee's point of view along those three lines, and we have let over 400 people go using that annual review board process.

Unfortunately, you're right, Senator Sessions, 30 have gone back to the fight. We are at war.

Senator SESSIONS. Thirty have been caught.

Senator GRAHAM. Thirty have been caught. And who knows what the others are doing.

But having said that, Senator Sessions, I think it is incumbent upon us to have a hybrid process, because if we don't, the initial decision is a de facto life sentence and I am proud of this process and when it comes to your side, General Hartmann, if there is an allegation that the evidence in question is tainted because it's a result of torture, it is my understanding the military judge must exclude any evidence that violates the torture statute. Is that correct?

Mr. HARTMANN. Any statement obtained through torture is inadmissible.

Senator GRAHAM. And as to an allegation of coercion, which is our enemy is trained to allege, Al Qaida operatives are trained into the American legal system. They know exactly what to say.

It's my understanding, at Guantánamo Bay, the military judge will have a hearing regarding the allegation of coercion and will decide whether or not the evidence is reliable and should go to the finder of fact. Is that correct?

Mr. HARTMANN. Reliable, probative, and in the best interest of justice.

Senator GRAHAM. And that judicial decision by that judge can be appealed to civilian courts.

Mr. HARTMANN. That's correct. It can be appealed to the civilian courts after going through the military process.

Senator GRAHAM. It is my understanding that every detainee at Guantánamo Bay, Senator Durbin, will have their day in federal court, that every decision by the military will be reviewed by the D.C. Circuit Court of Appeals and that is ongoing right now.

The difference I have with you, my friend, is I don't want to turn over to the federal judges in this country the ability to determine the enemy force in the first instance, because they're not trained to do so.

That is a military decision. But I do not mind any judge in any appellate court in this land looking over the shoulder of these gentlemen here to make sure they did it right.

I think that is the sweet spot for this country.

Now, when it comes to whether or not there's political influence on these trials, Senator Feinstein, I want to get to the bottom of this. Now, I know Mo Davis and I know you. I've been an Air Force JAG for 25 years. I respect you both and I want to find out the best I can what's going on down there.

But I would like to just tell my good friend, Senator Durbin, if we close Guantánamo Bay, and maybe we should, where do we send them and what do we do with them? And the only thing I ask

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00032 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

of my colleagues is that as we try to correct the process and improve it, and I think there's ways that we can go forward to make it better, please don't lose sight that the people that we're dealing with, the truly guilty, are warriors, not domestic common criminals.

And those who have been caught up in this net of trying to find out who the enemy is, some of them are probably either on the fringes or just in the wrong place at the wrong time, and that's been the nature of war as long as man has been engaged in war.

What I'm looking for is not the outlier case where they went back to killing Americans, because if you do that, nobody ever gets released, or the idea that they're all victims and just at the wrong place at the wrong time. All we can hope to find as a nation is a process that will be flawed, but still adheres to our values, and I think we're very close to that process being correct in terms of us being at war.

Now, one of the issues facing this country is water boarding. General Hartmann, do you believe water boarding violates the Geneva Convention?

Mr. HARTMANN. I was asked that earlier, Senator, and with regard to this entire issue, we start with the following premise: torture is illegal in the United States.

Senator GRAHAM. We have a downed airman in Iran. We get a report that the Iranian government is involved in the exercise of water boarding that downed airman on the theory they want to know when the next military operation may occur.

What would be the response of—what should be the response of the uniformed legal community regarding the activity of the Iranian government?

Mr. HARTMANN. I'm not equipped to answer that question, Senator.

Senator GRAHAM. You are.

Mr. HARTMANN. I will tell you the answer to the question that you asked in the beginning, Senator, and that is—

Senator GRAHAM. You mean you're not equipped to give a legal opinion as to whether or not Iranian military water boarding, secret security agents water boarding downed airmen is a violation of the Geneva Convention.

Mr. HARTMANN. I am not prepared to answer that question, Senator. I am prepared—

Senator GRAHAM. Thank you. I have no further questions.

Chairman FEINSTEIN. Thank you very much, Senator. That completes this round.

I'd like to just quickly make a brief comment. I think Senator Sessions and Senator Graham have pointed out some interesting things, which indicate a real dichotomy in this situation that all of us have to deal with.

The first is the undeclared state of war, which is this situation. Senator Sessions pointed out that there is no requirement to try detainees during the course of hostilities of a declared war, that is true.

The president himself has said this could go on for a generation and if you look at the history of terrorism in the world, it is likely

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00033 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

to go on. Ergo, what happens to people who are not charged, who remain in custody, for what period of time?

I'm going to ask, and will send you in writing, both of you, a question and that question will be: what is the government's plan to deal with the indefinite detention, without charge, of detainees for what may be decades?

And I think we have to come to grips with that question. I think there has to be an answer and if we need to legislate, we should.

With respect to Guantánamo and its closure, we've just done an inventory of super max beds and if there are 305 detainees currently, then we can add up those super max beds and come to 326 available beds today in the United States between maximum security, military brigs, and maximum security federal prisons.

So I think we have to come to grips with both of those and whether Guantánamo, left the way it is over the next half-decade, decade, really redounds to the credibility of this nation or whether it destroys that credibility.

And, here, we have different opinions. There are those that believe it does and there are those of us that believe it does not. And I think that's a real question.

So we will put this in writing to both of you and we will follow up so we will not forget. So please answer the questions.

Thank you very much. We appreciate that.

Mr. ENGEL. Thank you.

Chairman FEINSTEIN. And now the second panel, Professor Mark Denbeaux. Professor Denbeaux serves as professor of law at Seton Hall Law School in New York, New Jersey. Through a law school project, he has reviewed and categorized most publicly released DOD data. Prior to teaching, he was the senior attorney in charge of litigation for the New York City legal services program.

The second witness will be retired United States Navy Rear Admiral John Hutson. Admiral Hutson currently serves as the president and dean of Franklin Pierce Law Center in Concord, New Hampshire. From 1997 to 2000, he served as the Navy's judge advocate general. As a judge advocate general, he provided over the JAG corps and advised the secretary of Navy, the commandant of the Marines, and the senior leadership of the Navy in all legal matters related to military justice.

And our final witness of the morning is Debra Burlingame. She is a member of the board of directors of the National 9/11 Memorial Foundation and she is the sister of Charles "Chic" Burlingame, III, the pilot of the hijacked American Airlines Flight 77, which crashed into the Pentagon on September 11.

I have had the privilege of meeting with Debra Burlingame and her family and it's very good to see you again. So I welcome you.

And we will begin with Professor Denbeaux.

STATEMENT OF PROFESSOR MARK DENBEAUX, PROFESSOR OF LAW, SETON HALL LAW SCHOOL

Mr. DENBEAUX. Thank you very much. I appreciate the opportunity to come here. I'm here, in large part, because of a fortuitous circumstance involving my son, Joshua—

Chairman FEINSTEIN. Could you pull the mike closer to you?

Mr. DENBEAUX. —who asked me about four years ago what I thought of Guantánamo and I said, "Not much." And then he said, "Do you think they have the right people there?" And I said, "Probably." And then he said, "What do you think grandpa would think?"

And my father was a combat chaplain with General Patton. And he said, "Would grandpa believe that the 3rd Army could've figured out who were the good German civilians from the bad ones?" And I said, "My father didn't think the 3rd Army would have a clue about doing that."

And then I said something, I said, "But he wouldn't cared, because he didn't believe there were any good German civilians." And my son said, "Isn't that the point," and that got me interested in looking into why people are detained in Guantánamo and who's there.

And while I believe process is crucially important, I believe truth is equally important and I think misinformation is very pernicious in this particular debate.

What I did in trying to resolve who was there and what it was was to become involved with a small group of incredibly diverse Seton Hall law students, some of whom have served tours of duty in Afghanistan and Iraq. Others have come from all parts of the country.

And we started looking at the Department of Defense data, and our position has been very simple. What the Department of Defense says we take as true and our investigation was to see what the Department of Defense said, and we've really come up with a fairly stark picture that I think most people have accepted, in at least some parts.

I mean, the Department of Defense data, for instance, concedes that it only charges 45 percent of those people in Guantánamo with ever having committed any hostile act against U.S. or coalition forces.

Their statement is that eight percent of the people in Guantánamo are fighters for Al Qaida or the Taliban. But they've also made some other points and one of the other points they've made is that these people were captured on the battlefield, and, in fact, many senior government officials have said they were captured on the battlefield shooting at American forces.

Well, my students were stunned, when we looked at the data, to find out that the entire array of Defense Department data identified 21 detainees as having ever been on a battlefield. And my students were even more shocked to discover that only 24 of those detained in Guantánamo, at least as of the summer of 2004, were captured by U.S. forces.

And they were even more surprised to find out that only one of the detainees in Guantánamo was captured by U.S. forces on a battlefield, and I'd like to point out that that person is Khadr and he's being prosecuted under the military commission.

So my understanding is that every single person captured on a battlefield shooting at Americans has had a hearing or will have a hearing in front of the military commission.

My understanding is that the best thing that could happen to most Guantánamo people is to have a military commission and lose. After all, Mr. Hicks, who was supposed to be one of the worst

of the worst, and supposedly, if Senator Sessions is right, they had the best case they had against him because they tried him first, that man was given effectively a nine-month sentence, sent home to Australia, and will basically be there with his family on New Year's.

If he had won his hearing before the military commission, he would have been held as an enemy detainee and returned to Guantánamo indefinitely. The people in Guantánamo who are not even accused of any war crimes, who aren't being identified as people for whom a military commission are appropriate, are much worse off than Mr. Hicks.

But I want to add a few other points that my students raised. My students pointed out that if American's didn't capture these people, who did? And the answer is that the Americans captured 24 people and of the 517 files available to review, all the rest were turned over by either third parties, Pakistani authorities, Afghan authorities, tribal chiefs, warlords, and all of our evidence for these people begins with the information provided from those sources in exchange for bounties.

Now, one of the things that I wanted to show this panel, because I think it goes to the entire weight and truth, is the release in which they simply drop this bounty out and it says "get wealth and power beyond your dreams, help the anti-Taliban forces, and rid Afghanistan of murderers and terrorists," and nobody objects to that.

But if you look at the bottom, it says, "You can receive millions of dollars for"—

Chairman FEINSTEIN. Would you hold that up for a minute, please?

Mr. DENBEAUX. Yes.

Chairman FEINSTEIN. Thank you. Thank you.

Mr. DENBEAUX. "This is enough money to take care of your family, your village, pay for the rest of your life, pay for livestock and doctors, school books and housing for all your people."

To the best of our knowledge, only four percent of the people who are in Guantánamo could have not been turned over for bounties. I'm not saying everybody was. We can't tell. DOD's data doesn't say.

But bounties were paid that were enough to take care of people's whole villages for the rest of their life for people who are detained in Guantánamo.

Now, that deals with the first proposition, and I am very distressed by the fact that so many people keep claiming they were captured on the battlefield shooting at American people.

It's simply not true, according to what the Department of Defense alleges for each one of these people.

But there's another even more pernicious piece of information that is coming out now and it has penetrated the halls of Congress, as I've heard here today, and that is the claim that detainees, after release, have returned to the battlefield.

I have a couple points I would like to make about that. First of all, if true, that would have a terribly important effect on the CSRT process, because it would be very hard to release people if you

knew that was to happen. Judges are tempted by that fear and everyone else.

But a couple of crucial facts. One is the Department of Defense, after being pushed from a variety of sources, produced a report and the report doesn't say what Senator Sessions says it did. The report says up to 30 people have returned to the fight and to get to that, they can't identify 15 of them and of the remaining 15, three of them are called the Tipton Three and the evidence they returned to the fight was that they made a documentary in England called "The Road to Guantánamo" after they were released.

Five of them are listed as Uighurs. Now, the Uighurs are the Chinese nationalists who, in fact, left China, partly because of religious oppression, and we've released them and they're being held in Albania in a refugee camp. The other seven that they've identified as having been released from Guantánamo and returned to the fight, two of them were never in Guantánamo, which is distressing.

And in addition, the remaining five, two of them apparently are still alive. They may have returned to the battlefield, but they're still alive, and that leaves three. And the Defense Department has said the number is 30. Senator Sessions has said the number is 30. They keep repeating it.

And it's a very upsetting thing to learn that our own government, from the Department of Defense, is characterizing the released detainees in that fashion.

If I could, I'd like to show one other chart. This chart—and, by the way, Senator—Joshua, can you lift it higher? This chart is in our report, which I hope will be included with my testimony today.

Chairman FEINSTEIN. It is included.

Mr. DENBEAUX. Okay. Thank you. This chart actually shows two things. The blue line is the line of statements made by Department of Defense officials about the number of detainees killed or captured on the battlefield. The red line is the number of detainees killed or captured on the battlefield that the Department of Defense data, as of July 2007, identify.

And if you'll notice, as late as April of this year, the deputy general counsel to the Defense Department came before the Armed Services Committee and stated that up to 30 people have been killed or captured on the battlefield.

That statement is simply refuted by everything that DOD's data says. It's simply not true and it's a very upsetting thing.

Now, I know my time is up, but if I could just briefly comment on the effect of this on the CSRT process.

Senator KYL. (OFF–MIKE)

Chairman FEINSTEIN. When you were chairman, you did it your way. In the meantime, the answer is, yes, you may.

Mr. DENBEAUX. The CSRT process is a process that is administered by the military, not under the military judges, not under the Code of Military Justice.

What we have in the CSRT process are the senior government officials saying these are the worst of the worst, they were captured on the battlefield shooting at American people.

I think when you look at the record that these people had to review, the record that they had to review made clear that it wasn't true. But when senior officials tell you that everyone there was

captured on the battlefield shooting at American troops and that's false, there's a message there. And when they say the same thing about their return to the battlefield, I think the same message is there.

I would love to stop that myth about return to the battlefield. It's a very dangerous and damaging point.

Thank you.

Chairman FEINSTEIN. Thank you, Professor Denbeaux.

Admiral Hutson.

STATEMENT OF JOHN D. HUTSON, DEAN AND PRESIDENT, FRANKLIN PIERCE LAW CENTER

Mr. HUTSON. Thank you, Madam Chair. Thank you for holding this hearing. I have a written statement that I, too, would like to have made part of the record.

Chairman FEINSTEIN. So ordered.

Mr. HUTSON. I feel like I should sede some of my time to Professor Denbeaux and I will try to be brief to get us back on track.

When I think about what I was going to say here, a phrase I think I learned from my dad was that you could accomplish something if the future of the free world depended on it. We could rake all the leaves in the front yard today if the future of the free world depended on it.

That was sort of the thought that came to my mind when I was thinking about closing Guantánamo Bay. The president has called for it, the secretary of defense has called for it. Lots of people have called for that to happen and we just can't seem to do it, but we could do it if the future of the free world depended on it.

And then it occurred to me that, indeed, it does depend on it in a very large way. How the United States, the leader of the free world for generations, conducts its business, even its war fighting business, determines the future of the free world in a very real way.

And I think that Guantánamo has become an iconic example of misadventure and it is absolutely incumbent upon the United States to close it.

I have a hard time believing that the generation that won World War II, the so-called greatest generation, couldn't close Guantánamo and figure out what to do with 305 people if the future of the free world depended on it.

There are lots of things and, Senator, you demonstrated the ease of doing it with the beds in maximum security. We can close Guantánamo and for us to pretend that we can't is just pretending.

The question isn't so much closing Guantánamo and whether or not we can do it. The question becomes what to do with those people who are in Guantánamo.

I was an early and ardent supporter for a long time, too long, in retrospect, of military commissions. I was attracted to them from a historical point of view. I thought that having military people involved was a good idea. I thought that the security aspect of it was a good idea.

But as has been pointed out on other occasions here today, we've tried exactly one person who pled guilty and is now back in Australia, somewhat ironically, perhaps, a former kangaroo skinner

from Australia, not the worst of the worst, not Himmler, not Gering. The comparisons to Nuremberg, I think, are inapt.

We need to make a change and I think that time has long since passed. As recently as yesterday, in Manhattan, the United States court of appeals was dealing with terrorists quite well, no big problems.

We have the greatest judicial system on the face of the earth in the U.S. district courts and rather than using it and showcasing what the United States can do. We're hiding under the leaky bushel of the military commissions, which, in all these years, has tried one person.

We ought to demonstrate to the world what the United States stands for, what kind of justice we can afford. These people, the worst of the worst, if they are, we need to prosecute them. We need to get convictions. We need to incarcerate them, if they should be incarcerated, if there's evidence against them, execute the worst of the worst.

I am not for mollycoddling terrorists, very much to the contrary. I prefer to prosecute them. But we simply seem to be incapable of doing it.

I think that General Hartmann's phrase was telling when he said that they have been guided—using the guidance of the Supreme Court, I think is an interesting turn of a phrase, the Supreme Court keeps knocking down what we do and so we are, in some ways, responding to the guidance of the Supreme Court.

General Hartmann seemed like a nice guy, but I thought his testimony is a perfect example of the problems we've got. He was the personification of the issues with the military commissions.

You cannot listen to his testimony and come away with a comfortable feeling about what the United States is doing with the military commissions, that Hamdan wears a tie and the Navy judge has a black robe. It's all very interesting, but the reality of it is that it just ain't working and we need to do something that starts to work and that starts with closing Guantánamo and getting these cases either into U.S. district court or into the military court-martial system, which is another fine alternative.

The court-martials could do this. There is no doubt in my Navy mind that Senator Graham and I couldn't sit down and, by the close of business this afternoon, have a system that—the United States court-martial system, the Uniform Code of Military Justice, the Manual for Courts-Martial, couldn't adapt and adopt and start prosecuting people successfully.

And by successfully, I mean prosecuting them in such a way that we can be proud of. But we simply can't reverse engineer the process. We can't start with a conviction and then reverse engineer it to ensure that we have a conviction.

We have to be willing to have an acquittal. If we're not willing to have an acquittal, if we are so intent on having a conviction, the system isn't going to work. It's not going to stand up to scrutiny.

It's only a human right if it applies to all human beings. It's only a rule of law if it applies all the time.

I look forward to your questions. Thank you very much.

Chairman FEINSTEIN. Thank you very much, Admiral.

Ms. Debra Burlingame.

STATEMENT OF DEBRA BURLINGAME, MEMBER OF THE BOARD OF DIRECTORS, NATIONAL SEPTEMBER 11 MEMORIAL FOUNDATION

Ms. BURLINGAME. Thank you for the opportunity to be here today, Chairman Feinstein. It's a pleasure to be here and to be able to thank you personally for all you did for my family six years ago.

As we sit here today, there are 192,000 men and women in uniform in some of the most dangerous places in the world. They are still taking fire. They are still taking casualties. They are still risking their lives to collect the vital intelligence that we need to stop the very evil and bad people in this world from doing what they want to do, very similar to what they did six years ago.

They are determined not just to kill Americans and to kill U.S. military and our allies, they really do want to destroy this country and if you don't believe that, just roll back, dial back the video and watch what happened in lower Manhattan, where you had an estimated $2 trillion of damage which that attack is estimiated to have cost, and that isn't even touching on the lives lost in 102 minutes.

I would like to say, before I get into the heart of my testimony, that kangaroo skinners can be very dangerous when they are toting RPGs launchers on their shoulders. We have pictures of David Hicks as a jihadi, a deadly guy.

I, frankly, don't understand why it is hard to understand that these so-called lowly foot soldiers can be quite lethal. I think in the summer of 2000, if you had been, Mr. Hutson, in Al Farouq training camp and you had encountered 19 men who, up unto that point, had committed no crimes, you might have described one as an engineering student, another would be a rather hapless young man from Saudi Arabia who dreamed of flying airplanes, who was having a hard time getting a pilot's license and who might have claimed to be doing charity work in Afghanistan.

If you had rounded those guys up, they would have seemed utterly harmless, even less threatening than our kangaroo skinner, David Hicks. But look at what those men did. Look at what they did. When they were in that camp, they weren't firing at Americans. They weren't firing at anybody. But they were slaughtering camel and sheep with short knives in preparation for storming the cockpits of four airplanes.

Now, I would like to say to you, Senator Durbin, again, before I take away my own time, the battlefields are everywhere and I think to dismiss that is to totally misapprehend the kind of danger we face.

The battlefields are in schools in Beslan. They're in nightclubs in Bali. They're on commuter trains in Madrid. They are in condos in Riyadh. They are in hotel wedding receptions in Amman. And they are in the sky at 35,000 feet.

So I think that to be stuck on the old paradigm of war and even the old paradigm of jurisprudence for dealing with this incredibly difficult enemy I think is very, very dangerous.

And I would like to say to you, Senator Sessions, I, too, would like to get to the bottom of why some of these people have been let go.

And now I will get to my testimony and tell you what I think is going on here.

Senator Cardin wanted to know or made an observation that so many mistakes have been made and how did we get down this road. In point of fact, the Center for Constitutional Rights filed their first case on behalf of the detainees in February of 2002. The camp was only one month old. People knew very little about it.

Abu Ghraib wouldn't happen for another two years. There were no allegations of abuse, torture, inhumane treatment. CCR was determined from the very beginning, when none of the so-called Guantánamo Bay bar wanted anything to do with these cases, they were determined to get these guys full habeas corpus rights or get them released.

But there was one law firm that joined with the Center for Constitutional Rights. There was one law firm, it was Sherman and Sterling, and they joined that lawsuit at the behest of their oil industry client, the government of Kuwait. They were paid a handsome fee and they have been paid handsome fees for the entire duration of their representation not only as attorneys, but as lobbyists.

Now, they deny that they were lobbying for the government of Kuwait, but in point of fact, and I have all the records here and, Chairman Feinstein, I would like all of the financial records of the lobbying fees paid to these attorneys to be made part of the record.

These are reportings under the protocol of the Foreign Agents Reporting Act (FARA). This is the FARA reporting document filed by Sherman and Sterling, as well as their filing under the LDA, Lobbying Disclosure Act.

They have earned, from the government of Kuwait, over $1 million just in lobbying fees alone on behalf of 12 Kuwaiti detainees.

Chairman FEINSTEIN. We will add that to the record.

Ms. BURLINGAME. Yes. They are not alone. Arnold and Porter, I've traced, as of June of 2006, reported $792,000 in lobbying fees under the Foreign Agents Act and the Lobbying Disclosure Act.

Sherman and Sterling was initially being paid, they said, by the families of these 12 Kuwaitis. I found reports where the government of Kuwait said, "No, we are footing all the bills." Sherman and Sterling was very coy about their fees. They said that they were donating everything to 9/11 related charities. I don't know why they would say they were donating it to 9/11 related charities. They insist, that what's happening at Guantánamo has nothing to do with September 11.

I think it's very, very disturbing to think that these are the same attorneys—and, by the way, it's very important for you to understand that Sherman and Sterling, I would say, is probably the most influential law firm of all of the so-called Guantánamo lawyers, because they were in the case from early 2002.

They were obviously very well funded and they were in the Guantánamo cases a full two years before most of all of the other blue chip firms that you've heard about were willing to come into the cases.

It wasn't until the Supreme Court accepted cert in Rasul that—and the politics of all of this had begun to change that all these other firms came in.

But more disturbing than all of that—and if I can digress one moment. The government of Kuwait is considered—

Chairman FEINSTEIN. If you could summarize. Your time is up.

Ms. BURLINGAME. Well, the government of Kuwait is considered an ally, but they've got a big Islamist problem in that country. Sixty-five percent of their population is under 30, 40 percent of them are under 16. There is a huge Al Qaida presence there and they're tamping it down.

Levick Strategic Communications is the PR firm that was hired by Sherman and Sterling, and I would also like this document entered into the record.

Chairman FEINSTEIN. So ordered.

Ms. BURLINGAME. It is called "PR Perspective: The Long-Term Struggle." This is the PR firm that was hired to make the detainee case. They were hired very early on. They are called Levick Strategic Communications and under FARA reporting protocols they indicate that the government of Kuwait has paid them $846,000 in fees. The firm's president, Richard Levick, has laid out the entire PR strategy, and it is devastating.

This is why, when you move these detainees out of Guantánamo, these men will follow. When you move this into the civil court system, you will now be inviting criminal defense attorneys who are zealously defending their clients, perhaps for millions of dollars and maybe it won't be coming from Kuwait, maybe it will be coming through corporate fronts, financed by terrorists and terrorist organizations, to get these guys out.

And I've run out of time.

Chairman FEINSTEIN. Thank you very much. And we will look at that material.

To begin, if I could, please, ask you to be restrained.

Admiral Hutson, I'd like to ask you the same question that my distinguished colleague, Senator Graham, asked General Hartmann.

What would you say if a member of the United States military was water boarded overseas?

Mr. HUTSON. I would say that, unequivocally, it's torture. It violates the laws of war. It violates human rights. There's no question about it.

And I testified some time ago at the Senate Armed Services Committee, along with all the service JAGS, who all agreed that water boarding was torture.

So there's no question about that.

Chairman FEINSTEIN. Professor Denbeaux, you were criticized the CSRT process. Detainees can appeal to CSRT and to the D.C. District Court of Appeals, although that review is limited to procedural challenges.

The solicitor general (OFF-MIKE) broadly or even exercise the authority in order for detainees to be freed.

If that occurred, what would the legal process afforded to—would then the legal process afforded to Guantánamo detainees, in your view, be sufficient? Why or why not?

Mr. DENBEAUX. As I understand your question, it was if the CSRTs could be appealed to the court of appeals and they ruled on it, would that be sufficient. Am I correct?

Chairman FEINSTEIN. That is correct.

Mr. DENBEAUX. The first problem is everything in life, and if you'll forgive me, Your Honor (sic), garbage in is garbage out. My problem with the CSRTs has been simply this. The process has been tainted from the top to the bottom.

The evidence that has been presented by them has been inadequate. We know very well that one of the terrible prices some military people have paid for this is their careers have been damaged because they've attempted to come forward and show that the CSRT substantive results shouldn't have led to the conclusion they did.

We can't tell how many people shouldn't have to appeal to the court of appeals, because they were, in fact, initially found not to be enemy combatants.

So we start with the proposition that a very large number of these people, perhaps a majority, should not ever have had the opportunity to appeal.

Now, any system that says innocent and guilty must be treated alike and innocent and guilty are supposed to appeal equally as if they're still trying to prove they're innocent makes absolutely no sense.

By way of digression, I think this is a serious problem for many military careers. I yield to nobody in terms of my support for the patriotic efforts not only of those soldiers and sailors in Guantánamo, but the career officers who have stepped forward and, I think, paid a significant price.

But included in my view of patriots happens to be the patriotism of my hardworking students who deserve recognition and, most importantly, I feel that the utmost patriots I've come across here, no less than the soldiers and certainly no more, are the members of the bar who have chosen to step forward.

I think they've been heroic. I deeply regret it took me three years to get here, because I think it's a really serious issue that we all have to address.

Chairman FEINSTEIN. If I may, during oral arguments last week before the United States Supreme Court, Justice Breyer suggested that Congress might consider enacting a new preventive detention law that could provide a basis for holding dangerous detainees indefinitely without criminal charges.

Do you believe that preventive detention is a viable option in this particular context? Why or why not and how would it work?

Mr. DENBEAUX. I had heard that and I thought about that a little bit. One of my problems turns out to be when we always have a really hard problem and we don't like the two choices we have, do nothing or, in this case, give them habeas corpus.

We all struggle to find three, four and five other gimmicks to get around the problem. I think preventive detention does work in the United States in certain cases.

But the first question is what are they being detained for and one of the big problems that I faced in all of this is that people in Guantánamo aren't being charged with being terrorists. The ones that aren't going to get military commissions aren't being charged with having committed war crimes or crimes.

So we have a whole lot of people in Guantánamo for whom the idea is let's have a process to detain dangerous people.

I think dangerous people are people under the military commissions. I think that's what the military commissions are for, if they're for anything. They can't just be there to release David Hicks. They have to be doing something.

But I don't think, when you hold people without charges for six years, that you then say now we want to come up with a new process other than habeas corpus in order to decide what would happen.

So I don't see how that solves any of the problems we face and I think it's a distraction to the core issue, which is who should be detained and who shouldn't, and the Article 3 judges should make that decision.

Chairman FEINSTEIN. Thank you very much.

Senator Sessions.

Senator SESSIONS. Thank you.

Ms. Burlingame, I know your brother was the captain of the plane that crashed into the Pentagon and appreciate your leadership in this effort over a number of years.

Are you suggesting that these fees—are you suggesting that we, as a nation, ought to be aware of the fact that forces can be involved in the defense of persons that are captured that do not have the interest of the United States involved, at heart, and that our courts can be used really as a vehicle to promote an agenda or to disrupt our ability to be successful in stopping further attacks on America?

Ms. BURLINGAME. That's exactly what I'm suggesting and that's why I hope that you will read this document, which spells out the entire strategy on releasing these 12 detainees that the government of Kuwait wanted out.

Senator SESSIONS. The document, fundamentally, what does it say?

Ms. BURLINGAME. Well, basically, what it says is we know—

Senator SESSIONS. This is a public relations campaign document that indicates a lot of money that has been paid to a firm to develop a plan of public relations. And what does the plan say?

Ms. BURLINGAME. I'm sure that Mr. Levick is not happy that this is going to be made public. It was published on a Website that only PR people read and he was very proud of his campaign, because it's gone very well.

But what he describes is a model PR campaign. He said, "How a media campaign helped turn the Guantánamo tide," how a model PR campaign could be used in an unpopular cause to reverse a tidal wave of adverse opinion.

Now, remember, for him and the people he's working for, the detainees, ultimately, adverse opinion is, first of all, that America is a force for good, that Guantánamo should exist, and these people are being properly adjudicated or detained, preventive detention, because they're dangerous people.

It was the purpose of this campaign to turn that around and he says here that their goal was to give these prisoners legal protections provided U.S. citizens. They wanted to give them full habeas corpus rights.

They were brought in right away by the law firm. He says here, "We'd advise a two-tier PR strategy." One was to put a human face

on the detainees and the subtext of that was, "United States is resorting to nefarious and undemocratic tactics worthy of the terrorists themselves."

This is the PR plan. This is a firm right here in Washington, D.C. He says, "This will diminish the country's image and endanger the lives of Americans abroad," this is what Mr. Hutson here has said.

Their "ace in the hole" in this plan, according to the PR firm, was the United States Supreme Court. He says, "In the beginning, however, the high court judgment was our main weapon. The case was so unpopular that we had to recast the dialogue to, in a sense, make the Supreme Court our de facto client."

And to be sure, the Sherman team, the lawyers led by senior partner Thomas Wilner, recognized that a top notch legal effort would not be sufficient. The cases would have to be pled in the court of public opinion as surely as they would have to be pled in the court of law, and then he goes on to describe how they did it.

He said that Sherman's lead lawyer is a "media savvy, media experienced lawyer, who never needed the explanations for why we were doing what we were going to do."

I mean, I could go on. It's quite astonishing. And the reason why I think that this committee should know about it and the congress should know about it is if we're going to bring these cases into the civilian federal courts and try them as criminal cases, if they're doing this at Guantánamo, they're going to be far more unfettered in a civil court system.

And, remember, one of the reasons that—I don't believe President Bush is saying that he wants to close Guantánamo because he thinks it's not operating. It's because he wishes he didn't have the problem of terrorists to begin with.

But the fact of the matter is closing Guantánamo isn't going to solve the state of bad publicity that a lot of people feel is the reason we have to close it.

The folks sitting behind you in these crazy outfits are going to follow wherever those detainees go. I hope we don't bring them to the United States, but we know that the Center for Constitutional Rights has already filed for habeas relief on behalf of 25 "John Doe" detainees in Bagram.

They will not relent and this PR war will not relent and if this gets to the civil courts, it will explode, because lawyers in the civil courts do dangerous things when they become committed to the belief that what's happening in the government against these "defenseless, innocent" people is wrong.

You have Lynne Stewart, who aided and abetted the so-called "blind sheikh." Then you have the embassy bombing case, where defense lawyers were given a list of un-indicted co-conspirators, 200 jihadis, in discovery. That became known by Osama Bin Laden within 24 hours of the lawyers finding it out.

That's my fear.

Senator SESSIONS. Well, I think you are correct that there are increased dangers of public trials in America for serious cases involving information and intelligence that could hurt our country.

And I agree with you, also, that the issues that are raised in Guantánamo are not going to go away if the cases are brought to the United States.

Someone has quoted former Secretary of State Colin Powell as saying he criticized military commissions. I'm not exactly sure what his quote was. I would just say what do we do with them.

As Senator Graham has said, we've wrestled with this for some time and the military has come forward with an unprecedented way to review the people that are being held on an annual basis, if not more often, and to try to release anybody that they can release.

It's not the goal of our military to see how many people we can hold in Guantánamo. It's obvious that their goal is to try to release everyone they can release safely, but it's also obvious they've made some mistakes in some that have been released.

Madam Chairman, I would offer, for the record, a response to the Seton Hall study that's been done by Colonel Joseph Felter and Dr. Jared Brockman, and it just would say a couple of things.

Professor Denbeaux's study is based only on the information publicly available to him when he did it and even then, he was not very accurate, because this study at least found that 73 percent of the unclassified summaries meet the CTC's highest threshold of a demonstrated threat as an enemy combatant.

That's their analysis and I guess we can have—

Chairman FEINSTEIN. That will be added to the record.

Senator SESSIONS. —different opinions, but I would offer that for the record.

Chairman FEINSTEIN. Thank you. Are you—

Senator SESSIONS. I'm through.

Chairman FEINSTEIN. Thank you very much, Senator.

Senator Durbin.

Senator DURBIN. Thank you, Chairman Feinstein.

Let me say at the outset, in relation to Ms. Burlingame's testimony, two of my friends in Chicago, Tom Sullivan, former U.S. attorney for Chicago, northern district of Illinois, and Jeffrey Coleman, a man who's been in practice there many years, are, in fact, pro bono lawyers for Guantánamo detainees, and I have spoken to them several times.

They have published their findings. They don't—to my knowledge, they have no financial motive. In fact, they are absorbing the expense of flying back and forth because they believe that's part of the responsibility of a professional.

And I would just say that the characterization of those who are dong this as doing it for financial gain is your right to make and you've made it and you've put some items in the record as part of this hearing.

And, Madam Chairman, I would like to ask you if you— I don't know this law firm of Sherman and Sterling of New York, but I would at least like to have our staff offer them an opportunity to put in the record their response to what Ms. Burlingame has now made part of our official record, her accusations against this firm and some of the people in it. I think that's only fair.

I know that they've—this is many months back, but I know that there was an ongoing dialogue in the "Wall Street Journal Letters

to the Editor" over this and at least allow this firm to tell their side of the story and put that in the record.

Chairman FEINSTEIN. I think that's a good point and we will send them a letter and offer them that opportunity.

Senator DURBIN. Thank you very much.

I might also say I'm sorry that Senator Sessions stepped out, because he asked an important question that I want to answer, and it was about Secretary of State Colin Powell, who I don't believe is a pawn of any public relations firm in his comments, and this is what he said in June of this year. "If it were up to me, I would close Guantánamo, not tomorrow, but this afternoon."

He added, "I would not let any of those people go. I would simply move them to the United States and put them in our federal legal system" and that he would, "get rid of Guantánamo and the military commission system and use established procedures in federal law."

So to suggest that the critics of Guantánamo were somehow caught up in a big public relations campaign here, I have more respect for General Powell. We've disagreed, but, certainly, as former chairman of the Joint Chiefs of Staff, his service to our country, being our secretary of state, I think we ought to acknowledge that people of goodwill have reached an opposite conclusion that you've reached.

Ms. BURLINGAME. Well, Senator, I'm not saying that anyone who wants to shut down Guantánamo isn't of goodwill. What I'm saying is that there are those who understand that these are very dangerous people, but that the reputation of Guantánamo because of these charges about what's going on down there, that fly in the face of what's actually happening, has so tainted the reputation of the process down there that it can't be rehabilitated.

Senator DURBIN. I agree with that completely and I think the record speaks for itself.

Ms. BURLINGAME. And I think it's very—I don't think that necessarily means that Colin Powell is conceding that Guantánamo is everything that its critics are saying it is. He's acknowledging that it's become a PR nightmare for this country.

Senator DURBIN. I am not going to go into the business of trying to figure out what's on his mind, but his conclusion is very clear.

Ms. BURLINGAME. Well, closing it doesn't—

Senator DURBIN. If I could ask—

Ms. BURLINGAME. —tell you—

Senator DURBIN. Professor Denbeaux, let me ask you and Admiral Hutson, if I might.

You heard the testimony, the response of General Hartmann to the question offered by Senator Graham about a downed United States airman being subjected to water boarding as a torture—or water boarding in interrogation and whether that was torture, and he was reluctant to reach that conclusion, in fact, would not on the record.

We went through that a few weeks ago with the nominee for attorney general.

I am trying to get, in my own mind, if there is a reasonable explanation as to why General Hartmann would be reluctant to say this in light of the fact that the United States has prosecuted its

own military officers, in our history, for water boarding—this goes back 100 years ago—and that we've prosecuted Japanese officials and soldiers for water boarding American prisoners during World War II.

I don't understand the ambiguity of this charge. It's like saying, "Well, I know you said murder, but I need to know more about the circumstances." Well, it was the taking of a life. I mean, that's the circumstance.

And the same thing with water boarding. It is simulated drowning as part of an interrogation technique. I mean, I can't understand this "I need to know more information" response that we're getting on this question of water boarding.

Do either of you have an opinion as to why we're running into this?

Mr. DENBEAUX. Well, I think it's torture. I think it would be an outrage happening to any airman. We believe that. And my real suspicion is that we know we've water boarded and we don't want people who—we want to protect people who have water boarded from being prosecuted and I think people don't want to call it what it is simply because the consequences of doing so for some people who may have done it could be great.

Senator DURBIN. And if I'm not mistaken, in the Military Commissions Act, we included language, I don't want to go too far, but at least in some form, legally absolving those in the intelligence agencies who may have engaged in these techniques.

Admiral Hutson.

Mr. HUTSON. That's right, Senator Durbin. It was like déjà vu all over again, because I was at the attorney general confirmation hearing. I was sitting in about the same place I was sitting for that and you were sitting at sort of the same place, with Senator Whitehouse, and the reaction was kind of the same.

It sort of sucked the oxygen out of the room when he wouldn't agree that water boarding was torture, and I'm not sure why that is that—it may be as a consequence of the service JAGs talking about it in another way at another hearing, so that the administration response now is to just deflect the question, no matter how silly that may seem at the time. You've deflected the question and finally the Senators get tired of it and move on.

Senator DURBIN. Thank you very much for your testimony. Thank you, Madam Chair.

Chairman FEINSTEIN. Thank you, Senator.

Senator Graham.

Senator GRAHAM. Thank you.

Admiral Hutson, we've met a lot about this whole issue —

Mr. HUTSON. Indeed, we have, sir.

Senator GRAHAM [continuing]. And I do respect you. I know you've spoken from the heart and with great experience.

And, Debra, I just want to let you know that I believe we're at war and I don't want to apply domestic criminal law to what I think is a mighty struggle between good and evil and that the people that we're fighting are just as much committed to their cause as Adolf Hitler was to his.

And I had the unique opportunity, with Senator Levin, to go to the combat status review tribunal and witness Sheikh Moham-

med's presentation to the tribunal. I thought he never was going to shut up.

He talked for about an hour of everything he has done in recent times to wage war against the United States. He very much tried to impress upon the tribunal that he was at war with us because of his religion and I think it's incumbent upon us to recognize we're in war.

But having said that, this is a war of ideologies. There will be no capital to conquer, Debra. There will be no navy to sink or air force to shoot down.

And I was in Iraq Thanksgiving and I met one of the senior Al Qaida operatives who was captured and he's since broken away from Al Qaida and is actually helping us. And we asked him about what happened in Iraq and he said two things that were very stunning.

He said the lawlessness after the fall of Baghdad created a vacuum that they filled. People got intimidated. There was no rule of law. There was no police and they were able to kind of operate openly and nobody challenged them, and they were surprised, and that intimidated the population. And he said that Abu Ghraib was a godsend, that it was used in an amazingly effective manner to recruit people and that they exploited that to no end.

So what I'm trying to do is get us back into a wartime footing, maintain the moral high ground, because that's where you win the war here.

And, Admiral Hutson, it is clear that water boarding violates the Geneva Convention.

And, General Hartmann, as a fine officer, I do think there's some fear here that if you express that opinion, it may jeopardize people in the past, I think.

But the Military Commissions Act provided basically the corporal's defense to the CIA. And to those CIA agents out there who are operating around the world, I appreciate what you're doing and I know you're risking your lives, but no agency is above the law.

And the fact that we provide military counsel to people accused of a trial and our enemy doesn't is a strength. I know what they do to our people. It's well known in Iraq what happens to you if you're caught by these folks.

But it should be equally well known that in America we do something different. The fact that we would provide a lawyer and base our decision on evidence, not a twisted view of religion, is a strength. There is no shortage in this world of people who would cut your head off because of their ideology.

There is a shortage in this world of a process that believes in something bigger than revenge or hate.

And, Admiral Hutson, I am firmly committed to the idea that habeas corpus, as Justice Jackson said, it would be difficult to devise a more effective bettering of a field commander than to allow the very enemies he's ordered to reduce to submission to call into account at his own civil courts and divert his efforts and attention away from the military offensive abroad to the legal defensive at home.

I think habeas lawsuits are inappropriate, that I do want judicial review, but allow the military to make the decision as to who an

enemy combatant is and have the federal courts review that process.

And back to your point about military court-martials versus military commissions, could you provide me with some examples of where you think the commission process that is deviated from the court-martial process could be improved

Mr. HUTSON. The review process.

Senator GRAHAM. Not so much the review, the actual trial itself and the review both.

Mr. HUTSON. I think that just to finish that point for a second, I think the military review process, as you know very well, is tried and true and I would just stick with that.

Senator GRAHAM. Let that be your basis. But like Article 31 rights, we can't—

Mr. HUTSON. No, you couldn't have Article 31 rights. I think that whatever system, whether it's the military commission system or the court-martial or U.S. district court, it would have to accommodate the vagaries of the circumstances by which the person was convicted.

But as Secretary England said quite clearly and the Supreme Court said, more importantly, the Supreme Court said that Common Article 3 applies.

Senator GRAHAM. It does.

Mr. HUTSON. All of the judicial guarantees considered indispensable by civilized peoples have to apply, which starts out, I think, with a presumption of innocence, which can be overturned or met with admissible evidence.

Senator GRAHAM. And I do believe the military commission has a presumption of innocence. It has the right to counsel. It has the ability to confront witnesses.

As a matter of fact, I think you help us write the judicial review of an allegation of coercion. Torture is a, per se, excludable event and the allegation of coercion has be balanced by the judge and his decisions or her decisions reviewed by civilian courts.

That is generally where we need to go, isn't it?

Mr. HUTSON. I think it is, although it depends, to some extent, what we're talking about when we're talking about coercion. If we're talking about coercion in the sense of Fifth Amendment confessions and where the person's will has been overcome by—that's one question.

Senator GRAHAM. Under the military justice system, you have to have voluntary statements.

Mr. HUTSON. Right.

Senator GRAHAM. And our judges, I think, can handle the ramifications—the different ideas that may present themselves about coercion. I'm looking at a process where the judge's decision can be reviewed and people can have their say that my client said this only because somebody made him say it and he didn't want to.

That's the essence of a humane, fair trial, that, "You know what? You've got to prove me guilty. I don't have to prove myself innocent," and you're telling the jurors there, basically, "You've got to decide among yourselves in a unanimous way if you're going to put somebody to death."

I mean, we've got generally what I think is a workable system, but I would like more input from you, because I respect you, about how to make it better.

Mr. HUTSON. Thank you.

Senator GRAHAM. And I'll just end with this thought. The idea of Guantánamo Bay being closed is a statement we're trying to make. Then once the statement is made, the war goes on.

Here's the statement I'm trying to make along with this debate. I believe we're at war and I believe the military legal system is the proper venue to adjudicate matters involving our enemies. I am proud of them, the military legal community.

I believe civilian Article 3 courts should review their work product, because it makes us stronger, not weaker. And the techniques and the devices we use to prosecute people and to gather information will do one of two things—it will elevate this country so we can beat this enemy or it will diminish us.

And I believe we can be safe and maintain the moral high ground and that is a false choice to have to choose between the two and if you do, you've already lost to the enemy.

Thank you for this hearing.

Chairman FEINSTEIN. Thank you very much.

Ms. Burlingame, Admiral Hutson, Professor Denbeaux, we very much appreciate it.

Senators Feingold—

Ms. BURLINGAME. Chairman Feinstein.

Chairman FEINSTEIN. One second—and Leahy would like to have statements entered into the record. That will be the order.

Ms. BURLINGAME. Could I have mine entered into the record, as well, my full—

Chairman FEINSTEIN. Yes, you certainly may.

Ms. BURLINGAME. Thank you.

Chairman FEINSTEIN. All statements will be. And thank you very much.

And the hearing is adjourned.

[Whereupon, at 12:29 p.m., the hearing was adjourned.]

[Questions and answers and submissions for the record.]

QUESTIONS AND ANSWERS

Answers to Questions Submitted by U.S. Senator Russell D. Feingold to Professor Mark Denbeaux

1. **Could you go into more detail about the process that you used to gather and organize the data in your reports? In particular, for each of the facts and statistics in your reports, was there an official government source, statement, or document supporting that fact or statistic?**

All of the findings reported in Seton Hall's Guantánamo reports are supported by official Government data.

Each report contains a detailed discussion of its particular methodology, but the general process begins with the collection of all relevant and publicly available Government data and the analysis of those data as a set. Sources have included, among others, CSRT summaries of evidence, CSRT transcripts, Administrative Review Board transcripts, Department of Defense press releases, official lists of prisoners, and public statements made by Government officials. Although some Government documents may not be available for inspection, the data sets used in Seton Hall's reporting are as complete as possible; for example, while there are 558 detainees for whom a CSRT was convened, the Government made only 517 CSRT summaries of evidence publicly available. Accordingly, Seton Hall's database analyzed a data set that was culled from these 517 summaries.

Seton Hall did not attempt to evaluate the truth or falsity of the Government's allegations or evidence, but rather honored the Government's data as accurate. In short, Seton Hall's Guantánamo reports aggregated and analyzed the Government's own data.

Thus, Seton Hall's findings are not only supported by official Government sources, but are in fact derived from the Government's own data.

2. **In your written testimony, you stated that "fully 55% of detainees were not even accused of committing a hostile act against the United States or coalition forces." For these fifty-five percent, what was the stated basis for detaining these individuals?**

The fifty-five percent (55%) of detainees who were not accused of committing hostile acts were detained on the stated basis of their alleged affiliations (of varying closeness and formality) with Al Qaeda, the Taliban, or certain other organizations.

The definition of "Enemy Combatant" is comprised of two parts: (1) to have had affiliations with Al Qaeda or the Taliban is to be an Enemy Combatant; and (2) to have engaged in a hostile act against the United States or coalition forces is to be an Enemy Combatant. Accordingly, the CSRT summaries of evidence feature two corresponding parts: (1) the "3(a)" section, which describes a detainee's alleged group connections; and (2) the "3(b)" section, which describes a detainee's alleged engagement in hostile acts.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00052 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.001

Of the 517 publicly available CSRT summaries of evidence, 55% do contain a 3(a) section, but do not contain a 3(b) section. Thus, fully 55% of CSRT unclassified summaries (which are intended to state the Government's entire basis for detention) do not assert that a detainee engaged in a single hostile act. A slight majority of the Guantánamo detainees, then, were detained solely upon the stated basis of their alleged connections (not limited to membership) with prohibited groups.

In short, an individual need not have committed a hostile act to fall under the Government's definition of "Enemy Combatant." For more on this issue, please see the first of Seton Hall's reports, "Report on Guantánamo Detainees" (2006), available at http://law.shu.edu/news/guantanamo_reports.htm.

3. **You've indicated that only 21 detainees were captured on the battlefield, according to Department of Defense data. What is the data on which you were relying, and how does the Defense Department define the battlefield for purposes of this set of data?**

The data set was comprised of the 517 publicly available CSRT summaries of evidence. Whenever a summary of evidence stated that a detainee had been on a battlefield or had engaged in battle against United States forces, coalition forces, or the Northern Alliance, it was assumed for the purposes of the report that the detainee had been captured on the battlefield. Twenty-one (21) of the 517 summaries made such statements.

Seton Hall did not rely on any official Government definition of battlefield, but rather accepted the Department of Defense's assertions as to whether a detainee had been either on a battlefield or in battle. Thus, whenever the Department of Defense stated that a detainee had been on a battlefield, Seton Hall honored that statement and counted the detainee toward the total of detainees who had been captured on the battlefield. This approach resulted in the determination that four percent (4%) of detainees were alleged to have been captured on the battlefield.

For more on this issue, please see "The Empty Battlefield and the Thirteenth Criterion" (2007), available at http://law.shu.edu/news/guantanamo_reports.htm.

If one reads the Department of Defense manuals to find out what they considered to be a battlefield there is a clear definition. The clear definition of battlefield becomes murky when it is used in the context of the global war on terror.

In the "Global War on Terror", the Bush administration's critics and supporters have used the word *battlefield* generically when referencing efforts by coalition forces to seek out and destroy suspected terrorists. A battlefield, whether in conventional or unconventional warfare, encompasses the following four elements: (1) presence of leadership among combatants, (2) significant number of combatants, (3) motive for the presence of such forces in the area, and (4) presence of ongoing combat operations.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00053 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.002

Without a significant level of leadership to direct combat operations, any active fighting assumes a form of violence akin to a street riot rather than conventional or guerrilla warfare. A significant number of combatants must be present in order for combat to sufficiently threaten violence and, in light of the law of war, to justify the proportionate use of significant military power. The leadership's motive in emplacing, maneuvering, supplying, and arming its subordinate forces must be commensurate with ongoing combat operations.

The presence of ongoing combat operations, i.e., contemporaneous active fighting between two or more opposing forces, may seem elementary, but this particular attribute of a battlefield in "GWOT" deserves clarification. A battlefield involves *ongoing* combat operations rather than, more broadly, operations which only anticipate possible combat in some distant future. Ongoing combat operations are directed toward contemporaneous active fighting and include troop movements to attack or defend an objective, conducting surveillance in anticipation of imminent active fighting or during active fighting, and providing supplies and arms to personnel.

The war on terror either ignores battles and battlefields as irrelevant or it treats the entire world as a battlefield. It is not clear whether no battlefields or everywhere a battlefield is a distinction that matters.

4. You testified that at least eight of the 15 people that the government identified as having "returned to the fight" had in fact done nothing more than criticize the government's detention policies. How did you determine this?

On July 12, 2007, the Department of Defense issued a press release with the heading "Former Guantánamo Detainees who have returned to the fight," in which the Defense Department claimed that thirty (30) ex-detainees had returned to the fight. (The press release is available at www.defenselink.mil/news/d20070712formergitmo.pdf.) The Defense Department identified only fifteen (15) alleged recidivists; among these were the "Tipton Three and the Road to Guantánamo" and the "Uighurs in Albania" (of whom there are five).

The "Tipton Three" are three former detainees who have lived in their native Tipton, England since their release from Guantánamo. The United States has expressed no interest in re-capturing these individuals; nor has the United States made any accusations regarding the ex-detainees beyond the mere mention of their connection to "The Road to Guantánamo"—a commercial film which featured the Tipton Three, criticized the Government's detention policies, and depicted dramatizations of torture. Clearly, the Defense Department deemed the Tipton Three's participation in a film (available at your local video store) which criticized the United States Government's detention policies as their "return to the fight." The Government has not accused the Tipton Three of having committed any other act against United States interests.

The "Uighurs in Albania" is five ethnic Chinese individuals who were released from Guantánamo to a refugee camp in the mountains of Albania—where four of them remained as of the Defense Department's July 12, 2007 press release. (One of the

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00054 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.003

Uighurs was residing with his sister in Sweden.) The United States has neither expressed an interest in re-capturing the Uighurs, nor identified any hostile acts committed by the Uighurs against United States interests. Seton Hall's most recent report surmised that the Department of Defense's contention that the Uighurs in Albania have "returned to the fight" is based on an opinion piece—penned by one of the Uighurs and published by the New York Times—which urged the United States Government to allow habeas rights for the Guantánamo detainees. Abu Bakker Qassim's aforementioned opinion piece, entitled "The View from Guantánamo" (Sept. 17, 2006), is available at http://www.nytimes.com/2006/09/17/opinion/17qassim.html?_r=2&oref=slogin&oref=slogin.

For more information on these and other alleged Guantánamo recidivists, please see Seton Hall's most recent report, "The Meaning of 'Battlefield'" (2007), available at http://law.shu.edu/news/meaning_of_battlefield_final_121007.pdf.

5. According to your review of the Combatant Status Review Tribunal proceedings, the government never called a single witness and produced documentary evidence in only 4% of the cases. How, then, did the government support its designation of "enemy combatant" for the remaining 96% of cases?

This issue—along with deficiencies in the CSRT process generally—is discussed in Seton Hall's "No-Hearing Hearings" (2006), available at http://law.shu.edu/news/guantanamo_reports.htm. Each CSRT relied upon information contained in the unclassified summaries of evidence, as well as upon evidence that was deemed *classified*. Importantly, detainees were never informed of the nature or source of the classified evidence against them, and were accordingly quite limited in defending themselves against an "Enemy Combatant" designation. The Government's reliance upon classified evidence presents substantial procedural questions about the validity of the CSRT process.

For example, among the significant findings of "No-Hearing Hearings" was that, in each instance that a CSRT found both the classified and unclassified evidence insufficient to support an Enemy Combatant designation, the CSRT was ordered to be reopened—and eventually every detainee was found to be an Enemy Combatant. Detainees were neither informed of the initial decision nor provided with an opportunity to appear before the reconvened CSRT.

Since the publication of "No-Hearing Hearings," various Military officers have certified that CSRTs relied upon classified information that was incomplete, that exculpatory evidence was withheld, and that inadequate processes were used to collect evidence. Please see the sworn Declaration of Lieutenant Colonel Stephen Abraham, who served on a CSRT that was ordered to be reopened as a result of its failure to make a positive Enemy Combatant determination.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00055 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.004

Answers to Questions Submitted by U.S. Senator Dianne Feinstein to Professor Mark Denbeaux:

1. **During the hearing, Senator Sessions introduced into the record two reports from the Combating Terrorism Center (CTC), which he claimed had criticized some of your report's conclusions. How do you respond to these CTC reports?**

Senator Sessions is incorrect. The CTC report did not criticize any of the conclusions in any of the Seton Hall reports. Seton Hall published a report in response to the CTC report. (The second of the CTC "reports" was originally annexed to the first CTC report as "Appendix A.") Seton Hall's report, entitled "The Empty Battlefield and the Thirteenth Criterion" (2007), is available at http://law.shu.edu/news/empty_battlefield_final.pdf. I request that this report be included in the Congressional Record as part of my testimony.

The CTC report challenged only the first of Seton Hall's (then) six Guantánamo reports, and attempted to recast the argument from whether a detainee's enemy combatant status is justified by the unclassified summary of evidence in his CSRT to whether a detainee's unclassified summary meets arbitrary "threat levels" invented by the CTC. The CTC report does not, for instance, attempt to address the glaring procedural defects of the CSRT as identified by Seton Hall in its subsequent reports.

"Appendix A" of the CTC report, which responded directly to Seton Hall, did not dispute any of Seton Hall's key findings, and in fact confirmed that ninety-five percent (95%) of those detained as enemy combatants were not alleged to have been captured by United States forces. Seton Hall created a profile of the Guantánamo detainees based entirely upon the Department of Defense's own data; to the extent that the CTC purported to find defects in Seton Hall's methodology, it actually criticized the Department of Defense's evidentiary bases for the detention of Guantánamo detainees as enemy combatants.

The bulk of the CTC report was devoted to the creation of a rubric for evaluating dangerousness. As Seton Hall pointed out in its response, the CTC used a methodology that is arbitrary—confusing rather than clarifying the issue of whether detainees are properly designated as enemy combatants. The CTC deviated from Defense Department data and terminology, justifying such departures—if at all—with mere anecdotal evidence. Furthermore, the CTC employed repetitive data fields and engaged in double-counting—piling up irrelevant statistics in favor of its implicit thesis that the detainees' dangerousness is sufficiently evident from the CSRT unclassified summaries of evidence.

At the core of the CTC's methodology are twelve explicit "threat variables" for evaluating dangerousness—but a number of these are nonsensical and vast enough to cover the inclusion of millions of Americans as evidencing threat—*if* not coupled with West Point's implicit *thirteenth variable*: namely, that a detainee poses some type of threat if he satisfies any one of West Point's twelve variables *and* he satisfies the

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00056 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.065

criterion of being detained at Guantánamo. This reasoning is, of course, circular. Nonetheless, the CTC applied this reasoning to its analysis of each detainee's CSRT unclassified summary.

When all the CTC report's faulty categories are stripped away, all that remains are the variables contained within the Government's definition of "enemy combatant."

Finally—despite erring heavily on the side of over-inclusion—the CTC essentially conceded that at least twenty-seven percent (27%) of CSRT unclassified summaries of evidence *do not necessarily indicate that a detainee is in fact threatening*, as well as that more than one percent (1.16%) evidence *no threat whatsoever*.

2. Can you discuss more fully your position on whether a preventive detention paradigm might be appropriate in the context of holding suspected terrorists?

I am not sure what is encompassed by the word paradigm in the preventive detention paradigm. After all, it has been argued that Guantanamo is appropriate preventive detention. My answer assumes that any preventive detention paradigm will be consistent with the preventive detention model that meets the Constitutional requirements for such detention that the Supreme Court established in *U.S. vs. Salerno* 481 U.S. 739 (1987)

Even if there were a debate about the process requirements for preventive detention, before the issue of process can be addressed we must address the most compelling issue which applies to detention in Guantanamo and around the world. We must determine what the proper basis for the detention of non enemy combatants who are not alleged to have committed criminal acts.

The first question that must be determined is the definition and/or criteria for what warrants detention under any paradigm. The National Security model, the criminal justice model and some form of preventive detention, can be not be implemented until we determine what the proper basis is for detention.

As it currently stands, the national security model justifies detention if the detainee meets the definition of an Enemy Combatant; the criminal justice model justifies detention upon the commission of a crime; and the preventive detention model, justifies detention upon the status as dangerous.

There is no appropriate standard for any detention except perhaps under the criminal justice model; commission of a crime.

NATIONAL SECUIRTY MODEL AND "ENEMY COMBATANTS"

The present standard—that is, the designation of a detainee as an Enemy Combatant—is inadequate. Not only does the present standard permit the detention of individuals as enemy combatants who have not committed a single hostile act, it similarly permits the detention of individuals who have had some association with members of Al Qaeda or the Taliban

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00057 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.006

The present standard permits detention as an enemy combatant of individuals who not only are not accused of any hostile act but also are not accused of anything more than having had an association with the Taliban or A Qaeda. It must be noted that association with the Taliban before the fall of 2001 means no more than some form of association with the ruling party in Afghanistan prior to the initiation of the war in Afghanistan. The definition of "Enemy Combatant" is over-inclusive; any detention process is destined to fail.

The problem that underlies the concept of enemy combatant is the absence of combat and that is compounded by our inability to determine what counts as a battle or battlefield. There has always been a conventional definition of battle. We know what to do with those who are engaged in what is conventionally found to be a battle. We do not know what to do when we have lost our connection with a meaningful understanding of battle. That is our current problem. The Bush administration's critics and supporters have used the word *battlefield* generically when referencing efforts by coalition forces to seek out and destroy suspected terrorists. A battlefield, whether in conventional or unconventional warfare, must encompasses the following four elements: (1) presence of leadership among combatants, (2) significant number of combatants, (3) motive for the presence of such forces in the area, and (4) presence of ongoing combat operations.

Without a significant level of leadership to direct combat operations, any active fighting assumes a form of violence akin to a street riot rather than conventional or guerrilla warfare. A significant number of combatants must be present in order for combat to sufficiently threaten violence and, in light of the law of war, to justify the proportionate use of significant military power. The leadership's motive in emplacing, maneuvering, supplying, and arming its subordinate forces must be commensurate with ongoing combat operations.

The presence of ongoing combat operations, i.e., contemporaneous active fighting between two or more opposing forces, may seem elementary, but this particular attribute of a battlefield given the current debate deserves clarification. A battlefield involves *ongoing* combat operations rather than, more broadly, operations which only anticipate possible combat in some distant future. Ongoing combat operations are directed toward contemporaneous active fighting and include troop movements to attack or defend an objective, conducting surveillance in anticipation of imminent active fighting or during active fighting, and providing supplies and arms to personnel.

THE CRIMINAL JUSTICE MODEL

I believe that the criminal justice model should be the primary and preferred first option for all detentions. I reject any idea that assumes that our criminal justice model does not and can not work. We all know that our criminal justice system works both efficiently and effectively. The criminal justice model has demonstrated, over and over again, for centuries that it meets our needs of order and our basic values. It is efficient and effective and it reflects and upholds our values. We have successfully prosecuted members of Al Qaeda in our federal courts.

While, I am confident that our criminal justice model is sufficient for most non battlefield detainees, for the few individuals for whom it does not work, that is non

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00058 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.007

criminals, who have not engaged in combat of any sort, but who are nonetheless dangerous, the preventive detention model has been suggested.

PREVENTIVE DETENTION AND THE STANDARD OF DANGEROUSNESS

I begin by pointing out that once we have chosen not to use the criminal justice model and when we are planning to detain those who are not alleged to have engaged in combat, we are swimming in dangerous waters. I think the danger in those waters is greatly enhanced when we are replacing a battle or a crime with a metaphor. Using a metaphor for a battlefield rather than an actual battle changes everything. The debate is no longer the detention of people who have engaged in battle but the detention of those who may be sufficiently dangerous to the United States to warrant detention or who may possess important information. The determination of dangerousness is very difficult, even if we had a definition of what constituted dangerousness. If teat were not hared enough to define and determine dangerousness, once determined to be dangerous, we need to be able to determine when someone has been "cured" of dangerousness.

The current debate seeks to choose between the national security model and the criminal justice model.

When neither battlefields nor the criminal justice model will suffice, we either do not detain or we need a new basis to justify detention. A new basis for detention outside of battle and outside of the criminal justice system could be some form of preventive detention.

The benefit of preventive detention is that it would presumably offer far better treatment for those detained. Preventive detention to detain individuals not for what they have done but for what they *might* do parallels the preventive detention model that has been used for those deemed to be dangerous to themselves or others: there is a right to treatment, cure, and then release. Preventive detention should not be employed to escape judicial review; nor should it be used as a means of holding individuals indefinitely and without hope of treatment—especially when those individuals have not been found to have done anything dangerous.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00059 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.008

CHARRTS No.: SJ-02-001
Hearing Date: December 11, 2007
Senate Judiciary Committee
Response to Written Questions submitted by Senator Russ Feingold
Witness: Brigadier General Hartmann
Question: #1

"Coercive" Measures and Probative Value

Question: As you know, the Military Commissions Act distinguishes between interrogation techniques that are merely "coercive" and those that rise to the level of torture. If evidence was obtained by means that the detainee alleges are "coercive," the judge determines on a case-by-case basis whether to admit the evidence based on factors including reliability, probativeness, and the interests of justice. With respect to evidence obtained by torture, however, the Act categorically forbids the use of such evidence - as you acknowledged in your testimony. It does not allow judges to determine, on a case-by-case basis, whether to admit such evidence by weighing reliability, probativeness, etc. In response to questions from Senator Feinstein, you repeatedly declined to state that if evidence had been obtained by waterboarding, that evidence would be excluded. Furthermore, when asked as a hypothetical whether evidence obtained by waterboarding could be used, you responded: "If the evidence is reliable and probative and the judge concludes that it is in the best interest of justice to introduce that evidence, ma'am, those are the rule we will follow." It appears to follow from these statements that you consider waterboarding to fall into the category of "coercive" techniques that may be evaluated on a case-by-case basis, rather than torture which must be excluded without any consideration of its reliability or other factors. Is that an accurate statement of your position? If not - if you have not concluded that waterboarding is merely "coercive" rather than rising to the level of torture - will you take this opportunity to amend your testimony that any evidence obtained by waterboarding would be assessed based on the statutory criteria applicable to "coercive" techniques?

Answer: As the Legal Advisor to the Convening Authority, I provide independent legal advice to the Convening Authority and supervise the Chief Prosecutor. (*See* Rules of Military Commissions (R.M.C.) 406 and 1106; Regulation for Trial by Military Commission, para 8-6.) As one aspect of those responsibilities, I advise whether probable cause exists to refer a case to trial. It is possible that I will have to evaluate the methods and techniques employed to collect evidence as I review cases submitted by the prosecution for a probable cause determination. Therefore, I do not believe it is appropriate to offer hypothetical public opinions about issues on which I may be required to provide legal advice.

Nonetheless, I can, in general, address the matter at issue. Statements obtained by torture are strictly barred from use by a military commission. (10 U.S.C. § 948r(b)).

Torture is defined by U.S. law as "the act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or

53355.089

suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for purposes of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind." (120 Stat. 2633; *see also*18 U.S.C. §§ 2441 and 2340). Statements in which the level of coercion is in dispute are considered by the military judge and only admitted if the judge finds that in the totality of the circumstances the statements are probative and reliable, and that the best interest of justice requires admission. If the statement is obtained after the enactment of the Detainee Treatment Act, the method by which the statement was obtained must not amount to cruel, inhuman or degrading treatment. (10 U.S.C. §§ 948r(c) and (d)).

CHARRTS No.: SJ-02-002
Hearing Date: December 11, 2007
Senate Judiciary Committee
Response to Written Questions submitted by Senator Dianne Feinstein
Witness: Brigadier General Hartmann
Question: #2

Future of Guantanamo Detainees

Question: What is the U.S. government's plan to deal with the indefinite detention of Guantanamo detainees or other persons held as enemy combatants in the "war on terror," for a period of time that it appears may last for decades?

Answer: In accordance with the law of war, the Department of Defense may continue to detain unlawful enemy combatants for the duration of hostilities in the Global War on Terror. The Department will continue to seek to transfer eligible unlawful enemy combatants to third-party countries, subject to satisfactory security and humane treatment assurances, or pursue prosecution as prescribed under the Military Commissions Act, in appropriate circumstances.

CHARRTS No.: SJ-02-003
Hearing Date: December 11, 2007
Senate Judiciary Committee
Response to Written Questions submitted by Senator Dianne Feinstein
Witness: Brigadier General Hartmann
Question: #3

Logistics and Feasability of Detainee Relocation

Question: Is there sufficient capacity to move and detain the remaining Guantanamo detainees into U.S. prison facilities or military brigs? Would it be possible to at least move to the U.S. some or all of the Guantanamo detainees whom the military has said it has no plans to prosecute? Why or why not?

Answer: Currently, there is insufficient capacity in U.S. military brigs to handle a large number of GTMO detainees. There is only one installation currently equipped to provide the level of security required for high-threat detainees (Ft. Leavenworth). Under the law of war, enemy combatants may not cohabitate with indigenous prison populations. Thus, transferring Guantanamo detainees could necessitate either moving the prisoners into existing facilities somewhere else, expanding current prison facilities, or building entirely new facilities that comply with our international treaty obligations and can adequately address Guantanamo's unique qualifications for ensuring security and intelligence exploitation. As the Secretary stated in the Senate Appropriations Committee Hearing on September 26, 2007, moving detainees to detention in the United States would require new legislation that successfully balances safeguarding surrounding civilian populations with the ability to process unlawful enemy combatants legally and administratively in a humane yet secure manner.

The Department of Justice and the Bureau of Prisons are best suited to address the capacity issues of civilian penal institutions.

HUTSON ANSWERS 12-11-07

1. "Legal challenges" are just that...legal. They are part and parcel of the system. If a system of justice can't withstand legal challenges, it is not really a system of justice at all, it is a kangaroo court. Responding convincingly to challenges will make the Commissions stronger and better. That is the only way they will rise to a level of justice which endures domestic and international scrutiny. If we prosecute and convict detainees in a court in which legal challenges are discouraged or not allowed we might as well just take them out in the back and shoot them without a trial.

   I would add that if the Commissions can't get underway because they are hamstrung by legal challenges, then Congress should look hard at whether they are the appropriate forum in the first place. Literally dozens of terrorists, including some very high level ones, have been successfully prosecuted in U.S. District Courts around the country. They aren't stymied by so-called "legal challenges." Indeed, they welcome them because it showcases how just the U.S. federal criminal court system is.

2. a. I suppose it is theoretically possible but I have a difficult time conceiving a scenario in this context in which a person could be legitimately detained but not be guilty of a war crime. Terrorism is a war crime. If they have not engaged in terrorism, they shouldn't be detained. That's the war we said we are fighting and that's the enemy we said we will engage. Ergo, if we legitimately detain them, we must believe they have committed a war crime. Wandering around in Afghanistan, even aimlessly, doesn't necessarily make one a terrorist.

   If an individual makes war against the U.S., and qualifies as a POW (i.e., a lawful enemy combatant) by virtue of wearing a recognizable insignia, bearing arms openly, operating within a chain of command, and complying with the law of war, then he would not have committed a war crime (by definition) and could not be prosecuted. His detention, however, could continue.

3. They are either POWs by virtue of the four characteristics laid out above, or they are criminals. If they are POWs, their rights are defined by the Geneva Conventions. Most significantly, they may not be prosecuted for their war making activity and they are repatriated at the cessation of the hostilities. (The latter creates its own issue in the present situation, but none of the detainees has been classified as a POW, so it's moot.)

   If they aren't POWs, then they are common criminals. As such, their rights are found in the Fourth Geneva Convention relating to civilian populations. They are simply criminal civilians. Specifically, for these purposes, Common Article 3 is instructive. If they are prosecuted, as they may be as civilian criminals unlike POWs, they must be afforded "all the judicial guarantees considered indispensible by all civilized people."

4. This war resembles all other wars in one very important way. We know how it started but we have no idea how it will end, or what will happen in the middle. In the successful prosecution of

any war, the planners—the national command authority—and the overseers—Congress—have to make adjustments to accommodate mistakes and changed circumstances. To simply forge ahead with the same plan devised on Day One is a fool's errand. Calling this a Global War on Terror may have made sense in 2001. It rallied Americans and focused us on how important the effort was. In 2008, it is distracting us from how the effort ought to be pursued. Our military is a hammer, but the enemy may not be a nail. We need to be able to step back, reassess, and be willing to devise a brand new strategy in which DoD may not be the lead agency. This would require vision and a willingness to make necessary course corrections to meet the changing circumstances.

SUBMISSIONS FOR THE RECORD

Statement of Debra Burlingame

Co-founder of 911 Families for a Safe & Strong America and S ister of Capt. Charles F. "Chic" Burlingame, III, pilot, American Airlines flight 77, September 11, 2001

Before the United States Senate Judiciary Committee Subcommittee on Terrorism, Technology and Homeland Security

December 11, 2007

Madam Chairwoman and Members of the Committee:

Introduction

Thank you for the opportunity to be here today to offer my testimony on this subject of vital importance to the American people. The issues surrounding the question of the legal rights of Guantanamo detainees are both novel and complicated. Even the United States Supreme Court, which was prepared last spring to let Congress and a lower court have the last word on the matter, has decided to weigh in once more. No matter which side of the debate one finds most persuasive, clearly, all can agree that these issues and their consequences resonate far beyond the factual circumstances of the 300 or so individuals still detained at Guantanamo Bay.

As we sit here today, 192,000 American men and women in uniform are deployed in some of the most dangerous places in the world. They and our coalition partners continue to take enemy fire, to sustain casualties, to risk their lives in order to attain and preserve the kind of battlefield intelligence that may yield vital, life-saving information in the war on terror. Conferring full habeas corpus rights on alien enemy combatants during wartime is something no English or American court has granted in the 800-year history of Anglo-American jurisprudence. Today, it is our troops who bear the heaviest burden in carrying out the will of Congress. Congress owes it to them and to the American people to consider the full consequences of granting this level of extraordinary relief to the kind of people who detonate IEDs, who use suicide vests to target tourists and commuters, and who crash commercial airliners filled with innocent men, women and children into buildings.

As a former attorney, I have an appreciation for some of the issues that the high court and Congress must take into consideration as they sort through this difficult problem. I know that the Senate has held numerous hearings on the legal issues surrounding Guantanamo detainees. I am not here as a Constitutional expert or a legal scholar. I am here to discuss an issue about which I believe this committee should be aware, and which may be one of the reasons the legal rights of detainees at Guantanamo Bay is on the table today. I believe it goes to the heart of the practical debate, not over the issue of whether a reasonable interpretation of the Constitution does or does not give enemy combatants full access to our federal courts, but whether, in fact, it should. John Adams wrote in 1776

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00065 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.014

that "we are a nation of laws, not men," but I would ask, who writes the laws and to what end?

There is no reason why we must be rendered helpless by our own refusal to find creative ways of adapting our laws to reflect the changing circumstances of our times. Americans fundamentally understand and accept that we are a nation of laws, but they do no accept that this means they must surrender their security to terrorists, individuals who would exploit and hide behind our enlightened laws in order to use weapons of mass destruction to kill thousands of people in a single act. Our laws should not leave us defenseless. I simply refuse to believe that "rule of law" means that we must rigidly adhere to a particular line of reasoning when interpreting legal cases—cases which were decided long before modern warfare-by-suicide against civilians became a terrorist tactic—and reach the astounding conclusion that unlawful enemy combatants are entitled to the same due process rights as American citizens and U.S. residents. The terrorists know what kind of impact extending civilian due process rights to groups like Al Qaeda would have. When Khalid Sheikh Mohammed was captured and handed over to the United States, he reportedly initially told his interrogators, "I'll talk to you guys when you take me to New York and I can see my lawyer."

Extending litigation rights to people like KSM would deny us valuable information about terrorist organizations, and could cause the deaths, not just of hundreds of people, but of whole populations. Surely being "better than our enemies" doesn't mean that we are so morally vain that we are willing to sacrifice our children and grandchildren to prove it.

Just Shut It Down

Back when the Detainee Treatment Act of 2005 was being publicly debated, New York Times columnist Thomas Friedman published a blunt column about Guantanamo entitled, "Just Shut It Down." Referring to it as a "P.O.W. camp," he said that it has become so embarrassing to America's standing abroad that we should just "shut it down and then plow it under." Friedman's sentiments have been widely echoed in the national media and on Capitol Hill. Guantanamo, according these voices, has become a national disgrace that is seriously harming our reputation as a beacon of freedom and justice throughout the world, particularly in the Muslim world. Whether one sincerely believes that failing to confer Constitutional rights on unlawful enemy combatants will destroy America's moral fiber or whether one believes that Guantanamo is now so irrevocably associated with allegations of "prisoner abuse" that keeping it open and rehabilitating its reputation is no longer an option, the reality is that radical Islamists have won another important propaganda war, the first being the highly damaging and deeply heartbreaking Abu Ghraib.

Congress is in the process of debating where these detainees should go if Guantanamo is shut down. It is remarkable how easy it is for members of Congress to recommend sending these dangerous men who are the subject of so much controversy here and so much propaganda in the Muslim world, to the states of other members of Congress. They, in turn, aren't terribly happy at the prospect. 97 Senators voted in favor of a

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00066 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.015

resolution that the detainees should not be brought to the United States. The resolution is not binding. Let's ask the American people whether they would like to have these men and their angry supporters brought to their communities. There is talk of sending them to Bagram air base in Afghanistan, where other detainees are being kept and where U.S. jurisdiction is not a problem. But that is what was said about Guantanamo. Today, the Center for Constitutional Rights (CCR), which filed the original detainee cases in February of 2002, has already filed habeas corpus petitions on behalf of 25 detainees in Bagram.

They will not relent until every jihadi in U.S. custody is either released or brought into the federal system. They have set their sights on the so-called "secret prisons" in which they believe the U.S. or its allies have detained jihadis elsewhere in unknown places in the world. They have filed frivolous lawsuits in other countries contending that terrorists who have been captured and detained aimed merely at creating political pressure on America's allies in the war on terror. They maintain that the capture and detention of suspected terrorists is not a response to an international global threat of violent fundamentalist Islam, but an effort by the Bush administration to exploit the anger and fear generated by the September 11 attacks in order to create a "Unitary Executive." That is what they tell college students and law students in talks all across the United States.

If Mr. Friedman of the New York Times believes that shutting down Guantanamo will plow under all the problematic public relations that Guantanamo has caused for this country, he has not been paying attention. Mr. Friedman has said, and I believe he is sincere, that he wants the President of the United States to just shut Guantanamo down because he believes that keeping it open is causing and will cause more Americans to die. He wants Guantanamo shut down because, he says, he wants to win the war on terror. But even as some of these detainees are rendered back to their home countries and admit, even boast, that they went to Afghanistan to join the global jihad, even as dozens have returned to the battlefield to kill again—the lawyers for detainees continue to argue that these men are innocent victims. Perhaps Mr. Friedman and this committee should consider that it is the propaganda being fed to the world press that is giving this country a black eye, and if that is so, what makes him, and this Congress, actually believe that the bad press will stop if detainees are moved from one geographical location to another?

As Congress considers the type and degree of legal rights enemy combatants should be granted, it is vital that it consider how those rights will operate in the new multimedia world in which we live. Today, nearly every corner of the world is plugged-in to radio, the internet, and satellite television. Al Manar television, run by Hezbollah out of Beirut, reaches between ten and fifteen million Muslim viewers all over the world *every day*, encouraging Muslim youths to engage in violent jihad and suicide operations against the United States and its allies. Lies, distortions, and strategic propaganda are the mainstay of Al Manar. Al Jazeera at least has dissenting views, but will air sensational stories and pictures of un-rebutted propaganda, sending it around the world in mere minutes.

Once an inflammatory image hits the internet there is no reeling it back in. A photo-shopped or out-of-context photograph can set back our diplomatic and national security

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00067 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.016

efforts in immeasurable ways. The media is lazy or affirmatively complicit in the sensationalism. Today, the images of newly-arrived, hooded, and shackled Guantanamo detainees at Camp X-ray wearing orange jumpsuits accompanies countless stories about torture and detainees' rights. They no longer bother with the word "alleged." But Camp X-ray was shut down years ago, and detainees don't wear orange jumpsuits. Detainees who do not engage in violence or break the rules move freely about in recreational areas. But the hoods and the jumpsuits are just better copy, better TV. When Newsweek magazine ran a false story about Guantanamo interrogators desecrating a Koran, riots broke out in Jalalabad, Afghanistan and elsewhere in the Muslim world, resulting in the deaths of 15 people. It is almost quaint to talk about the professional responsibility of the working press. Today, anyone with a video cell phone or an internet connection can call him or herself a reporter.

In this high-speed-communications world, the Bush administration's attempts to cast preventative detention and status review protocols at Guantanamo as a necessary and adequate substitute for judicial review in the federal courts have been drowned out by an effective public relations campaign waged on behalf of enemies of this country, paid for by a government that purports to be our ally, and enabled by the lawyers who have perpetrated a fraud on the public while casting themselves as patriotic heroes and champions of the Constitution. The story of these lawyers and their representation of 12 Guantanamo detainees is a tame preview of what future detainee cases might look like if they are moved into the federal system and handled in a manner similar to the kind of adversarial litigation associated with ordinary criminal cases.

An Army of Lawyers

In January of this year, a controversy arose over the fact that hundreds of Guantanamo lawyers, dozens of whom work for prestigious "blue chip" firms, were criticized for volunteering their considerable legal skills on behalf of Guantanamo detainees. An official working for the Department of Defense Office of Detainee Affairs suggested that corporations who retain these high-priced firms as outside counsel might be shocked to learn that their own fees are subsidizing pro bono work on behalf of terrorists. "I think, quite honestly," said the official in an interview, "when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms."

The reaction to these comments was swift and explosive. Members of the "Guantanamo Bar"—which was said to number between 400 and 500 hundred—expressed their outrage in op-ed pieces, on internet sites, and in press releases all across the nation. Major newspapers such as the New York Times and the Washington Post editorialized on the subject, denouncing the comments and calling for the DOD official to be disciplined or fired. National and state bar associations presidents, legal ethics experts, and law journals weighed in to defend the legal bar's noble tradition of defending "unpopular clients" pro bono—without charge.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00068 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.017

Some even called for the DOD official, a former prosecutor, to be disbarred on charges that he was trying to exert pressure on corporate law firms to drop their pro bono detainee clients.

Some of the corporate clients came forward to defend their private law firms and their comments were published in an article in the LegalTimes Online on January 22, 2007.

"Pro bono service and the rule of law are great traditions in the American legal profession, and we at GE have no intention of—and strongly disagree with the suggestion of in any way—discriminating against law firms that represent us on the basis of the pro bono, charitable, or public service that the lawyers in those firms choose to engage in," said Brackett Denniston, senior vice president and general counsel at General Electric, in a statement. Two of GE's outside counsel, Jenner & Block and Covington Burling, were representing detainees.

"I intend to continue to use the firms that regularly represent us. The fact that they engage in pro bono work or work for other clients that I don't necessarily agree with doesn't affect my decision," said William Barr, general counsel of Verizon Communications and former attorney general under President George H. W. Bush. Two of Verizon's outside firms, Debevoise & Plimpton and WilmerHale were representing detainees. Verizon's support was particularly noteworthy, as the company had lost three employees on September 11, one at the Pentagon, two at the World Trade Center.

"The Bush administration wants a 'no law zone,'" quipped one of the Gitmo bar attorneys from a New Jersey firm, "now they want a 'no lawyer zone.'"

But the Bush administration, the Department of Defense, and Attorney General Alberto Gonzales did not defend the official's comments, whose immediate apology was later followed by his resignation.

As a result of this controversy, there was curiosity about what some considered to be an over-the-top reaction on the part of these attorneys. Why were they so riled up by an interview given by an obscure DOD official on Federal News (FN) Radio, a small AM station that caters to the interests of federal employees and can only be heard inside the District of Columbia?

I decided to look into it and published the results of what I found in an article in the Wall Street Journal last March. First, I learned that the widely-held belief that all of the Guantanamo attorneys are working pro bono is simply not true. The FN Radio interview raised the issue of lawyer fees, and who might be paying them. The DOD official answered, "It's not clear, is it? Some will maintain that they are doing it out of the goodness of their heart, that they're doing it pro bono, and I suspect they are; others are receiving moneys from who knows where, and I'd be curious to have them explain that."

Michael Ratner, head of the Center for Constitutional Rights (CCR), subsequently told the New York Times that none of the 500 lawyers associated with Guantanamo detainee

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00069 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.018

representation are being paid. The article reported that Tom Wilner, from the Washington D.C. firm of Shearman & Sterling and the lead attorney who joined the CCR in filing the first Guantanamo case in 2002, *Rasul v. Bush*, said that his firm received money from the families of the 12 Kuwaiti detainees but all of it was donated to charities related to the September 11 attacks. This is lawyerly wording. Perhaps Shearman did "receive money from detainee families," but the government of Kuwait has acknowledged that they are paying all of the detainees' and their families' legal fees, which were reported to run in the millions of dollars. According to one news report in 2004, the fees had reached at least two million dollars. This raises several questions. Why would Shearman hide that information? Which, if any "9/11 charities" received donations and how much were they? Mr. Wilner isn't saying. He gave an interview in which he dodged questions about Shearman's pro bono billable hours.

In addition to its legal services, the firm registered as an agent of a foreign principal under the Foreign Agents Registration Act of 1938 (FARA) as well as the Lobbying Disclosure Act of 1995 (LDA) to press the Kuwaiti detainees' cause on Capitol Hill. Shearman reported $749,980 in lobbying fees under FARA for one six-month period in 2005 and another $200,000 under the LDA over a one-year period between 2005 and 2006. Those are the precise time periods when Congress was engaged in intense debates over the Detainee Treatment Act and the Military Commissions Act, legislation that the government of Kuwait and Shearman & Sterling hoped would pave the way for shutting down Guantanamo permanently and setting their clients free.

After my Wall Street Journal piece ran, Shearman reported another $300,000 dollars in lobbying fees under FARA. In response to my article, the firm's managing partner, Rohan S. Weerasinghe, denied in a letter to the editor that his firm was lobbying on behalf of the government of Kuwait. I suppose this means that while the nominal clients are the detainees and their families, the interests and motives of the entity footing the millions of dollars in legal and lobbying bills don't count. This raises more questions. These aren't ordinary criminal cases. These are cases in which individuals committed to martyring themselves in pursuit of the deaths of thousands of American civilians and U.S. soldiers are agitating through their attorneys for access to the federal courts, as well as for access to classified information. Shearman & Sterling's reluctance to publicly acknowledge the entity financing this litigation may be nothing more than a high-profile firm being embarrassed that it is making millions of dollars in fees in furtherance of acquiring the release of committed jihadis from U.S. custody while men and women of the U.S. armed services are under fire in Iraq and Afghanistan. I submit that the ordinary rules of confidentiality which pertain to the matter of legal fees are a great problem in these cases. It is not too hard to imagine Al Qaeda's sympathizers and the terrorist fund-raisers whom the U.S. Treasury Department is trying to apprehend might subsidize these cases in the federal courts and generate more bad press for American and anti-U.S. propaganda while they do it.

To be fair, Shearman & Sterling isn't the only law firm cashing in. Arnold & Porter, another D.C. firm, also reported $380,000 in lobbying fees on behalf of the "International Counsel Bureau"—which is nothing more than a P.O. Box in Safat, Kuwait—and "the

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00070 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.019

Kuwaiti Detainees Committee." Their FARA registration indicates that they "contacted members of Congress, congressional staffers, and media representatives, in an effort to obtain due process for the Kuwaiti detainees in U.S. custody at Guantanamo Bay." These lobbying efforts appear to be having a tremendous effect.

Finally, after the first Supreme Court victory in *Rasul*, Shearman said that its representation of detainees had come to a close. The firm of Pillsbury Winthrop Shaw Pittman has picked up where Shearman left off, taking up the cause of the only remaining four Kuwaiti enemy combatants still in custody of the original 12. Pillsbury Winthrop hasn't registered as lobbyists, but the matter of their fees and who is paying them remains unknown. I suppose they could be working pro bono, but it would be interesting to put the question to them in light of the fees their predecessors earned.

Turning the Guantanamo Tide

Another serious concern that this committee and Congress should consider as it debates the proper forum for the disposition of enemy combatants' legal rights is the litigation tools that the attorneys will bring to the legal battlefield. In the case of the Kuwaiti detainees, Shearman & Sterling immediately realized that the detainee cases posed a tremendous PR challenge in the wake of September 11. Accordingly, attorney Wilner brought in high-stakes media guru Richard Levick, the head of Levick Strategic Communications to change public perception about the Kuwaiti 12. Mr. Levick, a former attorney whose Washington, D.C.-based "crisis PR" firm has carved out a niche in litigation-related issues, has represented clients as varied as Rosie O'Donnell, Napster, and the Roman Catholic Church. I reported in my Wall Street Journal article that Mr. Levick's firm is also registered under FARA as an agent of a foreign principal for the "Kuwaiti Detainees Committee," reporting $774,000 in fees in a one year period. After publication of my piece, Levick Communcations reported an additional $174,000 as of April, totaling $846,000 as of April 2006.

After the U.S Supreme Court heard the first consolidated enemy combatant case, the PR campaign went into high gear, Mr. Levick wrote, to "turn the Guantanamo tide."

In numerous published articles and interviews, Mr. Levick has laid out the essence of the entire Kuwaiti PR campaign. The strategy sought to accomplish two things: put a sympathetic "human face" on the detainees and convince the public that it had a stake in their plight. In other words, the militant Islamists who traveled to Afghanistan to become a part of al Qaeda's jihad on America had to be reinvented as innocent charity workers swept up in the war after 9/11. The PR firm described one detainee's membership in the Tablighs as peaceful missionaries comparable to the Mormon missionaries or Peace Corps volunteers. In fact, the Tablighs are fundamentalist missionaries who are known to recruit young Muslim men and deliver them to Al Qaeda or Taliban training camps. Levick's firm transformed a committed Islamist who admitted firing an AK-47 in a Taliban training camp to a "teacher on vacation" who went to Afghanistan in 2001 "to help refugees." The member of an Islamist street gang who opened three al-Wafa offices with Suliman Abu Ghaith (Osama Bin Laden's chief spokesman) to raise al Qaeda funds

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00071 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.020

became a charity worker whose eight children were left destitute in his absence. All 12 Kuwaitis became the innocent victims of "bounty hunters."

A Montreal-based marketing firm was hired to create the families' full-service web site which fed propaganda—unsourced, unrebutted and uninvestigated by the media—aimed at the media all over the world. The website was "optimized," a term internet marketers use, meaning that the company paid search engines to direct researchers to their site. Put in the words "Guantanamo detainees" or "Kuwaiti detainees" and their website will pop up on the first page, if not at the top of the list. Creating what Mr. Levick calls a "war of pictures," the site is replete with images meant to appeal to Americans: smiling Kuwaiti families wearing T-shirts and baseball caps, cute children passing out yellow ribbons. They held a so-called public demonstration in London which even the tightly-framed photos can't hide was nothing more than a handful of family members, staged for the PR campaign and the gullible American press.

After the *Rasul* decision, the PR momentum picked up speed and the Supreme Court became, in Mr. Levick's words, their "main weapon," a "cudgel" that forced more attention in what he calls the traditional "liberal" press. Dozens of op-eds by Mr. Wilner and the family group leader (described as a U.S.-trained former Kuwaiti Air Force pilot who cherishes the memory of drinking Coca Cola) were aimed at the public and Congress.

Mr. Levick maintains that a year and a half after they began the campaign, their PR outreach produced literally thousands of news placements and that, eventually, a majority of the top 100 newspapers were editorializing on the detainees' behalf. Convinced that judges can be influenced by aggressive PR campaigns, Mr. Levick points to rulings in the detainee cases which openly cite news stories that resulted from his team's media outreach.

As I wrote in the Wall Street Journal, the Kuwaiti 12 case is a primer on the anatomy of a guerilla PR offensive, packaged and sold to the public as a fight for the "rule of law" and "America's core principles." Begin with flimsy information, generate stories that are spun from uncorroborated double or triple hearsay uttered by interested parties that are hard to confirm from halfway around the world. Feed the phonied-up stories to friendly media who write credulous reports and emotional human interest features, post them on a Web site where they will then be read and used as sources by other lazy (or busy) media from all over the world. In short, create one giant echo chamber.

One Kuwaiti's profile, Nijer Naser al-Mutairi, is the most brazen example of Mr. Levick's confidence that the media can be easily manipulated. The Web site describes him as a member of an apolitical and peaceful sect of missionaries, and that he went to Afghanistan in October of 2000 to "minister in the small mosques and schools" in the country's poorer regions. In fact, Mr. al-Mutairi participated in the Qala-I-Janga fortress uprising in Afghanistan where 32-year-old CIA paramilitary commando Johnny "Mike" Spann was shot execution style. That is the same uprising in which U.S. and Northern Alliance troops conducted a four-day siege against 536 armed foreign and Taliban

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00072 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.021

fighters. These were hard-core jihadis who employed a fake-surrender ruse, secreting grenades under their clothes, hanging in their genital area by shoe strings tied around their waist. They allowed themselves to be locked up at the fortress where they knew of a secret Taliban weapons cache. At the end of the siege, Al-Mutairi and the 85 other jihadis still alive were finally smoked out of the basement where they had retreated and where they murdered a Red Cross worker who went in to check on their status. This is the same uprising where Johnny Walker Lindh was captured, the "American Taliban" who is now serving in a federal prison.

Everything Mr. Levick did was in partnership with Tom Wilner and the law firm of Sherman & Sterling. It was their joint litigation-PR plan, with the Guantanamo lawsuits helping the PR messaging and the PR messaging helping the lawsuits. All of this may be legal, but it is hardly ethical.

Shearman & Sterling lawyers aren't hucksters crassly promoting a cheap product; they are sworn officers of the court volunteering to represent alien enemy combatants in a time of war, interjecting themselves in cases that affect how American soldiers on the battlefield do their job. It is one thing to take these cases in order to achieve the proper balance between due process concerns and unprecedented national security issues. It is another to hire PR and marketing consultants to create image makeovers for Al Qaeda financiers, foot soldiers, weapons trainers and bomb makers, all of which is financed by millions of dollars from a foreign country enmeshed in the anti-American, anti-Israel elements of Middle East politics.

As many of you know, but much of the American public does not know, the country of Kuwait is struggling with some of the same political and ideological issues as its neighbor Saudi Arabia. In the 1950s, Kuwait was a center of Palestinian political activism. This is where Yassir Arafat worked after he left university in Egypt to become an engineer, and it is where the Palestinian Liberation Organization had its offices. One area of Kuwait City was known as the West Bank. This is where Khalid Sheikh Mohammed grew up. This is where Suleman Abu Gaith, Osama Bin Laden's chief spokesman and fund raiser is from, and where Al Qaeda today has a strong presence. Kuwait University, where Khalid Sheikh Mohammed's older brothers attended and were members of the Muslim Brotherhood, was the home of the Islamic Association of Palestinian Students. Several of its members became leaders of Hamas.

The Kuwaiti royal family is struggling to tamp down the fundamentalist movement. Similarly to other places in the Middle East, 65% of is population is under 30, with 40% under 16. Osama Bin Laden is an adored, nearly mythical folk hero to these young, under- or unemployed men, many who come from well-to-do or even extremely wealthy Kuwaiti families – or from among the 55% of the Kuwaiti population that is non-Kuwaiti and that has never been fully accepted by the native population. In the media that I read, Kuwaitis expressed surprised that there were only 12 Kuwaitis at Guantanamo. Considering the vast numbers that leave home to join in the jihad, they thought it would have been much higher. Kuwait has a problem.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00073 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.022

Indeed, in October of 2001, 20-year-old Marine Lance Cpl. Antonio Sledd was killed and another Marine injured one month after September 11, 2001, when two young Kuwaitis attacked a group of Marines at a US military camp in Kuwait. They attacked a second group of Marines and were shot dead. One of the attacker's brothers told Al Jazeera television that his brother was a committed Islamist.

Although a few mistakes were made when some of the Guantanamo detainees were taken into custody in the fog of war, others were indisputably captured with AK-47s still smoking in their hands. Any one of those who have been properly classified in Combat Status Review Tribunals as an unlawful enemy combatant could be the next Mohamed Atta or Hani Hanjour, who, if captured in the summer of 2001, would have been described by these lawyers as a quiet engineering student from Hamburg and a nice Saudi kid who dreams of learning to fly.

How we deal with alien enemy combatants goes to the essence of the debate between those who see terrorism as a series of criminal acts that should be litigated in the justice system, one attack at a time, and those who see it as a global war where the "criminal paradigm" is no more effective against militant Islamists whose chief tactic is mass murder than indictments would have been in stopping Hitler's march across Europe. Michael Ratner and the lawyers in the Gitmo bar have expressly stated that the habeas corpus lawsuits are a tactic to prevent the U.S. military from doing its job. He has bragged that "The litigation is brutal [for the United States] . . . You can't run an interrogation . . . with attorneys." Of course, that is the objective of the CCR, to stop the interrogations altogether, something they boast that they have achieved.

I do not think Mr. Ratner and his colleagues appreciate the importance of these interrogations. After listening to month after month of testimony in the 9/11 Commission hearings from a long list of members in the US intelligence community, it became patently clear that Al Qaeda and other terrorist organizations are terribly difficult to infiltrate – covert operations take years of patient cultivation. One of the only effective ways to get the kind of quick information necessary to stop terrorist operations today is to capture the enemy and drain him of information. Critics of Guantanamo talk of "lowly foot soldiers," but lowly foot soldiers carry cell phones full of numbers. Lowly foot soldiers take orders from others. They know locations. They can confirm faces and identities. They carry Kalashnikov rifles, RPGs, and are taught how to make bombs.

We may never know how many of the hundreds of repatriated detainees are back in action, fighting the U.S. or our allies thanks to the efforts of the Guantanamo Bay Bar. Approximately 30 former detainees have been confirmed as having returned to the battlefield, 12 of them killed by U.S. forces. Of the eight detainees who were rendered back to Kuwait for review of their cases, all were acquitted in criminal proceedings, including Nijer Naser al-Mutairi, who has given press interviews admitting that he was shot in the November 2001 uprising at Qala-I-Jangi. In their response to my article in the Wall Street Journal, Shearman & Sterling stated that they did not know why this particular client was released and that the government did not tell them. That is a peculiar remark from a firm that has earned millions of dollars trying to acquire their client's

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00074 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.023

freedom.

Only one released Kuwaiti, Adel al-Zamel, was sent to prison for crimes committed before his work with al-Wafa in Afghanistan. A member of an Islamist gang that stalked, videotaped and savagely beat "adulterers," he was sentenced to a year in prison in 2000 for attacking a coed sitting in her car. These are some of the men Tom Wilner was talking about when he went on MSNBC and said with a straight face, "My guys . . . loved the United States."

Will Shutting It Down Stop the Bad Press?

Despite the thousands of media and VIP tours at Gitmo, despite the fact that vast improvements have been made since the detention center opened in January of 2002, the media continues to depict the hooded, goggled, orange jump-suited detainees shackled to the floor with their hands behind their backs. That is the enduring image of Gitmo. Despite the fact that Muslims themselves tell us that Islam forbids suicide, and that only a committed Islamist would take his own life, the tales of suicide due to despair (as opposed to strategic aims) continue to be broadcast. What makes Congress think that the suicide attempts and the hunger strikes will end if these men are transferred elsewhere? Why should we believe that the slick, well-financed PR campaigns against the US will stop once Guantanamo is shut down?

The Guantanamo lawyers have expressly stated that Guantanamo is a "smokescreen," a diversion from the real action: Bagram and the secret prisons. That is their next fight, Madam Chairwoman, and that is where the media campaign will go next. The lawyers will continue giving interviews in the Arab press, telling Muslims that the U.S government is "warehousing these men until they die," that detainees, the "ghost prisoners" continue to be tortured, abused and humiliated. One released Saudi detainee told a reporter than he'd been shot three times while at Guantanamo. What makes Congress think that if the detainees are transferred elsewhere, this kind of anti-American propagandizing will stop?

Some of the lawyers who are spearheading this effort held a Guantanamo "teach in" at Seton Hall Law School in October of 2006 that was broadcast via the internet to 100 law schools around the country. Professor Mark Denbeaux hosted the event which, he said, was ultimately about redemption. *Our redemption!* As you know, he is the author of a flawed anecdotal study about detainees' histories that is based on information that any high-school kid can find on the internet, as opposed to classified intelligence.

At the end of the conference, an attorney from Chicago read a selection of poems written by detainees which were later actually published by a university press. One poem, which was characterized as a "love poem to his lawyer," was written by a Kuwaitee detainee (now released) and was entitled, "To My Captive Lawyer, Miranda." This is an enemy combatant making a fool out of his attorney, even mocking the legal rights that the lawyer is working to extend to the detainee. The poem describes getting out of

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00075 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.024

Guantanamo and taking his lawyer captive in the night. "I pledge that if I ever see you outside this prison, I will capture you."

Another poem, called "Death Poem," was written by a Bahraini detainee named Juma Al Dossari. The law students at Seton Hall were not told that Al Dossari was the subject of a PBS documentary about the Lackawanna Six. Juma Al Dossari was dubbed "The Closer" because he was a jihadi recruiter who was very good at getting young Muslims to leave their homes and join the fight. The peaceful elder Muslims in Lackawanna, New York are deeply angry with Al Dossari because they invited him into their homes and welcomed him as a visiting imam, after which he persuaded six of their sons to go to terrorist training camps in Afghanistan. The six are now serving time in federal prison. Al Dossari, who is actually Saudi but whose passport was revoked by the Saudi government, was released from Guantanamo, to the dismay of the Muslim community in Lackawanna.

In 2005 I sat in the courtroom listening to a court-appointed federal defender make his closing argument in the Zacarias Moussaoui case. Moussaoui had pled guilty to six counts of conspiracy and was facing sentencing. The jury had just sat through two weeks of victim impact testimony and evidence. They listened to the cockpit voice recorder on United Airlines flight 93, in which a flight attendant, pushed into the cockpit when the hijackers took over the plane, and after witnessing the horrific murder of the cockpit crew, can be heard begging, pleading for her life. The jury was shown videotape of desperate people jumping from the Trade Center and hitting the ground below.

The defense attorney then had the audacity to tell these jurors that this trial wasn't really about Moussaoui at all. It was about them. *Redemption.* They actually projected a giant photograph on an overhead screen in the courtroom of Martin Luther King.

Mr. Denbeaux closed the Guantanamo teach-in by saying, "Five years after the fury and the fear first started, we are now back." This is deeply disturbing. The only fury and fear is that which came from determined, death-worshiping religious fanatics who believe that their ticket to paradise can be bought through the blood of innocent men, women, and children, and who wreaked havoc on a country that had welcomed them.

In closing, allow me to remind this committee of who is being hurt by the propaganda campaign that is being mounted by the lawyers and the PR firms on behalf of the Guantanamo detainees. What is significant about this episode cannot found in Kuwaitee-funded PR campaigns, at law-school teach ins, in defense lawyers' arguments – and especially not in detainee poetry. Rather, it is found in letters like one that I received from a Chicago lawyer after my column ran in the Wall Street Journal. Here is what this letter said:

> Dear Ms. Burlingame:
>
> Bless you for putting the considerable time and effort to dig out the real story behind so many of the detainee "victims" . . .

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00076 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.025

> My personal interest in your article is that I have a son in the US Navy who serves at Guantanamo. Though not stated explicitly, I can hear in his voice and infer through his written words how hurtful and harmful these media creations are to those who serve.

If this Congress votes to shut down Guantanamo, it will not shut down this problem. The government of Kuwait and others funding the campaign against Guantanamo are not interested in where the detainees are held. They want them released, regardless of how guilty they are or how likely they are to return to combat against the United States. Transferring detainees to the United States will not stop this campaign. Indeed, by extending further legal rights to the detainees, such a transfer would only give the lawyers more access to their clients and more tools with which to wage this legal and PR offensive against the United States. And it is our own nation's security and our own soldiers in the field who will suffer as a result.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00077 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.026

PR Perspective: A Long-Term Struggle...
How a Media Campaign Helped Turn the Guantanamo Tide
by Richard S. Levick,
President
Levick Strategic Communications
rlevick@levick.com

In the aftermath of 9-11, bounty hunters captured hundreds of young Arab men in the Afghanistan and Pakistan war zone. They were delivered over to the U.S. military as suspected terrorists and brought to the U.S. Naval base in Guantánamo Bay, Cuba. They've been held in secret detention without charges and without due process.

Among them were twelve Kuwaitis. Their fates would come to depend on the U.S. military personnel guarding them, the well-known law firm working on their behalf, the judges making decisions about their status - and our team of public relations professionals.

What has since occurred offers a model tale of how "PR" - sometimes unjustly a byword for sycophancy and hollow promotion - can be used in an unpopular cause to reverse a tidal wave of adverse public perception.

In 2002, relatives of the Kuwaiti detainees, led by an impressive gentleman named Khalid Al-Odah, whose son remains among the detainees, banded together to form the Kuwaiti Family Committee. The group hired the large New York-based law firm Shearman & Sterling to spearhead the battle to grant these prisoners the legal protections provided to U.S. citizens, such as the right to have charges brought against them and the right to a trial.

To create an environment where reporters knew that this issue deserved open-minded coverage, we devised a two-tiered PR strategy. One tack was to put a human face on the then "invisible" detainees in Guantánamo. With such exposure, Americans would be more apt to ask themselves: "Does our country really want to be treating people this way?" The subtext: The United States is supposed to be a beacon of freedom and justice in the world, and instead is resorting to nefarious and un-democratic tactics worthy of the terrorists themselves.

The second prong of the communication outreach would help the public understand that the issues faced by the detainees affect all Americans. The underlying message emphasized that suspending the rule of law, forsaking habeas corpus, and ignoring the Geneva Conventions diminishes this country's image and endangers the lives of Americans abroad.

The ace in the hole was the U.S. Supreme Court, which, in June of 2004, ruled that the prisoners had a right to either due process or release. In recent months, the messaging has extended far afield of that ruling, especially as reports of torture and abuse have allowed us to lobby reporters and editorial columnists with renewed urgency.

In the beginning, however, the High Court judgment was our main weapon. The cause was then so unpopular that we had to recast the dialogue - to, in a sense, make the Supreme Court our de facto client. To be sure, the Shearman team,

53355.027

headed by partner Thomas Wilner, recognized that a top-notch legal effort would not be sufficient. The cases would have to be pled in the court of public opinion just as surely as they would be pled in a court of law.

At the outset, when the Supreme Court was our only cudgel, the entire issue of foreigners secretly imprisoned by the United States received little traction in the national media. Gradually, we forced more attention in the traditional "liberal press" with interviews and articles in the *Washington Post* and the *New York Times*.

But that was hardly enough. We needed to reach the *Cleveland Plain Dealer* and the *Sacramento Bee* as well. We also noted something interesting. From the very beginning, certain organs of conservative opinion, like the *National Review*, were already on our side, fired by constructionist passion for Constitutional rights and due process. Why not undermine the opposition by reaching out to a yet broader spectrum of conservatives?

Shearman's Wilner became the main spokesperson for the efforts on behalf of the Gitmo detainees. Indeed, he's been our other ace in the hole. In our work, we sometimes come across attorneys who resist any attempt to mount a vigorous public campaign, or they vet the terms of each communication so circumspectly as to neuter it altogether.

By contrast, Wilner is a media-savvy, media-experienced lawyer who never needed explanations of why were doing what we had to do. At the same time, we know from experience where the legal and PR strategies don't overlap. A parallel and fluid relationship with the legal team requires great effort to ensure that the PR strategy does not ever conflict with the legal agenda.

Also crucial, we optimized a new website. "Optimization" means posting sites with sufficient meta-tags and embedded key words to maximize visitors throughout the world. That website - www.kwaitifreedom.org - remains a repository of information for journalists and other audiences as well as a tool of powerful advocacy for our clients. It also underscores our "human faces" strategy. You can simply see these "real" people on the website.

The tandem efforts of the legal and PR specialists have yielded good results for The Kuwaiti Family Committee. The past 14 months of public relations outreach have produced literally thousands of news placements.

You often hear lawyers and clients disclaim any attempt to directly influence juries and judges. Nonsense! PR does just that, and it does so honorably. Our news feed, including dozens of op-eds by both Wilner and Khalid Al-Odah, reached the public and Congress directly, raising awareness of the situation in Guantánamo. In turn, such public awareness would ensure that judges knew that people were paying attention, that the prisoners weren't forgotten, and that it was indeed a viable as well as correct position to affirm due process in this situation.

The judges working on the detainee cases have openly cited stories that resulted from the media outreach in some of their rulings, which generally have been favorable to the detainees' cases. As Michael J. Glennon, a professor of international law at Tufts University, told the *Washington Post*: "The discomfort some justices may have with U.S. foreign policy is bound to lap over into their views of the legal issues. There is no question the justices live in this world and they read the newspapers."

To date, six of the detainees have been set free, and the legal and public relations teams continue to coordinate efforts to help free the remaining six. Considering the mood of the country just one year ago, we take immense pride in showing just what public relations can accomplish, not with slick talking points, but with a just cause and indefatigable advocacy.

About the author

Richard S. Levick, Esq., rlevick@levick.com, is President of Levick Strategic Communications, which has directed the media in the highest- profile matters, from Guantánamo and Napster to the Catholic Church controversy and the Rosie O'Donnell Rosie magazine lawsuit. Their latest book, "365 Marketing Meditations: Daily Lessons for Marketing & Communications Professionals is available at Amazon.com, as is their classic Stop the Presses: The Litigation PR Desk Reference."

Copyright © 2005 Richard Levick. All rights reserved.

00030211064

Clerk of the House of Representatives
Legislative Resource Center
B-106 Cannon Building
Washington, DC 20515

Secretary of the Senate
Office of Public Records
232 Hart Building
Washington, DC 20510

SECRETARY OF THE SENATE
03 MAY 22 AM 10:44

LOBBYING REGISTRATION

Lobbying Disclosure Act of 1995 (Section 4)

Check if this is an Amended Registration ☐ 1. Effective Date of Registration April 17, 2003

2. House Identification Number _____ Senate Identification Number _____

REGISTRANT

3. Registrant name Shearman & Sterling

Address 801 Pennsylvania Avenue, N.W.

City Washington State DC Zip 20004

4. Principal place of business (if different from line 3)

City State/Zip (or Country)

5. Telephone number and contact name

202-508-8050 Contact Thomas B. Wilner E-mail (optional) twilner@she

6. General description of registrant's business or activities

Law Firm

CLIENT

A Lobbying firm is required to file a separate registration for each client. Organizations employing in-house lobbyists should check the b

labeled "Self" and proceed to line 10. ☐ *Self*

7. Client name Kuwaiti Counsel for the families of International Counsel Bureau, Kuwaiti Citizens at Guantanamo Bay

Address Dasman Commercial Complex No. 3, 8th Floor, Al Sharq, P.O. Box 20941

City Safat State Kuwait Zip

8. Principal place of business (if different from line 7)

City State/Zip (or Country)

9. General description of client's business or activities

Lawyer for families of 12 Kuwaiti citizens detained at Guantanamo Bay.

LOBBYISTS

10. Name of each individual who has acted or is expected to act as a lobbyist for the client identified on line 7. If any person lis this section has served as a "covered executive branch official" or "covered legislative branch official" within two years o acting as a lobbyist for the client, *state the executive and/or legislative position(s) in which the person served.*

Name	Covered Official Position (if applicable)
Thomas B. Wilner	
Kristine Huskey	
Heather Lamberg Kafele	

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00081 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.030

00000312993

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

RECEIVED
SECRETARY OF THE SENATE
PUBLIC RECORDS
03 AUG 14 PM 2:18

00000312993

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) - **All Filers Are Required to Complete This Page**

1. Registrant Name
Shearman & Sterling LLP

2. Address ☐ Check if different than prior only reported
801 Pennsylvania Avenue, N.W., Suite 900, Washington, DC 20004

3. Principal Place of Business (if different from line 2)
New York City: NY 10022 State/zip (or Country)

4. Contact Name	Telephone	E-mail (optional)	5. Senate ID #
Thomas B. Wilner	(202) 508-8050	twilner@shearman.com	33057-292

7. Client Name ☐ Self
International Counsel Bureau, Kuwaiti Counsel for the Families of Kuwaiti Citizens at Guantanamo Bay

6. House ID # 33058019

TYPE OF REPORT 8. Year 2003 Midyear (January 1-June 30) ☑ OR Year End (July 1-December 31)

9. Check if this filing amends a previously filed version of this report ☐

10. Check if this is a Termination Report ☐ ⇨ Termination Date _____ 11. No Lobbying Activity

INCOME OR EXPENSES Complete Either Line 12 OR Line 13

12. Lobbying Firms

INCOME relating to lobbying activities for this reporting period was:

Less than $10,000 ☑

$10,000 or more ☐ ⇨ $ _____ Income (nearest $20,000)

Provide a good faith estimate, rounded to the nearest $20,000, of all lobbying related income from the client (including all payments to the registrant by any other entity for lobbying activities on behalf of the client).

13. Organizations

EXPENSES relating to lobbying activities for this reporting period were:

Less than $10,000 ☐

$10,000 or more ☐ ⇨ $ _____ Expenses (nearest $20,000)

14. REPORTING METHOD. Check box to indicate expense accounting method. See instructions for description of options.

☐ **Method A.** Reporting amounts using LDA definitions only
☐ **Method B.** Reporting amounts under section 6033(b)(8) of the Internal Revenue Code
☐ **Method C.** Reporting amounts under section 162(e) of the Internal Revenue Code

Signature Kristine A. Huskey Date 8/14/03

Printed Name and Title Kristine A. Huskey, Associate

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00082 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.031

00000510278

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

RECEIVED
SECRETARY OF THE SENATE
PUBLIC RECORDS
04 FEB 17 PM 12:27

00000510278

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) - **All Filers Are Required to Complete This Page**

1. Registrant Name
Shearman & Sterling LLP

2. Address ☐ Check if different than previously reported
801 Pennsylvania Avenue, N.W., Suite 900, Washington, DC 20004

3. Principal Place of Business (if different from line 2)
New York (City) NY 10022 (State/zip (or Country))

4. Contact Name	Telephone	E-mail (optional)	5. Senate ID #
Thomas B. Wilner	(202) 508-8000	twilner@shearman.com	33057-292

7. Client Name ☐ Self	8. House ID #
International Counsel Bureau, Kuwaiti Counsel for the Families of Kuwaiti Citizens at Guantanamo Bay	33058019

TYPE OF REPORT 8. Year 2003 Midyear (January 1-June 30) ☐ OR Year End (July 1-December 31)

9. Check if this filing amends a previously filed version of this report ☐

10. Check if this is a Termination Report ☐ ⇨ Termination Date _____ 11. No Lobbying Activity

INCOME OR EXPENSES - Complete Either Line 12 OR Line 13

12. Lobbying Firms	13. Organizations
INCOME relating to lobbying activities for this reporting period was:	**EXPENSES** relating to lobbying activities for this reporting period were:
Less than $10,000 ☑	Less than $10,000 ☐
$10,000 or more ☐ ⇨ $ _____ (Income (nearest $20,000))	$10,000 or more ☐ ⇨ $ _____ (Expenses (nearest $20,000))
Provide a good faith estimate, rounded to the nearest $20,000, of all lobbying related income from the client (including all payments to the registrant by any other entity for lobbying activities on behalf of the client).	**14. REPORTING METHOD.** Check box to indicate expense accounting method. See instructions for description of options. ☐ Method A. Reporting amounts using LDA definitions only ☐ Method B. Reporting amounts under section 6033(b)(8) of the Internal Revenue Code ☐ Method C. Reporting amounts under section 162(e) of the Internal Revenue Code

Signature _____ Date 2/12/04

Printed Name and Title Thomas B. Wilner

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00083 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.032

00000810678

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

RECEIVED
SECRETARY OF THE SENATE
PUBLIC RECORDS
04 AUG 16 PM 2:29

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) - **All Filers Are Required to Complete This Page**

1. Registrant Name
Shearman & Sterling LLP

2. Address ☐ Check if different than previously reported
801 Pennsylvania Avenue, N.W., Suite 900, Washington, DC 20004

3. Principal Place of Business (if different from line 2)
New York — City; NY 10022 — State/Zip (or Country)

4. Contact Name	Telephone	E-mail (optional)	5. Senate ID #
Thomas B. Wilner	(202) 508-8050	twilner@shearman.com	35057-292

7. Client Name ☐ Self	6. House ID #
International Counsel Bureau, Kuwaiti Counsel for the Families of Kuwaiti Citizens at Guantanamo Bay	33058019

TYPE OF REPORT 8. Year 2004 Midyear (January 1-June 30) ☑ OR Year End (July 1-December 31

9. Check if this filing amends a previously filed version of this report ☐

10. Check if this is a Termination Report ☐ ⇨ Termination Date _____ 11. No Lobbying Activit

INCOME OR EXPENSES - Complete Either Line 12 OR Line 13

12. Lobbying Firms

INCOME relating to lobbying activities for this reporting period was:

Less than $10,000 ☑

$10,000 or more ☐ ⇨ $ _____ (income (nearest $20,000))

Provide a good faith estimate, rounded to the nearest $20,000, of all lobbying related income from the client (including all payments to the registrant by any other entity for lobbying activities on behalf of the client).

13. Organizations

EXPENSES relating to lobbying activities for this reporting period were:

Less than $10,000 ☐

$10,000 or more ☐ ⇨ $ _____ (expenses (nearest $20,000))

14. REPORTING METHOD. Check box to indicate expense accounting method. See instructions for description of options.

- ☐ **Method A.** Reporting amounts using LDA definitions only
- ☐ **Method B.** Reporting amounts under section 6033(b)(8) of Internal Revenue Code
- ☐ **Method C.** Reporting amounts under section 162(e) of the Internal Revenue Code

Signature _____ Date 8/16/04

Thomas B. Wilner, Partner

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00084 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.033

00000140265

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

RECEIVED
SECRETARY OF THE SENATE
PUBLIC RECORDS
05 FEB 15 AM 10:51

00000140265

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) - **All Filers Are Required to Complete This Page**

1. Registrant Name
Shearman & Sterling LLP

2. Address ☐ Check if different than previously reported
801 Pennsylvania Avenue, N.W., Suite 900, Washington, DC 20004

3. Principal Place of Business (if different from line 2)
New York (City:) NY 10022 (State/zip (or Country))

4. Contact Name	Telephone	E-mail (optional)	5. Senate ID #
Thomas B. Wilner	(202) 508-8050	twilner@shearman.com	35057-292

7. Client Name ☐ Self	6. House ID #
International Counsel Bureau, Kuwaiti Counsel for the Families of Kuwaiti Citizens at Guantanamo Bay	33058019

TYPE OF REPORT 8. Year 2004 Midyear (January 1-June 30) ☐ **OR** Year End (July 1-December 3

9. Check if this filing amends a previously filed version of this report ☐

10. Check if this is a Termination Report ☐ ⇨ Termination Date _____ 11. No Lobbying Activi

INCOME OR EXPENSES - Complete Either Line 12 OR Line 13

12. Lobbying Firms

INCOME relating to lobbying activities for this reporting period was:

Less than $10,000 ☑

$10,000 or more ☐ ⇨ $ _____ Income (nearest $20,000)

Provide a good faith estimate, rounded to the nearest $20,000, of all lobbying related income from the client (including all payments to the registrant by any other entity for lobbying activities on behalf of the client).

13. Organizations

EXPENSES relating to lobbying activities for this reporting period were:

Less than $10,000 ☐

$10,000 or more ☐ ⇨ $ _____ Expenses (nearest $20,000)

14. REPORTING METHOD. Check box to indicate expense accounting method. See instructions for description of options.

☐ **Method A.** Reporting amounts using LDA definitions only
☐ **Method B.** Reporting amounts under section 6033(b)(8) of Internal Revenue Code
☐ **Method C.** Reporting amounts under section 162(e) of the Internal Revenue Code

Signature _____ Date 2/10/05

Thomas B. Wilner, Partner

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00085 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.034

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

RECEIVED
SECRETARY OF THE SENATE
05 AUG 16 PM 12:49

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) - **All Filers Are Required to Complete This Page**

1. Registrant Name
Shearman & Sterling LLP

2. Address ☐ Check if different than previously reported
801 Pennsylvania Avenue, N.W., Suite 900, Washington, DC 20004

3. Principal Place of Business (if different from line 2)
New York — NY 10022
City — State/Zip (or Country)

4. Contact Name	Telephone	E-mail (optional)	5. Senate ID #
Thomas B. Wilner	(202) 508-8060	twilner@shearman.com	35057-292

7. Client Name ☐ Self	6. House ID #
International Counsel Bureau, Kuwaiti Counsel for the Families of Kuwaiti Citizens at Guantanamo Bay	33058019

TYPE OF REPORT 8. Year 2005 Midyear (January 1-June 30) ☑ **OR** Year End (July 1-December 31) ☐

9. Check if this filing amends a previously filed version of this report ☐

10. Check if this is a Termination Report ☐ ⇨ Termination Date _____ 11. No Lobbying Activity ☐

INCOME OR EXPENSES - Complete Either Line 12 OR Line 13

12. Lobbying Firms	13. Organizations
INCOME relating to lobbying activities for this reporting period was:	**EXPENSES** relating to lobbying activities for this reporting period were:
Less than $10,000 ☑	Less than $10,000 ☐
$10,000 or more ☐ ⇨ $ _____ Income (nearest $20,000)	$10,000 or more ☐ ⇨ $ _____ Expenses (nearest $20,000)
Provide a good faith estimate, rounded to the nearest $20,000, of all lobbying related income from the client (including all payments to the registrant by any other entity for lobbying activities on behalf of the client).	**14. REPORTING METHOD.** Check box to indicate expense accounting method. See instructions for description of options. ☐ **Method A.** Reporting amounts using LDA definitions only ☐ **Method B.** Reporting amounts under section 6033(b)(8) of the Internal Revenue Code ☐ **Method C.** Reporting amounts under section 162(e) of the Internal Revenue Code

0000400525

Signature _____ Date _____

Printed Name and Title Thomas B. Wilner, Partner

LD-2 (REV. 4/01)

PAGE 1 of 5

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00086 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.035

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

Secretary of the Senate
Received: Feb 14, 2006

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) - **All Filers Are Required To Complete This Page**

1. Registrant Name:

SHEARMAN & STERLING LLP

2. Address:
801 PENNSYLVANIA AVENUE, NW SUITE 900, WASHINGTON, DC 20004

3. Principal place of business (if different from line 2):
Country City: NEW YORK State/Zip(or Country): NY 10022

4. Contact Name: THOMAS B. WILNER
Telephone: (202) 508-8050
E-mail (optional): twilner@shearman.com

Senate ID #: 35057-292
House ID #: 33058019

7. Client Name: ☐ Self

INT'L COUNSEL BUREAU, KUWAITI COUNSEL FOR THE FAMILIES OF KUWAITI CITIZENS AT GT

TYPE OF REPORT

8. Year 2005 Midyear (January 1 - June 30): ☐ **OR** Year End (July 1 - December 31): ☒

9. Check if this filing amends a previously filed version of this report: ☐

10. Check if this is a Termination Report: ☐ => Termination Date: 11. No Lobbying Activity: ☐

INCOME OR EXPENSES

Complete Either Line 12 **OR** Line 13

12. Lobbying Firms

INCOME relating to lobbying activities for this reporting period was:

Less than $10,000: ☐

$10,000 or more: ☒ => Income (nearest $20,000): 160,000.00

Provide a good faith estimate, rounded to the nearest $20,000, of all lobbying related income from the client (including all payments to th registrant by any other entity for lobbying activities on behalf of the client).

13. Organizations

EXPENSES relating to lobbying activities for this reporting period were:

Less than $10,000: ☐

$10,000 or more: ☐ => Expenses (nearest $20,000):

14. Reporting Method.
Check box to indicate expense accounting method. See instructions for description of options.

☐ **Method A.** Reporting amounts using LDA definitions only
☐ **Method B.** Reporting amounts under section 6033(b)(9) of the Internal Revenue Code
☐ **Method C.** Reporting amounts under section 162(e) of the Internal Revenue Code

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00087 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.036

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

Secretary of the Senate
Received: Aug 14, 2006

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) - **All Filers Are Required To Complete This Page**

1. Registrant Name:

SHEARMAN & STERLING LLP

2. Address:
801 PENNSYLVANIA AVENUE NW SUITE 900, WASHINGTON, DC 20004

3. Principal place of business (if different from line 2):
Country City: NEW YORK State/Zip(or Country): NY 10022

4. Contact Name: THOMAS B. WILNER
Telephone: (202) 508-8050
E-mail (optional): twilner@shearman.com

Senate ID #: 35057-292
House ID #: 33058019

7. Client Name: ☐ Self

INT'L COUNSEL BUREAU, KUWAITI COUNSEL FOR THE FAMILIES OF KUWAITI CITIZENS AT GT

TYPE OF REPORT

8. Year 2006 Midyear (January 1 - June 30): ☒ **OR** Year End (July 1 - December 31): ☐

9. Check if this filing amends a previously filed version of this report: ☐

10. Check if this is a Termination Report: ☐ => Termination Date: 11. No Lobbying Activity: ☐

INCOME OR EXPENSES

Complete Either Line 12 **OR** Line 13

12. Lobbying Firms

INCOME relating to lobbying activities for this reporting period was:

Less than $10,000: ☐

$10,000 or more: ☒ => Income (nearest $20,000): 40,000.00

Provide a good faith estimate, rounded to the nearest $20,000, of all lobbying related income from the client (including all payments to th registrant by any other entity for lobbying activities on behalf of the client).

13. Organizations

EXPENSES relating to lobbying activities for this reporting period were:

Less than $10,000: ☐

$10,000 or more: ☐ => Expenses (nearest $20,000):

14. Reporting Method.
Check box to indicate expense accounting method. See instructions for description of options.

☐ **Method A.** Reporting amounts using LDA definitions only
☐ **Method B.** Reporting amounts under section 6033(b)(8) of the Internal Revenue Code
☐ **Method C.** Reporting amounts under section 162(e) of the Internal Revenue Code

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00088 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.037

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

Secretary of the Senate
Received: Feb 13, 2007

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) - **All Filers Are Required To Complete This Page**

1. Registrant Name:

SHEARMAN & STERLING LLP

2. Address:
801 PENNSYLVANIA AVENUE, NW Suite 900, WASHINGTON, DC 20004

3. Principal place of business (if different from line 2):
City: New York State/Zip(or Country): NY 10022

4. Contact Name: THOMAS B. WILNER
Telephone: 2025088050
E-mail (optional): twilner@shearman.com

Senate ID #: 35057-292
House ID #:

7. Client Name: ☐ Self

INTL COUNSEL BUREAU, KUWAITI COUNSEL FOR THE FAMILIES OF KUWAITI CITIZENS AT GT

TYPE OF REPORT

8. Year 2006 Midyear (January 1 - June 30): ☐ **OR** Year End (July 1 - December 31): ☒

9. Check if this filing amends a previously filed version of this report: ☐

10. Check if this is a Termination Report: ☒ => Termination Date: Dec 31, 2006 11. No Lobbying Activity: ☒

INCOME OR EXPENSES

Complete Either Line 12 **OR** Line 13

12. Lobbying Firms

INCOME relating to lobbying activities for this reporting period was:

Less than $10,000: ☒

$10,000 or more: ☐ => Income (nearest $20,000):_____

Provide a good faith estimate, rounded to the nearest $20,000, of all lobbying related income from the client (including all payments to th registrant by any other entity for lobbying activities on behalf of the client).

13. Organizations

EXPENSES relating to lobbying activities for this reporting period were:

Less than $10,000: ☐

$10,000 or more: ☐ => Expenses (nearest $20,000):_____

14. Reporting Method.
Check box to indicate expense accounting method. See instructions for description of options.

☐ **Method A.** Reporting amounts using LDA definitions only
☐ **Method B.** Reporting amounts under section 6033(b)(8) of the Internal Revenue Code
☐ **Method C.** Reporting amounts under section 162(e) of the Internal Revenue Code

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00089 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.038

00000302910

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

SECRETARY OF THE SENATE
03 AUG 14 AM 10:52

00000302910

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) -All Filers Are Required to Complete This Page

1. Registrant Name
Arnold & Porter

2. Registrant Address ☐ Check if different than previously reported
Address 555 12th Street, NW
City Washington State/Zip (or Country) DC 20004

3. Principal Place of Business (if different from line 2)
City State/Zip (or Country)

4. Contact Name	Telephone	E-mail (optional)	5. Senate ID #
Douglas Dworkin	202-942-5227		4301-1216

7. Client Name ☐ Self	6. House ID #
International Counsel Bureau	

TYPE OF REPORT 8. Year 2003 Midyear (January 1-June 30) ☒ OR Year End (July 1-December 3

9. Check if this filing amends a previously filed version of this report ☐

10. Check if this is a Termination Report ☐ >> Termination Date _____ 11. No Lobbying Acti

INCOME OR EXPENSES - Complete Either Line 12 OR Line 13

12. Lobbying Firms

INCOME relating to lobbying activities for this reporting period was:

Less than $10,000 ☒

$10,000 or more ☐ >> $ _____
Income (nearest $20,000)

Provide a good faith estimate, rounded to the nearest $20,000 of all lobbying related income from the client (including all payments to the registrant by any other entity for lobbying activities on behalf of the client).

13. Organizations

EXPENSES relating to lobbying activities for this reporting period were:

Less than $10,000 ☐

$10,000 or more ☐ >> $ _____
Expenses (nearest $10,000)

14. REPORTING METHOD. Check box to indicate expens accounting method. See instructions for description of options.

☐ Method A. Reporting amounts using LDA definitions only

☐ Method B. Reporting amounts under section 6033(b)(8) o the Internal Revenue Code

☐ Method C. Reporting amounts under section 162(e) of the Internal Revenue Code

Signature _____ Date 8/14/2003

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00090 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.039

00000510720

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

RECEIVED
SECRETARY OF THE SENATE
04 FEB 17 PM 1:49

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) -**All Filers Are Required to Complete This Page**

1. Registrant Name
Arnold & Porter

2. Registrant Address ☐ Check if different than previously reported
Address 555 12th Street, NW
City Washington State/Zip (or Country) DC 20004

3. Principal Place of Business (if different from line 2)
City State/Zip (or Country)

4. Contact Name	Telephone	E-mail (optional)	5. Senate ID #
Ronald Lee	202-942-5380	Ronald_Lee@aporter.com	4301-1216

7. Client Name ☐ Self
International Counsel Bureau

6. House ID #

TYPE OF REPORT 8. Year 2003 Midyear (January 1-June 30) ☐ **OR** Year End (July 1-December 3

9. Check if this filing amends a previously filed version of this report ☐

10. Check if this is a Termination Report ☐ >> Termination Date _____ 11. No Lobbying Acti

INCOME OR EXPENSES - Complete Either Line 12 OR Line 13

12. Lobbying Firms

INCOME relating to lobbying activities for this reporting period was:

Less than $10,000 ☐

$10,000 or more ☒ >> $ $140,000.00
Income (nearest $20,000)

Provide a good faith estimate, rounded to the nearest $20,000 of all lobbying related income from the client (including all payments to the registrant by any other entity for lobbying activities on behalf of the client).

13. Organizations

EXPENSES relating to lobbying activities for this reporting period were:

Less than $10,000 ☐

$10,000 or more ☐ >> $ _____
Expenses (nearest $20,000)

14. REPORTING METHOD. Check box to indicate expens accounting method. See instructions for description of options

☐ **Method A.** Reporting amounts using LDA definitions onl

☐ **Method B.** Reporting amounts under section 6033(b)(8) c the Internal Revenue Code

☐ **Method C.** Reporting amounts under section 162(e) of the Internal Revenue Code

Signature _____ Date 2/17/2004

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00091 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.040

00000783348

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

SECRETARY OF THE SENATE
04 AUG 16 PM 4:12

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) -**All Filers Are Required to Complete This Page**

1. Registrant Name
Arnold & Porter LLP

2. Registrant Address ☐ Check if different than previously reported
Address **555 12th Street, NW**
City **Washington** State/Zip (or Country) **DC 20004**

3. Principal Place of Business (if different from line 2)
City State/Zip (or Country)

4. Contact Name	Telephone	E-mail (optional)	5. Senate ID #
Ronald Lee	**202-942-5380**	**Ronald_Lee@aporter.com**	**4381-1216**

7. Client Name ☐ Self	6. House ID #
International Counsel Bureau	

TYPE OF REPORT 8. Year **2004** Midyear (January 1-June 30) ☒ OR Year End (July 1-December

9. Check if this filing amends a previously filed version of this report ☐

10. Check if this is a Termination Report ☐ >> Termination Date _____ 11. No Lobbying Acti

INCOME OR EXPENSES - Complete Either Line 12 OR Line 13

12. Lobbying Firms

INCOME relating to lobbying activities for this reporting period was:

Less than $10,000 ☐

$10,000 or more ☒ >> $ **$20,000.00**
Income (nearest $20,000)

Provide a good faith estimate, rounded to the nearest $20,000 of all lobbying related income from the client (including all payments to the registrant by any other entity for lobbying activities on behalf of the client).

13. Organizations

EXPENSES relating to lobbying activities for this reporting period were:

Less than $10,000 ☐

$10,000 or more ☐ >> $ _____
Expenses (nearest $20,000)

14. REPORTING METHOD. Check box to indicate expens accounting method. See instructions for description of options

☐ **Method A.** Reporting amounts using LDA definitions onl

☐ **Method B.** Reporting amounts under section 6033(b)(8) c the Internal Revenue Code

☐ **Method C.** Reporting amounts under section 162(e) of the Internal Revenue Code

Signature _____ Date **8/5/2004**

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00092 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.041

00000101975

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

SECRETARY OF THE SENATE
05 FEB 14 PM 4:21

00000101975

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) -All Filers Are Required to Complete This Page

1. Registrant Name
Arnold & Porter LLP

2. Registrant Address ☐ Check if different than previously reported
Address 555 12th Street, NW
City **Washington** State/Zip (or Country) **DC 20004**

3. Principal Place of Business (if different from line 2)
City State/Zip (or Country)

4. Contact Name	Telephone	E-mail (optional)	5. Senate ID #
Ronald Lee	**202-942-5380**	**Ronald_Lee@aporter.com**	**4301-1216**

7. Client Name ☐ Self — 6. House ID #
International Counsel Bureau - Kuwaiti Counsel for the families of Kuwaiti Citizens at Guantanamo Bay.

TYPE OF REPORT 8. Year 2004 Midyear (January 1-June 30) ☐ OR Year End (July 1-December

9. Check if this filing amends a previously filed version of this report ☐

10. Check if this is a Termination Report ☐ >> Termination Date _____ 11. No Lobbying Ac

INCOME OR EXPENSES - Complete Either Line 12 OR Line 13

12. Lobbying Firms	13. Organizations
INCOME relating to lobbying activities for this reporting period was:	**EXPENSES** relating to lobbying activities for this reporting period were:
Less than $10,000 ☐	Less than $10,000 ☐
$10,000 or more ☒ >> $ **$20,000.00** (Income (nearest $20,000))	$10,000 or more ☐ >> $ _____ (Expenses (nearest $20,000))
Provide a good faith estimate, rounded to the nearest $20,000 of all lobbying related income from the client (including all payments to the registrant by any other entity for lobbying activities on behalf of the client).	14. **REPORTING METHOD.** Check box to indicate expen accounting method. See instructions for description of option ☐ **Method A.** Reporting amounts using LDA definitions or ☐ **Method B.** Reporting amounts under section 6033(b)(8) the Internal Revenue Code ☐ **Method C.** Reporting amounts under section 162(e) of th Internal Revenue Code

Signature _____ Date **2/14/2005**

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00093 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.042

00000361054

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

RECEIVED
SECRETARY OF THE SENATE
PUBLIC RECORDS
05 AUG 15 PM 2:14

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) -**All Filers Are Required to Complete This Page**

1. Registrant Name
Arnold & Porter LLP

2. Registrant Address ☐ Check if different than previously reported
Address **555 12th Street, NW**
City **Washington** State/Zip (or Country) **DC 20004**

3. Principal Place of Business (if different from line 2)
City State/Zip (or Country)

4. Contact Name	Telephone	E-mail (optional)	5. Senate ID #
Ronald Lee	**202-942-5360**	**Ronald_Lee@aporter.com**	**4301-1216**

7. Client Name ☐ Self — 6. House ID #
International Counsel Bureau - Kuwaiti Counsel for the families of Kuwaiti Citizens at Guantanamo Bay.

TYPE OF REPORT 8. Year 2005 Midyear (January 1-June 30) ☒ OR Year End (July 1-December 31) ☐

9. Check if this filing amends a previously filed version of this report ☐

10. Check if this is a Termination Report ☐ >> Termination Date _____ 11. No Lobbying Activity ☐

INCOME OR EXPENSES - Complete Either Line 12 OR Line 13

12. Lobbying Firms

INCOME relating to lobbying activities for this reporting period was:

Less than $10,000 ☐

$10,000 or more ☒ >> $ $20,000.00
Income (nearest $20,000)

Provide a good faith estimate, rounded to the nearest $20,000 of all lobbying related income from the client (including all payments to the registrant by any other entity for lobbying activities on behalf of the client).

13. Organizations

EXPENSES relating to lobbying activities for this reporting period were:

Less than $10,000 ☐

$10,000 or more ☐ >> $ _____
Expenses (nearest $20,000)

14. REPORTING METHOD. Check box to indicate expense accounting method. See instructions for description of options.

☐ **Method A.** Reporting amounts using LDA definitions only

☐ **Method B.** Reporting amounts under section 6033(b)(8) of the Internal Revenue Code

☐ **Method C.** Reporting amounts under section 162(e) of the Internal Revenue Code

Signature Date 8/11/2005

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00094 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.043

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

RECEIVED
SECRETARY OF THE SENATE
PUBLIC RECORDS
06 FEB 14 PM 5:39

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) -All Filers Are Required to Complete This Page

1. Registrant Name
Arnold & Porter LLP

2. Registrant Address ☐ Check if different than previously reported
Address 555 12th Street, NW
City Washington State/Zip (or Country) DC 20004

3. Principal Place of Business (if different from line 2)
City State/Zip (or Country)

4. Contact Name	Telephone	E-mail (optional)	5. Senate ID #
Ronald Lee	202-942-5389	Ronald_Lee@aporter.com	4301-1216

7. Client Name ☐ Self	6. House ID #
International Counsel Bureau	

- Kuwaiti Counsel for the families of Kuwaiti Citizens at Guantanamo Bay.

TYPE OF REPORT 8. Year 2005 Midyear (January 1-June 30) ☐ OR Year End (July 1-December 31) ☒

9. Check if this filing amends a previously filed version of this report ☐

10. Check if this is a Termination Report ☐ >> Termination Date _____ 11. No Lobbying Activity ☐

INCOME OR EXPENSES - Complete Either Line 12 OR Line 13

12. Lobbying Firms	13. Organizations
INCOME relating to lobbying activities for this reporting period was:	EXPENSES relating to lobbying activities for this reporting period were:
Less than $10,000 ☐	Less than $10,000 ☐
$10,000 or more ☒ >> $ $20,000.00 (income (minimum $20,000))	$10,000 or more ☐ >> $ _____ (Expenses (minimum $20,000))
Provide a good faith estimate, rounded to the nearest $20,000 of all lobbying related income from the client (including all payments to the registrant by any other entity for lobbying activities on behalf of the client).	14. REPORTING METHOD. Check box to indicate expense accounting method. See instructions for description of options. ☐ Method A. Reporting amounts using LDA definitions only ☐ Method B. Reporting amounts under section 6033(b)(8) of the Internal Revenue Code ☐ Method C. Reporting amounts under section 162(e) of the Internal Revenue Code

00000070781

Signature _____ Date 2/14/2006

Printed Name and Title Leslie Nickel - Partner

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00095 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.044

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

Secretary of the Senate
Received: Aug 13, 2006

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) - **All Filers Are Required To Complete This Page**

1. Registrant Name:

ARNOLD & PORTER LLP

2. Address:
555 TWELFTH STREET, NW, WASHINGTON, DC 20004

3. Principal place of business (if different from line 2):
Country City: State/Zip(or Country):

4. Contact Name: RONALD LEE
Telephone: 202-942-5380
E-mail (optional): Ronald_Lee@aporter.com

Senate ID #: 4301-1216
House ID #: 31381088

7. Client Name: ☐ Self

INTERNATIONAL COUNSEL BUREAU - KUWAITI COUNSEL FOR FAMILIES OF KUWAITIS AT GUANT

TYPE OF REPORT

8. Year 2006 Midyear (January 1 - June 30): ☒ **OR** Year End (July 1 - December 31): ☐

9. Check if this filing amends a previously filed version of this report: ☐

10. Check if this is a Termination Report: ☐ => Termination Date: 11. No Lobbying Activity: ☐

INCOME OR EXPENSES

Complete Either Line 12 **OR** Line 13

12. Lobbying Firms

INCOME relating to lobbying activities for this reporting period was:

Less than $10,000: ☐

$10,000 or more: ☒ => Income (nearest $20,000): 20,000.00

Provide a good faith estimate, rounded to the nearest $20,000, of all lobbying related income from the client (including all payments to th registrant by any other entity for lobbying activities on behalf of the client).

13. Organizations

EXPENSES relating to lobbying activities for this reporting period were:

Less than $10,000: ☐

$10,000 or more: ☐ => Expenses (nearest $20,000):

14. Reporting Method.
Check box to indicate expense accounting method. See instructions for description of options.

☐ **Method A.** Reporting amounts using LDA definitions only
☐ **Method B.** Reporting amounts under section 6033(b)(8) of the Internal Revenue Code
☐ **Method C.** Reporting amounts under section 162(e) of the Internal Revenue Code

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00096 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.045

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

Secretary of the Senate
Received: Feb 09, 2007

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) - **All Filers Are Required To Complete This Page**

1. Registrant Name:

ARNOLD & PORTER LLP

2. Address:
555 12TH ST NW, WASHINGTON, DC 20004

3. Principal place of business (if different from line 2):

4. Contact Name: RONALD LEE
Telephone: 2029425380
E-mail (optional): Allison_Carroll@aporter.com

Senate ID #: 4301-1216
House ID #:

7. Client Name: ☐ Self

INTL COUNSEL BUREAU - KUWAITI COUNSEL FOR FAMILIES OF KUWAITIS AT GUANT

TYPE OF REPORT

8. Year 2006 Midyear (January 1 - June 30): ☐ **OR** Year End (July 1 - December 31): ☒

9. Check if this filing amends a previously filed version of this report: ☐

10. Check if this is a Termination Report: ☐ => Termination Date: 11. No Lobbying Activity: ☐

INCOME OR EXPENSES

Complete Either Line 12 **OR** Line 13

12. Lobbying Firms

INCOME relating to lobbying activities for this reporting period was:

Less than $10,000: ☐

$10,000 or more: ☒ => Income (nearest $20,000): 100,000.00

Provide a good faith estimate, rounded to the nearest $20,000, of all lobbying related income from the client (including all payments to th registrant by any other entity for lobbying activities on behalf of the client).

13. Organizations

EXPENSES relating to lobbying activities for this reporting period were:

Less than $10,000: ☐

$10,000 or more: ☐ => Expenses (nearest $20,000):

14. Reporting Method.
Check box to indicate expense accounting method. See instructions for description of options.

☐ **Method A.** Reporting amounts using LDA definitions only
☐ **Method B.** Reporting amounts under section 6033(b)(8) of the Internal Revenue Code
☐ **Method C.** Reporting amounts under section 162(e) of the Internal Revenue Code

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00097 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.046

Clerk of the House of Representatives	Secretary of the Senate
Legislative Resource Center	Office of Public Records
B-106 Cannon Building	232 Hart Building
Washington, DC 20515	Washington, DC 20510

Secretary of the Senate
Received: Aug 14, 2007

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) - **All Filers Are Required To Complete This Page**

1. Registrant Name:

ARNOLD & PORTER LLP

2. Address:
555 Twelfth Street, N.W., Washington, DC 20004-1206

3. Principal place of business (if different from line 2):

4. Contact Name: RONALD LEE
Telephone: 2029425380
E-mail (optional): Allison_Carroll@aporter.com

Senate ID #: 4301-1216
House ID #:

7. Client Name: ☐ Self

INTL COUNSEL BUREAU - KUWAITI COUNSEL FOR FAMILIES OF KUWAITIS AT GUANT

TYPE OF REPORT

8. Year 2007 Midyear (January 1 - June 30): ☒ **OR** Year End (July 1 - December 31): ☐

9. Check if this filing amends a previously filed version of this report: ☐

10. Check if this is a Termination Report: ☐ => Termination Date: 11. No Lobbying Activity: ☐

INCOME OR EXPENSES

Complete Either Line 12 **OR** Line 13

12. Lobbying Firms

INCOME relating to lobbying activities for this reporting period was:

Less than $10,000: ☐

$10,000 or more: ☒ => Income (nearest $20,000): 40,000.00

Provide a good faith estimate, rounded to the nearest $20,000, of all lobbying related income from the client (including all payments to th registrant by any other entity for lobbying activities on behalf of the client).

13. Organizations

EXPENSES relating to lobbying activities for this reporting period were:

Less than $10,000: ☐

$10,000 or more: ☐ => Expenses (nearest $20,000):

14. Reporting Method.
Check box to indicate expense accounting method. See instructions for description of options.

☐ **Method A.** Reporting amounts using LDA definitions only
☐ **Method B.** Reporting amounts under section 6033(b)(8) of the Internal Revenue Code
☐ **Method C.** Reporting amounts under section 162(e) of the Internal Revenue Code

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00098 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.047

Foreign Agent Registration Act filings - Kuwait

KUWAIT

Arnold & Porter, LLP **#1750**
555 - 12th Street, N.W.
Washington, DC 20004-1206

International Counsel Bureau, Kuwaiti Counsel for the families of Kuwaiti Citizens at Guantanamo Bay

Nature of Services: Legal and Other Services/Lobbying

The registrant provided legal advice and representation in efforts to obtain due process for the Kuwaiti detainees in U.S. custody at Guantanamo Bay.

$177,211.34 for the six month period ending June 4, 2005

Cleary, Gottlieb, Steen & Hamilton, LLP **#508**
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801

State of Kuwait

Nature of Services: Legal and Other Services

Activities: None Reported

Finances: None Reported

Levick Strategic Communications **#5649**
1900 M Street, N.W.
Suite 400
Washington, DC 20036

International Counsel Bureau on behalf of Kuwaiti Detainees Committee

Nature of Services: Media Relations

The registrant contacted representatives of the media, other private organizations, and U.S. Government officials to discuss issues regarding the detainees in U.S. custody in Guantanamo Bay.

$345,181.28 for the six month period ending April 30, 2005

Patton Boggs, L.L.P. **#2165**
2550 M Street, N.W.
Washington, DC 20037-1350

Embassy of the State of Kuwait

Nature of Services: Promotion of Trade

The registrant communicated with U.S. Government officials to discuss bilateral relations with the United States and the signing of a possible Free Trade Agreement between the two countries.

$132,000.00 for the six month period ending June 30, 2005

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00099 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.048

KUWAIT

Shearman & Sterling, LLP **#5670**
599 Lexington Avenue
New York, NY 10022-6069

International Counsel Bureau, Kuwaiti Counsel for the families of Kuwaiti Citizens at Guantanamo Bay

Nature of Services: Lobbying

The registrant will provide legal services in an effort to provide "due process for the Kuwaiti detainees in U.S. custody at Guantanamo Bay."

Finances: None Reported

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00100 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.049

KUWAIT

Arnold & Porter, LLP **#1750**

555 - 12th Street, N.W.
Washington, DC 20004-1206

International Counsel Bureau, Kuwaiti Counsel for the families of Kuwaiti Citizens at Guantanamo Bay

Nature of Services: Legal and Other Services/Lobbying

The registrant contacted members of Congress, congressional staffers, and media representatives, in an effort to obtain due process for the Kuwaiti detainees in U.S. custody at Guantanamo Bay. The registrant also provided legal advice and representation in this regard.

$156,522.17 for the six month period ending December 31, 2005

Cleary, Gottlieb, Steen & Hamilton, LLP **#508**

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801

State of Kuwait

Nature of Services: Legal and Other Services

Activities: None Reported

Finances: None Reported

Levick Strategic Communications **#5649**

1900 M Street, N.W.
Suite 400
Washington, DC 20036

International Counsel Bureau on behalf of Kuwaiti Detainees Committee

Nature of Services: Media Relations

The registrant contacted representatives of the media, other private organizations, and U.S. Government officials to discuss issues regarding the detainees in U.S. custody in Guantanamo Bay.

$318,317.77 for the six month period ending October 31, 2005

Patton Boggs, L.L.P. **#2165**

2550 M Street, N.W.
Washington, DC 20037-1350

Embassy of the State of Kuwait

Nature of Services: Promotion of Trade

The registrant communicated with U.S. Government officials to discuss bilateral relations with the United States and the signing of a possible Free Trade Agreement between the two countries.

$132,000.00 for the six month period ending December 31, 2005

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00101 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.050

KUWAIT

Shearman & Sterling, LLP **#5670**

599 Lexington Avenue
New York, NY 10022-6069

International Counsel Bureau, Kuwaiti Counsel for the families of Kuwaiti Citizens at Guantanamo Bay

Nature of Services: Lobbying

The registrant provided legal services in an effort to provide "due process for the Kuwaiti detainees in U.S. custody at Guantanamo Bay."

$749,980.00 for the six month period ending August 31, 2005

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00102 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.051

KUWAIT

Arnold & Porter, LLP #1750

555 - 12th Street, N.W.
Washington, DC 20004-1206

International Counsel Bureau, Kuwaiti Counsel for the families of Kuwaiti Citizens at Guantanamo Bay

Nature of Services: Legal and Other Services/Lobbying

The registrant contacted members of Congress, congressional staffers, and media representatives, in an effort to obtain due process for the Kuwaiti detainees in U.S. custody at Guantanamo Bay. The registrant also provided legal advice and representation in this regard.

$74,989.95 for the six month period ending June 30, 2006

Cleary, Gottlieb, Steen & Hamilton, LLP #508

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801

State of Kuwait

Nature of Services: Legal and Other Services

Activities: None Reported

Finances: None Reported

Levick Strategic Communications #5649

1900 M Street, N.W.
Suite 400
Washington, DC 20036

International Counsel Bureau on behalf of Kuwaiti Detainees Committee

Nature of Services: Media Relations

The registrant contacted representatives of the media, other private groups, and congressional staffers to discuss issues regarding the detainees in U.S. custody in Guantanamo Bay.

$172,411.75 for the six month period ending April 30, 2006

Patton Boggs, L.L.P. #2165

2550 M Street, N.W.
Washington, DC 20037-1350

Embassy of the State of Kuwait (t)

Nature of Services: Promotion of Trade

Activities: None Reported

Finances: None Reported

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00103 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.052

Shearman & Sterling, LLP #5670

599 Lexington Avenue
New York, NY 10022-6069

International Counsel Bureau, Kuwaiti Counsel for the families of Kuwaiti Citizens at Guantanamo Bay

Nature of Services: Lobbying

The registrant provided legal services in an effort to provide "due process for the Kuwaiti detainees in U.S. custody at Guantanamo Bay." The registrant also disseminated informational materials through radio/TV broadcasts and contacted members of Congress, congressional staffers and delivered speeches regarding efforts to obtain due process for the Kuwaiti detainees/and or influence the "Graham Amendment" (Senate Amendment 2516 to S. 1042).

$300,000.00 for the six month period ending February 28, 2006

Shearman & Sterling $ One million plus Feb. 2004
lobby

Akin Gump & Parker $ 952,000 June 2004

Lewis Strategic Cons $ 946,000 April 2004

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00104 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.053

Cleary, Gottlieb, Steen & Hamilton, LLP **#508**
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801

State of Kuwait

Nature of Services: Legal and Other Services

Activities: None Reported

Finances: None Reported

JWI, L.L.C. **#4990**
1401 K Street, N.W.
Suite 400, 4th Floor
Washington, DC 20005

Fouad Alghanim & Sons Group (t)

Nature of Services: Public Relations

The registrant advised the foreign principal on matters related to political, economic, and commercial relations with the United States. The registrant contacted members of the media to discuss issues regarding the image enhancement of Kuwait.

Finances: None Reported

Levick Strategic Communications **#5649**
1900 M Street, N.W.
Suite 400
Washington, DC 20036

International Counsel Bureau on behalf of Kuwaiti Detainees Committee

Nature of Services: Media Relations

The registrant will contact representatives of the media and other private organizations to discuss issues regarding the detainees in U.S. custody in Guantanamo Bay.

$110,000.00 received prior to registration on October 8, 2004

Patton Boggs, L.L.P. **#2165**
2550 M Street, N.W.
Washington, DC 20037-1350

Embassy of the State of Kuwait

Nature of Services: Promotion of Trade

The registrant communicated with U.S. Government officials to discuss bilateral relations with the United States and the signing of a possible Free Trade Agreement between the two countries.

$88,000.00 for the six month period ending December 31,2004

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00105 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.054

KUWAIT

Cleary, Gottlieb, Steen & Hamilton, LLP **#508**
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801

State of Kuwait

Nature of Services: Legal and Other Services

Activities: None Reported

Finances: None Reported

JWI, L.L.C. **#4990**
1401 K Street, N.W.
Suite 400, 4th Floor
Washington, DC 20005

Fouad Alghanim & Sons Group (t)

Nature of Services: Public Relations

Activities: None Reported

$77,000.00 for the six month period ending February 28, 2004

JWI, L.L.C. **#4990**
1401 K Street, N.W.
Suite 400, 4th Floor
Washington, DC 20005

Kuwait Foundation for the Advancement of Science (t)

Nature of Services: Public Relations

The registrant advised the foreign principal on matters related to political, economic, and commercial relations with the United States. The registrant contacted members of Congress and their staff, staff of relevant House and Senate committees, members of the Administration, and members of the media, to discuss legislation and issues regarding the image enhancement of Kuwait.

$235,500.00 for the six month period ending February 28, 2004

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00106 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.055

OPENING STATEMENT OF SENATOR BENJAMIN L. CARDIN

ON LEGAL RIGHTS OF GUANTANAMO DETAINEES

SENATE JUDICIARY COMMITTEE HEARING

DECEMBER 11, 2007

Chairman Feinstein, let me commend you for holding today's hearing on the legal rights of the Guantanamo detainees. It is time for Congress to assert its own constitutional prerogatives on this issue.

Congress has an obligation under the Constitution to enact legislation that creates fair trials for accused terrorists that will be upheld by the courts. We also have an obligation to protect our troops that fall into enemy hands, and to uphold American values and the rule of law. Even during wartime, the President must work with Congress and the courts to uphold our Constitution. Last year, the Supreme Court in *Hamdan v. Rumsfeld* struck down the President's military commissions, since they violated the Uniform Code of Military Justice and the Geneva Conventions. The Court noted that Congress, not the president, has the authority under Article I, Section 8 of the Constitution to ``define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." Congress also has the authority to "constitute tribunals".

The Supreme Court held additional arguments last week regarding the right of federal courts to entertain *habeas corpus* petitions from detainees. I have co-sponsored legislation offered by Chairman Leahy and Ranking Member Specter, S. 185, the Habeas Restoration Act, to restore the right of *habeas corpus* for accused terrorists to petition for a court hearing before an independent judge and challenge their detention.

I voted against the Military Commission Act last year as a member of the House of Representatives. I do not believe it is sound legislation, and I think it is susceptible to challenge in the courts. It is inexcusable that the United States has held detainees for over five years without proper charge or trial. We should be bringing terrorists to justice quickly, and we must create a system that meets basic rule of law standards.

I am privileged to serve as the Senate Co-Chairman of the U.S. Helsinki Commission. In June we held a hearing on this issue, and the implications of Guantanamo for U.S. human rights leadership. The credibility of the United States demands that we answer our critics when they raise human right issues with us, just as we hope representatives of other countries will respond seriously and substantively when we raise concerns with them.

In all the years that I have served as a member of the Helsinki Commission, there is no other concern that has been raised with the United States by our colleagues in Europe as often – and in earnest – as the situation in Guantánamo. As a member of the

U.S. Delegation to meetings of the OSCE Parliamentary Assembly, this has been a subject of constant debate.

The damage done to the United States goes beyond undermining our status as a global leader on human rights. Our policies and practices regarding Guantanamo and other aspects of our detainee policies have undermined our authority to engage in the effective counter-terrorism measures that are necessary for the very security of this country.

This view was echoed by former National Security Advisor Brent Scrowcroft, who stated "that the international community no longer trusts our motives is a new phenomenon, and I see it as one of many warning signs of a possible lasting realignment of global power. [. . .] I don't think were there yet, but it's certainly possible that we've created such a menace, and alienated so much of the world that we can never go back to where we were at the end of the Cold War. At that time, the United States was considered the indispensable ingredient in any attempt to make the world better." Or, as Phillip Zelikow, a former Bush administration official recently argued, "Sliding into habits of growing non-cooperation and alienation is not just a problem of world opinion. It will eventually interfere – and interfere very concretely – with the conduct of worldwide operations." This is not just a sad or even tragic commentary on how fast and how far we have fallen in the eyes of the world. It is a dangerous situation for our country if we cannot build and maintain effective global alliances.

To be clear, I do not mean to suggest that America should hold its finger to the wind of international opinion and make policy accordingly. The fact is, sometimes being a global leader means bearing the burden of persuasion, the burden of bringing other countries around to our position. In fact, there have been many times when the United States has been almost a lone voice on critical human rights issues. When our policies are just ones, then that is a burden we should be prepared to carry. But I think the question here is: are our underlying policies upholding the rule of law or attempting to circumvent it? Are our positions really defensible at home and abroad?

I am disappointed that the Administration, more than 6 years after the 9/11 terrorist attacks, has failed to reach out to our allies on this issue. The 9/11 Commission recommended that ``the United States should engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists. New principles might draw upon Article 3 of the Geneva Conventions ..... Allegations that the United States abused prisoners in its custody make it harder to build the diplomatic, political, and military alliances the [U.S.] government will need."

I look forward to working with my colleagues in the Senate Judiciary Committee on this critical issue of importance to the United States and its national security.

Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security Hearing:

"The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and Is an End in Sight?

The Statement of Professor Mark P. Denbeaux, Seton Hall Law School, Director of the Seton Hall Law School Center for Policy and Law, December 11, 2007:

"WHO TO RELEASE AND WHO TO DETAIN IS THE ONLY QUESTION. HABEAS CORPUS IS THE ONLY ANSWER"

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00109 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.058

INTRODUCTION

I appear today to present data demonstrating the failures of the "Guantanamo" process for the detainees and for our Country[1]. But at the outset I must stress that process failures have morphed into policy debacles. If there is one thing that stands out clearly from the Report I will discuss today and the prior Seton Hall reports, it is that the misinformation that has infected the entire debate about Guantánamo, including in formal hearings before Congress, has been the direct result of failures of our Government to accord the detainees basic legal rights. Had the detainees had such protections of process, the misinformation provided by the highest levels of our Government to the Congress and the American people would have been prevented or, at worst, corrected. Instead, the cloud of secrecy that enfolds the truncated CRST processes (themselves accorded only as the result of Supreme Court intervention), continues to distort policy debates across America and in the halls of Congress.

There are those who still believe that the average Guantanamo detainee was the "worst of the worst"; there are those who still believe that these individuals were captured "on the battlefield" in Afghanistan by American troops. And there are those who still believe that released detainees are still flocking back to the war to resume shooting at American or coalition soldiers.

It is possible, of course, that the individuals who first made these statements believed them to be true. I take no position on that. But the Department of Defense has provided us with the data necessary to show that each and every one of these statements is categorically false. And perhaps most significant, the Department of Defense data belying the statements of our highest level officials occurred only because of the intervention of the United States Supreme Court. There is a message here for the American people and for Congress: if we really want to know how the War on Terror is being waged, much less whether it is succeeding, according basic rights to detainees is an important step. Justice Brandeis's statement that "sunshine is the best disinfectant" could not be more apt.

Our research reveals that no one should trust the substantive findings of the Government's process. The core purpose of any procedure – of any legal process – is to accurately determine the rights and duties of those involved. The Department of Defense's substitute for judicial process fails this test.

The data presented and relied upon by me during my testimony and in the Seton Hall Center for Policy and Research published reports assumes that Department of Defense data is complete and accurate and that the statements made by senior public officials are also true and accurate, except when contradicted by their own data.

---

[1] None of this work would have been possible without the work of my co-authors, and the student and Senior Fellows of the Seton Hall Law School Center for policy and research. One of these Fellows deserves recognition for his service to his country. Before entering law school he served tours of duty in Afghanistan and Iraq.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00110 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.059

The most relevant reports are the report profiling the basis upon which detainees are being detained,[2] the report reviewing the procedures of the Combat Status Review Tribunal as defined and applied,[3] and the latest report, published today, addressing presence on the battlefield before detention and following release. [4] This latest report makes clear that statements that detainees were captured on the battlefield shooting at Americans and the statements that released detainees returned to be killed and captured on the battlefield are not accurate. They are, in fact, highly exaggerated.

There have been 759 people detained in Guantanamo. According to Department of Defense data, despite public assertions to the contrary by senior Department of Defense officials, only one of the 759 detainees was alleged to have been initially captured on a battlefield by United States forces.

Four hundred fifty detainees have been released. According to Department of Defense data, and again contrary to public statements by senior Department of Defense officials, no more than three detainees have been killed or captured after their release. An additional two may be fighting against coalition forces.

This new data refutes all claims by all senior Department of Defense officials about detainee presence on battlefields, both before and after detention.

This finding has important implications for the detainees still held in Guantanamo. The Department of Defense argues that the Combat Status Review Tribunals are fair and free of improper influence, but the continuing pattern of public misstatements about the dangerous of the detainees by the senior Department of Defense officials sent an undeniable signal to the fact finders in the CSRT process. These fact finders are not independent of such influences. They were not Judges in a Court of Military Justice; they were instead the subordinates of the senior officials publicly mischaracterizing the detainees, the reason for their detention, and their post-release conduct.

Basic Elements of Valid Adjudicative Process

There are several basic elements of valid legal process:

A. An independent tribunal; and
B. Basic minimum process requires weighing the private interests against the government's asserted interest by a process sufficient to accomplish the substantive goal.

[2] http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf
[3] http://law.shu.edu/news/final_no_hearing_hearings_report.pdf
[4] The most recent report, is available online at: http://law.shu.edu/news/guantanamo_reports.htm

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00111 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.060

Civilian courts and military courts meet both requirements for fairly resolving the rights of the litigants and the interests of the State. The CSRT process fails to protect either party.

The most important, among a number of defects, is the lack of independent tribunals. The CSRT tribunals were entirely dependent, and therefore likely to be influenced by the repeated public misstatements of fact made about the detainees by senior Department of Defense and even higher officials. These fall into two main categories:

First, that the detainees were "the worst of the worst" and had been caught fighting American forces on the battlefield, and

Second, that dozens of the released detainees had been recaptured or killed on the battlefield, fighting Americans, after they were released from their detention at Guantanamo.

Few of the Detainees Can Be Classified as the "Worst of the Worst"

The first Seton Hall report compared the public statements made by the senior Department of Defense officials about the detainees as against the Department of Defense data.

Senior officials, including then Secretary of Defense Donald Rumsfeld, described the detainees as "the worst of the worst" even though the Department of Defense data concluded that fully 55% of detainees were not even accused of committing a hostile act against the United States or coalition forces.

The first report also demonstrated that the public statements by senior Department of Defense officials that the detainees were captured on the battlefield shooting at American and coalition forces were inaccurate. In fact, the Department of Defense data showed that only 21 detainees were captured on the battlefield.

Only 24 detainees were captured by United States forces (the majority of the remainder was turned over to the United States in exchange for cash bounties). Of all the detainees, only one (1) could have been captured on the battlefield shooting at Americans, because only one was both captured by the United States forces and captured on a battlefield.

Very Few Released Detainees Engage in Hostilities Thereafter

Department of Defense senior officials have publicly claimed that dozens of former Guantanamo detainees were captured or killed during battles with American forces following their release. This public representation was entirely inaccurate every time it was uttered.

First, implicit in the claim that detainees have "returned to the battlefield" is the notion that such a detainee was on a battlefield prior to his detention in Guantanamo. As the

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00112 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.061

Seton Hall reports demonstrate, and as previously mentioned, only (21) were accused of having been on a battlefield.

As recently as April of 2007 the public assertions were that "approximately 30" released detainees had been killed or captured on the battlefield. That public statement was never true. It was false every time it was uttered.

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 at least thirty (30) former Guantánamo detainees have "returned" to the battlefield, where they have been re-captured or killed. To date, however, the Department has described at most fifteen (15) *possible* recidivists, and has identified only seven (7) of these individuals by name. More strikingly, data provided by the Department of Defense reveals that:

- at least eight (8) of the fifteen (15) individuals identified 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, 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.

I must interject a personal note

If the Department of Defense really considers that criticism of the United States is engaging in militant activities and if the Department of Defense truly believes that the whole world is a battlefield, then my testimony before this committee is also militant anti American activity. I reject, as abhorrent, such a charge and I am confident that my fellow citizens reject such a policy as a violation of all that America stands for.

In sum, at that time, the Department of Defense report could only confirm two (2) detainees as having been killed or captured on a battlefield after being released from Guantanamo. Another detainee was reportedly killed in a Russian apartment in June 2007. Thus, of the approximately four hundred forty-five (445) detainees that have been released from Guantanamo, no more than three (3) detainees, or less than one percent (1%), have subsequently returned to the battlefield to be captured or killed.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00113 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.082

The Misstatements of Fact Affected the CSRT Decision-makers

The statements by senior Department of Defense officials that asserted detainees were captured on the battlefield shooting at American soldiers was prejudicial because it was a false characterization of the very data the Tribunals were to evaluate.

The statements by Senior Department of Defense officials that asserted detainees were being captured and killed on battlefields following their release from detention was even more pernicious because it was not true and because it would clearly have a chilling effect on a decision-maker charged with determining whether to release a detainee.

In any event, this kind of data is not necessary to determine whether tribunals were independent. The record is clear that when the tribunals found certain detainees were not Enemy Combatants, the tribunal's decisions were basically treated as a "mulligan." That is, the tribunals were told to redo the process – secretly, without notifying the detainee – until the detainee was eventually found to be an Enemy Combatant. (See "No Hearing, Hearings.[5]) No tribunal finding a detainee to be an "enemy combatant" was ever mulliganed.

The message – we know the result we want, and it's your job to get it – was clear to everyone.

Our conclusions, drawn from the results of the process, were confirmed by an actual participant in the process. Lieutenant Colonel Abraham, a member of a CSRT Panel, who has stated that senior officials interfered with the CSRT process and compelled findings that detainees were Enemy Combatants when tribunals found to the contrary.

THE CSRT PROCEDURES ARE DEFECTIVE ON THEIR FACE AND IN THEIR IMPLEMENTATION

Before the tribunals, all tribunal members were told that 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 could never see, and that the Tribunal must presume that was reliable and valid.

Given these rules, the Government sustained its burden necessary to conclude that each detainee was an Enemy Combatant without calling a single witness. It produced documentary evidence in only 4% of the cases.

The Government also prevented the detainees from producing any evidence by leaving to the Tribunals the right to decide that facts sought by a detainee were not "reasonably available."

---

[5] http://law.shu.edu/news/final_no_hearing_hearings_report.pdf

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00114 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.063

All requests for witnesses not already detained in Guantánamo were denied. Even when a detainee requested that witnesses then detained in Guantánamo be produced for testimony, in 74% of the cases those witnesses were denied as well.

Requests by detainees to produce documentary evidence were denied in 60% of the cases. The only documentary evidence that the detainees were allowed to produce was from family and friends.

The detainees were denied lawyers. Instead of a lawyer, the detainee was assigned a "personal representative," whose role, both in theory and practice, was minimal. With respect to preparation for the hearing, in most cases, the personal representative met with the detainee only once (82%) for no more than 90 minutes (88%) only a week before the hearing (90%). At the end of the hearing, the personal representative failed to exercise his right to comment on the decision in 98% of the cases. During the hearing; the personal representative said nothing 12% of the time. During the hearing; the personal representative did not make any substantive statements in 48% of the cases and in the 52% of the cases where the personal representative did make substantive comments, those comments sometimes advocated for the Government.

CONCLUSION

The resolution of the Guantanamo problem is clear and simple. The United States and the detainees both need a legitimate judicial process to determine the facts.

All difficulties arising from and because of Guantanamo can be solved by fair adjudications. The Article III Courts and the Military Courts have served this country well for hundreds of years. They are fully capable of adjudicating all the matters arising from Guantanamo.

There is no cure possible for the pernicious tainting. The internal administrative procedures of the Department of Defense can not be corrected: The taint is too great, the time spent has been too long and the time left is too short for short cuts.

There is one remedy.

The remedy for Guantanamo is *habeas corpus*.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00115 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.064

THE EMPTY BATTLEFIELD AND THE THIRTEENTH CRITERION

AN ANALYSIS OF THE DATA AND METHODOLOGY IN THE DEPARTMENT OF DEFENSE'S RESPONSE TO CONGRESSIONAL REQUEST FOR JUSTIFICATION OF THE GUANTÁNAMO DETENTIONS

By
Mark Denbeaux
Professor, Seton Hall University School of Law and
Joshua Denbeaux, Esq.
Denbeaux & Denbeaux
Counsel to two Guantánamo detainees

And

Grace Brown, Jillian Camarote, Douglas Eadie,
Jennifer Ellick, Daniel Lorenzo, Mark Muoio, Courtney Ray
Students and Research Fellows
Seton Hall University School of Law

With
Matthew Darby, Shana Edwards, David Gratz, John Gregorek,
Daniel Mann, Megan Sassaman, Helen Skinner
Research Fellows at the Seton Hall Center for Policy and Law.

THE EMPTY BATTLEFIELD AND THE THIRTEENTH CRITERION:

EXECUTIVE SUMMARY

The Seton Hall Center for Policy and Research ("Seton Hall") published its first report on the Guantánamo detainees—a comparison between detainees' enemy combatant designations and detainees' Combatant Status Review Tribunal ("CSRT") unclassified summaries of the evidence—nearly two years ago. That report was based entirely upon the Department of Defense's own data, and revealed that the Defense Department's records were at odds with its claim that those detained were properly classified as enemy combatants.

Due to a Congressional request, the Department of Defense delegated to West Point's Combating Terrorism Center ("West Point") the task of responding to the Seton Hall reports. In the process, West Point's report[3] recast the argument from whether a detainee's enemy combatant status is justified by the unclassified summary of evidence in his CSRT, to whether a detainee's unclassified summary meets arbitrary "threat levels" invented by West Point. This report analyzes West Point's attempt to fulfill this congressional mandate.

West Point's report attempts to challenge only the first of Seton Hall's six Guantánamo reports.[4] West Point does not, for instance, attempt to address the procedural defects of the CSRT as identified by Seton Hall in its subsequent reports.

Part One (A) of this report discusses West Point's response to Seton Hall, and reveals the following:

1. West Point does not dispute any of Seton Hall's key findings.

2. To the extent that West Point purports to find defects in Seton Hall's methodology, it actually criticizes the Department of Defense's evidentiary bases for the detention of Guantànamo detainees as enemy combatants.

Part One (B) of this report discusses West Point's confirmation of Seton Hall's findings, and reveals the following:

---

[3] Jarrett Brachman, *et al.*, Combating Terrorism Ctr., *An Assessment of 516 Combatant Status Review Tribunal (CSRT) Unclassified Summaries* (2007) (hereinafter "WP Report").

[4] *See* Mark Denbeaux, *et al.*, *Report on Guantánamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data* (2006) (hereinafter "SH Profile"). Available at http://law.shu.edu/news/guantanamo_reports.htm.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00117 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.066

1. West Point confirms Seton Hall's finding that ninety-five percent (95%) of those detained as enemy combatants were not alleged to have been captured by United States forces.

2. This fact, confirmed by West Point, directly contradicts the executive branch's contention that Guantánamo was populated by individuals who were "picked up on the battlefield, fighting American forces, trying to kill American forces."

3. Upon further examination, the data shows that only twenty-one (21) of the 516 detainees in Guantànamo are accused of ever having been on a battlefield.

4. *Only one* (1) detainee in Guantànamo was alleged to have been captured by United States forces on a battlefield.

5. These new battlefield statistics are corroborated by Department of Defense data revealing that (a) fifty-five percent (55%) of those detained were never accused of committing a hostile act; (b) ninety-two percent (92%) were never accused of being a fighter; and (c) sixty percent (60%) were accused *not* of being members of al-Qa`ida or the Taliban, but merely of being "associated" with those groups.

Part Two of this report discusses West Point's methodology and reveals the following:

1. West Point uses a methodology that is not only arbitrary but ultimately circular. It confuses rather than clarifies the issue of whether detainees are properly designated as enemy combatants. West Point deviates from Defense Department data and terminology, justifying such departures—if at all—with anecdotal evidence. West Point employs repetitive data fields and engages in double-counting, piling up statistics in favor of its implicit thesis that the detainees' dangerousness is sufficiently evident from the CSRT unclassified summaries of evidence.

2. While this process results in twelve explicit "threat variables," West Point's categories are vast enough to include literally tens of millions of Americans as evidencing threat. The explicit threat variables make sense only when coupled with West Point's implicit *thirteenth variable*: namely, that a detainee poses some type of threat if he satisfies any one of West Point's twelve variables *and* he satisfies the *criterion of being detained at Guantánamo*. Obviously, such reasoning is circular. Nonetheless, West Point applies this reasoning to its analysis of each detainee's CSRT unclassified summary.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00118 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.067

3. When all of West Point's faulty categories are stripped away, all that remains are the variables contained within the Government's definition of "enemy combatant."

4. Despite erring heavily on the side of over-inclusion, West Point essentially concedes that at least twenty-seven percent (27%) of CSRT unclassified summaries of evidence *do not necessarily indicate that a detainee is in fact threatening*, as well as that more than one percent (1.16%) evidence *no threat whatsoever*.

INTRODUCTION

In February 2006, the Seton Hall Center for Policy and Research published its first in a series of six reports on the Guantánamo detainees. In this report, Seton Hall provided a detailed picture of the detainees, how they ended up in Guantánamo, and what the Department of Defense purported were the bases of their enemy combatant designations.[5] Seton Hall based its profile of the detainees entirely upon the Department of Defense's own records: namely, the unclassified summaries of the evidence for each of 516 detainees for whom a CSRT had been convened.

Seton Hall found the Government's claim that those detained at Guantánamo were the "worst of the worst"[6] to be at odds with the Department of Defense's own evidence. Among Seton Hall's findings were that: Fifty-five percent (55%) of detainees were not alleged to have committed any hostile acts against the United States or its allies; only eight percent (8%) of detainees were characterized as al-Qa'ida fighters; and five percent (5%) of detainees were captured by United States forces, whereas eighty-six percent (86%) were captured by either Pakistan or the Northern Alliance and handed over to the United States at a time when the United States offered large bounties for capture of suspected enemies.[7]

In subsequent reports, Seton Hall identified defects in the CSRT process, including, for example: that the Government relied upon hearsay and secret evidence; that the detainees were denied the opportunity to provide witnesses or other evidence; and that the detainees were denied adequate representation.

---

[5] SH Profile at 2.

[6] The Washington Post, in an article dated October 23, 2002, quoted then-Secretary Donald Rumsfeld as terming the detainees "the worst of the worst." Donald Rumsfeld Holds Defense Briefing. (March 28, 2002). FDCH Political Transcripts. Retrieved January 10, 2006 from Lexis-Nexis database.

[7] SH Profile at 2-3.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00119 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.068

The Department of Defense, at the request of Senator Carl Levin, Chair of the Senate Armed Services Committee, agreed on April 26, 2007 to respond to Seton Hall's reports.[8] However, the Department of Defense did not identify "any specific disagreement" with the accuracy of the Seton Hall reports pursuant to Senator Levin's request. Instead, the Department of Defense commissioned faculty at the Military Academy at West Point to respond to Seton Hall's profile.[9] Ninety days later, West Point's Combating Terrorism Center published its response, which, however, never addresses the central issue that the Senate Armed Services Committee was considering when Senator Levin issued his request. That is, West Point never attempts to address the question--Were the Combatant Status Review Tribunals an adequate substitute for habeas corpus? [10]

---

[8] Senator Carl Levin, Chair of the Senate Armed Services Committee:

"Would you get, for the Committee, any specific disagreements that you have...factually, with the reports of Mr. Denbeaux."

Daniel J. Dell'Orto, Principle Deputy General Counsel, Department of Defense:

"...Within a relatively short period of time, although I think one of the reviews is taking—it's going to take us about another 30 days."

Senate Armed Services Committee Hearing, April 26, 2007.

[9] Lt. Col. Joseph H. Felter, West Point faculty member and director of West Point's Combating Terrorism Center, acknowledged "that military officials had indicated they wanted to contest the Seton Hall report. 'They had been getting a lot of inquiries related to this previous study,' he said. 'They had a lot of concerns with the conclusions, but they did not have another study.'" Glaberson, William, "Pentagon Study Sees Threat in Guantánamo Detainees." *The New York Times*, July 26, 2007.

[10] The West Point study authors disclaim that their study is the official position of West Point Military Academy, the CTC, the U.S. Army, or the Department of Defense. If the Pentagon-commissioned report does not reflect the official position of the Department of Defense, then the Department has still not officially responded to Senator Levin's request that it identify its specific disagreements with the Seton Hall study. For the sake of brevity, this response refers to the study—authored by the Director and the Director of Research at West Point Military Academy's Combating Terrorism Center—as the "West Point" report.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00120 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.069

▪ PART ONE (A) ▪

WEST POINT'S RESPONSE TO THE SETON HALL STUDY

West Point, on behalf of the Department of Defense, does not list its factual disagreements with any of Seton Hall's reports, despite Senator Levin's request.[11] Instead, West Point's report invents its own methodology (discussed in Part Two of this report) for evaluating detainee dangerousness, and limits its disagreements with Seton Hall to an appendix in which it attempts to make four criticisms of just one of Seton Hall's reports. West Point's criticisms are without merit, and are discussed in detail below.

First, however, it is important to stress that the Pentagon-commissioned West Point report does not dispute any of the following:

A. According to the Department of Defense, the majority of those detained in Guantánamo as enemy combatants were not accused of engaging in any combat against either the United States or its allies. In fact, fifty-five percent (55%) of the detainees were not determined to have committed any hostile acts against the United States or its coalition allies. That means that fifty-five percent (55%) of the "worst of the worst"[12]—those alleged to be enemy combatants—are actually civilians.

B. Only eight percent (8%) of the detainees were characterized as al-Qa`ida fighters. Of the remaining detainees, forty percent (40%) had no definitive connection with al-Qa`ida, and eighteen percent (18%) had no definitive affiliation with either al-Qa`ida or the Taliban. Sixty percent (60%) of those detained were alleged only to have had some kind of "association" with one or the other. Furthermore, it is undisputed that to have been associated with the Taliban is to have been associated with the ruling party of Afghanistan before the United States took military action there.

[11] Supra note 6.
[12] Supra note 4.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00121 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.070

C. Moreover, detainees' alleged relationships with supposed terrorist groups vary considerably. Eight percent (8%) were detained because they were deemed "fighters for" such groups, and thirty percent (30%) were characterized as group "members"—but a large majority (60%) of detainees were detained merely because they are allegedly "associated with" a group or groups the Government asserts are terrorist organizations. As to two percent (2%) of prisoners, the Government identified no relationship with any terrorist group whatsoever.

D. According to the Department of Defense, a maximum of five percent (5%) of those detained in Guantánamo were captured by United States forces and even fewer were captured on *any* battlefield.[13] This data is expressly confirmed by West Point, and is discussed in detail in below.

E. The Department of Defense's own documents show that eighty-six percent (86%) of the detainees were arrested by either Pakistan or the Northern Alliance and later turned over to United States custody.

F. These detainees were handed over to the United States at a time during which the United States offered large bounties for the capture of suspected enemies.

G. The Government has detained numerous persons based on alleged affiliations with a variety of groups. Many of these groups either do not exist, or do exist and the Department of State allows their members into the United States.

Furthermore, West Point does not attempt to address the glaring procedural defects in the CSRT proceedings, which Seton Hall identified in its *No Hearing Hearings* report.[14] Thus, West Point does not dispute any of the following:

A. The Government (1) did not produce any witnesses in any hearing; (2) did not present any documentary evidence to the detainee prior to the hearing in ninety-six percent (96%) of cases; and (3) relied on classified evidence that it kept secret from the detainee and which was presumed to be reliable and valid.

B. Detainees were not allowed to produce evidence. All requests by detainees for witnesses not already detained in Guantánamo were denied, and the only documentary evidence that the detainees were allowed to produce was from family or friends.

[13] "The CTC [at West Point] did confirm that only 5% of the publicly released 516 CSRT unclassified summaries provide information that an individual was captured by U.S. forces. CTC faculty also found that the majority of those captured, for whom the CSRT unclassified summaries provide data, were captured by forces other than the United States." WP Response at 7.

[14] Available at http://law.shu.edu/news/guantanamo_reports.htm.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00122 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.071

C. Detainees were denied lawyers. Instead, each detainee was assigned a "Personal Representative" whose role, both in theory and practice, was minimal.

D. Even when detainees won, they lost. In each case where the Tribunal found a detainee to be not/no-longer an enemy combatant, the Department of Defense ordered a new Tribunal convened, and the detainee was then determined to be an enemy combatant. In one instance, a detainee was found to be no-longer an enemy combatant by *two* tribunals, before a third Tribunal was convened which then determined the detainee to be an enemy combatant. The detainee was not informed of his favorable decision.

Although the West Point report does not dispute any of Seton Hall's key findings, the study makes—in its appendix—four criticisms of the methodology Seton Hall used in its first report. At the core of each criticism is not Seton Hall's particular use of the Department of Defense data, but rather deficiencies that West Point finds in the Department's data itself.

A key difference between Seton Hall's methodology and West Point's methodology is that the Seton Hall profile assumed as true and accurate every piece of evidence that the Department of Defense provided to prove that those detained in Guantánamo are enemy combatants. Thus, Seton Hall accepted and honored the data that the Department of Defense produced; West Point does not.

West Point's criticisms of Seton Hall's methodology are as follows: (1) Seton Hall should have used more categories of data; (2) Seton Hall should not have made any distinction between "guest houses" and "safe houses"; (3) Seton Hall's report failed to make clear that the Department of Defense may have more evidence than was published; and (4) the list of organizations in Seton Hall's appendix included groups that were not terrorist organizations.

Seton Hall responds to each criticism in detail below. As a preliminary matter, however, it must be noted that: (1) the categories of data used by Seton Hall mirrored the *categories used by the Department of Defense*; (2) Seton Hall applied *the Department of Defense's distinction* between "guest" and "safe houses"; (3) Seton Hall evaluated the *data that the Department of Defense provided* in the summaries of the evidence (in support of its determination of detainees' enemy combatant status), and did not assume that the Department's data was incomplete; and (4) the organizations listed by Seton Hall in its appendix were drawn from organizations *cited by the Department of Defense* as groups with which membership or associations were considered grounds for continued detention.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00123 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.072

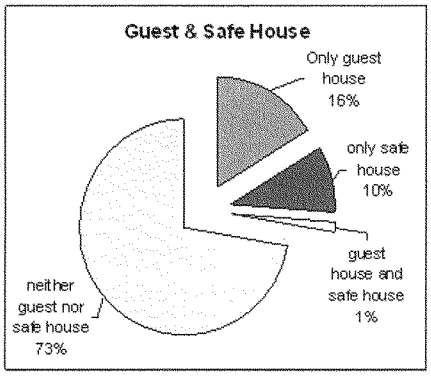
I. West Point contends that Seton Hall used too few data categories.[15]

The West Point study suggests that an increased number of categories of data necessarily results in better findings. While that could in theory be true, West Point fails to explain why any of its new categories are relevant or might lead to more reliable findings. More accurate and more precise categories necessarily lead to more accurate data and more precise findings; more categories only lead to more data. There is no logical correlation between sheer quantity of categories and quality of findings.

The Seton Hall profile employed the same categories that were used by the Department of Defense. The West Point report does not honor the Department of Defense's categories, but rather invents its own.

II. West Point suggests that Seton Hall erred in making a distinction between "safe houses" and "guest houses."[16]

The West Point study's second criticism is that the Seton Hall report failed to appreciate the contextual meaning of the term "safe house." Specifically, the study contends that Seton Hall erred by failing to recognize that "safe houses" are a well known haven for criminals and terrorists, and that "guest houses" are exactly the same as "safe houses." As West Point correctly notes, Seton Hall's report did distinguish between "guest houses" and "safe houses"; Seton Hall drew that distinction because the Department of Defense drew that distinction. As in all aspects of its study, Seton Hall honored the Department of Defense's data and terminology. Therefore, where the Department of Defense characterized a facility as a "safe house," Seton Hall maintained that facility's characterization as a "safe house," and where the Department characterized a facility as a "guest house," Seton Hall maintained that facility's characterization as such.



For instance, the Department of Defense's data stated that 16% of the detainees stayed in "guest houses," 10% stayed in "safe houses," and 1% used both. Seton Hall illustrated the data as it was described by the Department of Defense with the pie chart reprinted here.[17]

Seton Hall's methodology required that Seton Hall accept all of the Department of Defense's data and definitions. As such, Seton Hall's study used the Department of Defense's terms objectively and accepted their plain meanings—unlike the West Point

[15] WP Report at 4.
[16] *Id.*
[17] *See* SH Profile at Figure 15.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00124 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC
53355.073

study—which subjectively interprets the Department's terms in order to extrapolate different meanings from what was given. It is logically possible that West Point is correct, but that would be a reflection on the carefulness and accuracy of the Department of Defense's records. However, West Point does not provide any basis for equating guest houses and safe houses other than the obvious problem with detaining an individual in part based on his stay in a "guest" house.

III. West Point contends that Seton Hall erred by failing to recognize that other data, unpublished by the Department of Defense, may exist.[18]

West Point points out that, although the Department of Defense may not have reported certain evidence, it does not follow that unreported evidence does not exist. While this is true, it is irrelevant to the purpose of Seton Hall's study.[19] Seton Hall repeatedly made clear that its analysis was of the Department of Defense's *published* data; the Department of Defense stated that the published data comprising the summaries of evidence formed the bases upon which detainees were held as enemy combatants, and Seton Hall, for the purpose of its profile, assumed the truthfulness of everything the Department of Defense stated.

West Point does not go so far as to allege that Seton Hall ever explicitly contended that there could be no unpublished evidence known to the Department of Defense; rather, West Point suggests that Seton Hall's language might lead a reader to that conclusion. West Point writes:

> "[L]anguage in the Seton Hall study can potentially mislead readers by suggesting that if a CSRT record does not contain a direct reference to a piece of evidence, that it does not exist."[20]

In fact, no such language appears in Seton Hall's report. Because Seton Hall reported what the Department of Defense said—and not what the Department of Defense did not say—issues of incomplete data are issues to be taken with the Department of Defense, not with Seton Hall. If there are deficiencies in the data, those deficiencies exist because either (1) the Department of Defense does not have sufficient evidence to support its findings of enemy combatant status, or (2) the Department of Defense has, but failed to provide, sufficient evidence to support its findings of enemy combatant status.

A final point on the topic of potentially misleading implications about the existence or non-existence of unpublished evidence: West Point implies that any additional, unpublished data would support the Department of Defense's findings of enemy combatant status, but the facts suggest otherwise. The recent declaration by Lieutenant Colonel Stephen Abraham, dated June 15, 2007 and filed in the United States

---

[18] WP Report at 4.
[19] The purpose of the Seton Hall study was to analyze the evidence that the Department of Defense actually *produced* to support its finding that a detainee was an "enemy combatant."
[20] *Id.*

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00125 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.074

Supreme Court in *Al Odah v. U.S.*,[21] describes the Department of Defense's refusal to acknowledge whether exculpatory evidence had been withheld. If Lt. Colonel Abraham's declaration is correct, then there exists unclassified evidence—withheld by the Department of Defense—that would likely have portrayed the detainees in a far more benign light than did the data that the Department elected to provide.

IV. West Point contends that Seton Hall erroneously included non-terrorist organizations in its appendix.[22]

The Department of Defense, in its published data, listed detainees' affiliations with more than seventy "organizations" as evidence of enemy combatant status. West Point correctly notes that many of the organizations cited by the Department as terrorist organizations either did not exist or were not properly characterized as terrorist organizations. Again, Seton Hall—in keeping with its stated methodology—simply recorded the names of the groups that the Department of Defense cited in its evidentiary bases for detainees' detention as enemy combatants. That the groups were not properly categorized as terrorist or non-terrorist groups is a criticism of the Department of Defense and not of Seton Hall.

[21] 127 S.Ct. 3067 (2007).
[22] WP Report at 5.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00126 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.075

• PART ONE (B) •

THE EMPTY BATTLEFIELD

As noted previously, West Point expressly confirms one of Seton Hall's key findings with its acknowledgment that:

> The [West Point] CTC did confirm that only 5% of the publicly released 516 CSRT unclassified summaries provide information that an individual was captured by U.S. forces.[23]

Thus, West Point confirms that ninety-five percent (95%) of detainees *were not reported to have been captured by the United States, on the battlefield or anywhere else.*[24] Another two percent (2%) of detainees were captured by coalition forces. The term "coalition forces" is not defined by the Department of Defense and the Department of Defense distinguishes "coalition forces" from Pakistani Authorities and the Northern Alliance/Afghani Authorities.

West Point's confirmation of this finding is significant because it directly refutes the claims of numerous government officials, including President Bush,[25] Vice President Cheney,[26] Secretary of State Condoleezza Rice,[27] former White House press secretary

---

[23] *Id.* at 41.

[24] The profile of the twenty-four (24) detainees who were captured by United States forces, twenty (20) of them were never on a battlefield, fourteen (14) of them are not accused of committing any hostile act, and, of course only one (1) of the remaining ten (10) was ever accused of being on a battlefield. Eleven (11) of those twenty-four (24) captured by US forces were captured in Afghanistan. Of those eleven (11), two (2) were in Tora Bora at some point. The location of capture is not stated for the other thirteen (13).

[25] "These are people picked up off the battlefield in Afghanistan....They were picked up on the battlefield, fighting American forces, trying to kill American forces." President Bush, June 20, 2005. Retrieved November 4, 2007 from http://www.theatlantic.com/doc/prem/200602u/nj_taylor_2006-02-07.

[26] "The people that are there are people we picked up on the battlefield, primarily in Afghanistan. They're terrorists. They're bomb makers. They're facilitators of terror. They're members of Al Qaeda and the Taliban....We've let go those that we've deemed not to be a continuing threat. But the 520-some that are there now are serious, deadly threats to the United States." Vice President Cheney, June 23, 2005. Retrieved November 4, 2007 from http://www.theatlantic.com/doc/prem/200602u/nj_taylor_2006-02-07.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00127 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

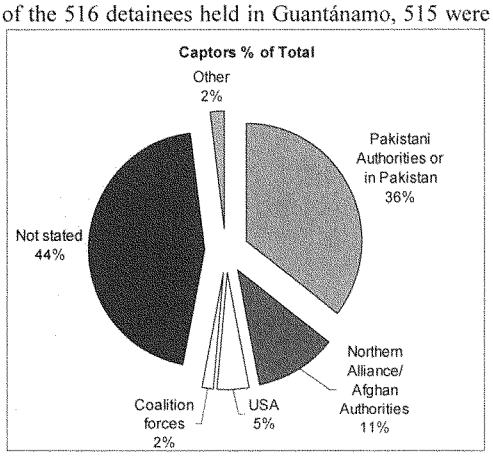
53355.076

Scott McClellan,[28] and Supreme Court Justice Antonin Scalia.[29] Each of these government officials has made public statements in perpetuation of the myth that the individuals detained at Guantánamo were captured on the battlefield by the United States.

There were no United States forces involved in the capture of ninety-five percent (95%) of those detained as enemy combatants. According to the same Department of Defense data, only four percent (4%)—or twenty-four (24) detainees— were reported to have been captured by US forces.

Fifty-five percent (55%) of those detained in Guantánamo were not accused of hostile acts. Of the forty-five percent (45%) that were accused of hostile acts, less than four percent (4%), or twenty-one (21) detainees, were accused of ever being on a battlefield.[30]

According to the Department of Defense data that West Point reviewed, *only one* (1) of those detained in Guantánamo captured by United States forces was alleged to have been on a battlefield. The battlefield upon which the United States captured this single detainee is not identified. Therefore, according to Department of Defense and West Point, of the 516 detainees held in Guantánamo, 515 were not captured by United States forces on a battlefield. Of the other twenty (20) alleged to have been captured on a battlefield, one (1) was turned over to the US by coalition forces, and the other nineteen (19) were turned over by non-coalition forces.



Again in accordance with our methodology, we assume that all government data is accurate. As indicated by the graph, referenced as Figure 12 in Seton Hall's first report, the government states that five percent (5%) were captured by U.S. forces, eleven percent (11%) by Northern Alliance/Afghan

[27] "If we do close down Guantánamo, what becomes of the hundreds of dangerous people who were picked up on battlefields in Afghanistan, who were picked up because of their associations with [al-Qa`ida]." Condoleezza Rice, quoted by John D. Banusiewicz for American Forces Press Service, May 21, 2006. Retrieved November 3, 2007 from http://www.defenselink.mil/news/newsarticle.aspx?id=15706.

[28] "These detainees are dangerous enemy combatants....They were picked up on the battlefield, fighting American forces, trying to kill American forces." White House press secretary Scott McClellan, June 21, 2005. Retrieved November 4, 2007 from http://www.theatlantic.com/doc/prem/200602u/nj_taylor_2006-02-07.

[29] "I had a son on that battlefield and they were shooting at my son and I'm not about to give this man who was captured in a war a full jury trial." Supreme Court Justice Antonin Scalia, just prior to oral arguments in *Hamdan*. As quoted by *Newsweek*, March 8, 2006.

[30] The CSRT unclassified summaries only alleged that twenty-one (21) detainees were on battlefields or in battle.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00128 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.077

Authorities, thirty-six percent (36%) by Pakistani Authorities or in Pakistan, two percent (2%) by other groups and two percent (2%) by coalition forces. The government does not identify the capturing entity for the remaining forty-four (44%) of the detainees.

Of the five hundred seventeen (517) detainees whose records were reviewed, four hundred ninety-six (496) were never reported to have ever been on any battlefield. This does not necessarily mean that these four hundred ninety-six (496) detainees were never on a battlefield; it means that the American Government either knows that the remaining prisoners were not captured on a battlefield *or* the government lacks a factual basis to assert that these prisoners were captured on a battlefield.

If one takes the view that all of Afghanistan is a metaphoric battlefield, then the seventy-one (71) detainees captured in Afghanistan were captured on a battlefield. None of those detained in Guantánamo were ever captured by US forces in either Pakistan or in the Afghanistan Pakistan border region.[31]

However, using these countries as synonymous with battlefields produces results contrary to the Government's grounds for detention of the individuals at Guantánamo. For example—as noted in Seton Hall's first Guantánamo report—fifty-five percent (55%) of those for whom a CSRT was convened were not accused of committing a hostile act.[32] Furthermore, only eight percent (8%) of detainees were alleged to have been "fighters." Because the majority of detainees were captured in Afghanistan or Pakistan, while the majority of detainees were *not accused of committing a hostile act*, it is not possible that the Government is considering the whole of these two countries to be a giant battlefield.

Thus, the majority of those detained at Guantánamo as enemy combatants are actually enemy *civilians*.

Part One in Review

West Point's CTC Report, on behalf of the Department of Defense, essentially concedes the Seton Hall report's key findings.

To the extent that the West Point response purports to find defects in Seton Hall's methodology, the response in fact criticizes the Department of Defense's evidentiary bases for the detention of Guantánamo detainees as enemy combatants. Thus, any alleged defects stem from deficiencies in the Department of Defense's data—not from Seton Hall's methodology—and are unrelated to Seton Hall's findings.

West Point concedes that the Defense Department's data is contrary to the executive branch's contention that the majority of Guantánamo detainees were captured on the battlefield by United States forces. This confirmation of Seton Hall's finding is

[31] Forty-six percent (46%) of the detainees were not identified as having been captured in either Pakistan, Afghanistan or the Pakistan Afghanistan Border region and another two percent (2%) were affirmatively alleged to have been captured elsewhere, such as Bosnia, Gambia, Iran, or the Kashmir.
[32] SH Profile at 2.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00129 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.078

supported by Defense Department data revealing that the vast majority of detainees were neither captured by United States forces nor captured on any battlefield, and is consistent with the fact that the majority of detainees were not alleged to have committed a single hostile act.

With its response to Seton Hall, West Point's Combating Terrorism Center supplements, rather than rebuts, Seton Hall's profile in demonstrating the defects in the evidence upon which the Department of Defense determined that detainees were enemy combatants.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00130 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.079

▪ PART TWO ▪

WEST POINT'S METHODOLOGY AND THE THIRTEENTH CRITERION

At the core of the methodology West Point uses to evaluate the detainees' dangerousness is the invention of a three-tiered[33] hierarchy of detainee "threat" with each of the three levels containing four discrete variables. If a detainee's CSRT unclassified summary of the evidence indicates the satisfaction of any one variable within a given level, that detainee is classified as evidencing that level of threat.[34]

Rather than distinguishing between enemy combatants and non-enemy combatants (as was the purpose of the CSRT process), West Point attempts to distinguish instead between the three levels of "Demonstrated," "Potential," and "Associated" threat in order to evaluate the detainees in terms of a more ambiguous concept—"dangerousness." West Point seems to equate enemy combatant status with dangerousness—every factor that supports a finding of enemy combatant status[35] also supports a determination of threat under West Point's system. West Point goes beyond the enemy combatant definition, however, and creates threat variables classifying even behavior such as possessing a digital watch as threatening.

The over-inclusiveness and arbitrariness of many of West Point's threat variables necessitate West Point's reliance on a thirteenth variable which, when coupled with any of West Point's other twelve variables, solidifies a detainee's classification as threatening. West Point's threat variables, if applied to the population at large, would include an enormous number of individuals. An additional limitation—a thirteenth criterion—is necessary if West Point is to avoid this result.

---

[33] Additionally, West Point concedes that six (6) unclassified summaries do not satisfy any of West Point's threat variables; thus these six are classified as "Level IV: No Evidence of Threat."

[34] WP Report at 4.

[35] The second paragraph from each CSRT unclassified summary of the evidence reads: "[A]n enemy combatant has been defined as: an individual who was part of or supporting the Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy forces."

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00131 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.080

The implied thirteenth criterion is as simple as it is circular: the individual in question is held at Guantánamo.

Below is a visual representation of West Point's hierarchy of threat variables. If one were to strip away the variables that are either over-inclusive or contain "other" as their largest or near-largest subcategory, only those variables contained in the Government's definition of "enemy combatant" would remain.[36]

Threat Level	Variable	Key Problem
Demonstrated Threat	Hostilities	An element of the definition of Enemy Combatant
	Fighters	An element of the definition of Enemy Combatant
	Combat Weapons	Variable is over-inclusive
	Training Camps	"Other" appears as variable's largest or near-largest subcategory
Potential Threat	Affiliations	An element of the definition of Enemy Combatant
	Small Arms	Variable is over-inclusive
	Commitment	"Other" appears as variable's largest or near-largest subcategory
	Support	"Other" appears as variable's largest or near-largest subcategory
Associated Threat	Connections	An element of the definition of Enemy Combatant
	International Travel	Variable is over-inclusive
	Pocket Litter	Variable is over-inclusive
	Guest House Stay	Variable is over-inclusive

Figure 1.

[36] Figure 1 represents only the primary problems with each variable. Some variables contain multiple problems; these are discussed in detail in the sections that follow.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00132 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.081

I. Level IV Dangerousness: "No Evidence of Threat"

Six (6) of the 516 unclassified summaries do not contain data fitting into any of the twelve variables created by West Point.[37] West Point does not identify the six (6) detainees for which it was unable to find any incriminating information. West Point concedes, then, that detention at Guantánamo is not in and of itself evidence of threat.

II. Level III Dangerousness: "Associated Threat as an Enemy Combatant"

Like Levels I and II, West Point's third level of threat contains exactly four discrete variables: "Guest House Stay"; "Travel to Three or More Countries"; "Pocket Litter"; and "Connections."[38] To satisfy one of these four variables is to be classified by West Point as an "Associated Threat"—which evidently signifies that a detainee is *even less than* a "Potential Threat" (West Point's second level of threat). West Point determines that seventy-seven percent (77%) of the CSRT unclassified summaries contain data satisfying at least one of its four Level III variables, and thus classifies these 77% of summaries as evidencing "Associated Threat."[39]

The four variables that comprise West Point's third level of threat are over-inclusive and non-determinative of threat. These variables would sweep up millions of individuals under each threat level, if not for the thirteenth variable--being detained at Guantánamo.

A. Threat Variable: "Guest House Stay"

CSRT unclassified summaries indicating that a detainee stayed in a guest house, safe house, or both, are classified by West Point under the "Guest House Stay" Level III threat variable. Although the Department of Defense distinguished between "guest houses" and "safe houses" in the CSRT unclassified summaries, West Point chooses to abandon distinctions between the two in its report without citing any basis to justify that choice. While a "guest house" is, by its plain meaning, "a house for the reception of paying guests,"[40] West Point asserts that a "guest house" (synonymous with "safe house") is any "type of infrastructure that houses individuals involved in nefarious activities."[41]

In fact, guest houses are a preferred form of lodging for American, European, and local travelers in the region.[42] Guest houses typically offer budget rates compared with

---

[37] WP Report at 6.
[38] *Id.*
[39] *Id.*
[40] Oxford English Dictionary.
[41] WP Report at 26.
[42] For example, The Embassy of Afghanistan in Washington, D.C. informs travelers visiting its website that two types of accommodations exist in Afghanistan: hotels and guest houses. The Embassy explains that the difference between the two is one of cost and amenities: "Guest houses are generally less expensive than hotels because fewer amenities are offered; guests usually share bathrooms." Thirty-three places for travelers to stay are listed on the Embassy's website—twenty-six of these are guest houses. *The Embassy of*

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00133 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.082

large hotels, and are similar to bed-and-breakfasts. The actual definition of "guest house" is important not only because it is quite different from what is connoted by the term "safe house," but also because the Department of Defense itself distinguished between the two in detainees' unclassified summaries.[43]

West Point's decision to merge two terms that the Department of Defense itself distinguished has the effect of being over-inclusive. Although seventeen percent (17%) of detainees were alleged by the Department of Defense in their unclassified summaries to have stayed only at a "guest house," West Point asserts that where the Department of Defense said "guest house" it really meant to say "safe house." Consequently, West Point sweeps up detainees never alleged by the Department of Defense to have stayed at a "safe house" under what it calls its "Guest House Stay" threat variable. West Point finds that twenty-four percent (24%) of CSRT unclassified summaries meet this criterion.[44] Thus, according to West Point, to have stayed in a guest house is to have "interacted with members of terrorist groups or exhibited behavior frequently associated with terrorist group members."[45] This determination is inconsistent with what the Department of Defense actually stated, and is over-inclusive and non-determinative of threat.

B. Threat Variable: Travel to Three or More Countries

West Point includes all CSRT unclassified summaries indicating that a detainee traveled to three or more countries under its "International Travel" threat variable.[46] Given that a majority of detainees were captured in the Afghanistan-Pakistan region,[47] it is not surprising that those two countries were by far the most common countries to appear in detainees' travel histories. Based upon West Point's Figure 20, it appears that travel within Afghanistan and Pakistan totals approximately three times the amount of detainees' travels to all other countries combined.[48] Thus, detainees who fled for Pakistan when violence erupted in Afghanistan had only to have traveled to one other country to be considered a "Travel" threat.

West Point's statement concedes that "operationally relevant travel history" is "*not determinative of an individual's threat or propensity to commit hostile acts*"

Afghanistan, Washington, D.C.: Travel Information. Retrieved October 15, 2007 from http://www.embassyofafghanistan.org/travel/travel4.html.

[43] Because Seton Hall's original report strictly honors the Department of Defense's data and terminology, it accurately represents that the detainees' unclassified summaries alleged that sixteen percent (16%) of detainees had stayed at a "guest house," ten percent (10%) had stayed at a "safe house," and one percent (1%) had stayed at both. *See* SH Profile at Fig. 15.

[44] WP Report at 6.

[45] *Id.*

[46] *Id.* West Point purports to concern itself with a detainee's "operationally relevant travel." However, West Point evidently considers any travel to three or more countries to be "operationally relevant." Although West Point contends, anecdotally, that "[t]here are multiple known al-Qa'ida and Jihadist international travel routes[,]" it fails to cite to any authority on this matter, and never claims to limit its consideration of "International Travel" to such "known" routes.

[47] WP Report at 23.

[48] *Id.* at 29.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00134 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.083

(emphasis added).[49] Nonetheless, each of the 119 unclassified summaries determined by West Point to indicate travel to three or more countries[50] is classified as a Level III threat. Again, West Point employs a data field that is over-inclusive[51]—and, by its own admission, not determinative of threat—to evaluate the detainees' dangerousness.

C. Threat Variable: Pocket Litter

CSRT unclassified summaries satisfying West Point's "Pocket Litter" threat variable are summaries indicating that a detainee possessed one of either a digital watch "of a concerning type" or "a large amount" of United States or foreign currency.[52] West Point does not define what constitutes "a large amount" of currency; nor does it describe what causes a digital watch to be "of a concerning type" (although the Department of Defense data indicates that the watches were made by Casio).[53]

West Point concedes that "in itself possession of large amounts of currency is not a highly concerning indicator of threat."[54] However, West Point mitigates this concession with a contention that, "when taken in concert with *other variables*," the possession of a large amount of money "tends to provide some sense of an individual's role within an organization" (emphasis added).[55] West Point posits one of these "other variables": "being in an active combat zone."[56, 57] Accordingly, West Point strays from its stated methodology of considering each of its threat variables discretely, and implicitly acknowledges its reliance on a thirteenth variable: that is, to exhibit one of West Point's threat variables is not necessarily to be a threat, *unless* one exhibits the additional criterion of being detained at Guantánamo.

D. Threat Variable: Connections

West Point includes all CSRT unclassified summaries indicating that a detainee had an "individual-to-individual relationship" with someone who was affiliated with al-Qa`ida, the Taliban, "or associated forces," under its "Individual Connections" threat

---

[49] *Id.* at 28.
[50] *Id.* at 29.
[51] It is interesting to imagine how many Americans would satisfy West Point's "Travel" threat variable, given that in the 2006 fiscal year alone, 12,133,537 United States passports were issued. *Bureau of Consular Affairs*. Retrieved October 23, 2007 from http://travel.state.gov/passport/services/stats/stats_890.html.
(Of course, Americans who travel internationally fail to satisfy West Point's thirteenth criterion because they are not held at Guantánamo.)
[52] WP Report at 29.
[53] Incidentally, Casio sold 33 million timepieces world-wide in 2006 alone, and has sold 60 million of its G-Shock digital watches to date. *Casio Corporate Report 2007*. Retrieved October 23, 2007 from http://world.casio.com/env/pdf/report_2007/All_ENG.pdf.
[54] WP Report at 29.
[55] *Id.*
[56] *Id.*
[57] Only five percent (5%) of detainees are even alleged to have been captured on the battlefield. *See* SH Profile at 2.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00135 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC
53355.084

variable.[58] The stated difference between "Connections" and "Affiliations" (which West Point classifies as a Level II threat variable) is that a "connection" is a relationship between two individuals, whereas "affiliation" is "an ongoing relationship between an individual and an organization, group or institution[.]"[59] In light of these definitions, it seems counterintuitive that affiliations would be more numerous than connections; to be affiliated, it would seem, is necessarily to be connected to at least one other affiliated person. Nonetheless, West Point finds 155 fewer instances of "Connection" than of "Affiliation."[60]

The "Connections" variable as an indicator of threat is problematic. First, what it means to be connected is never explained by West Point. Acquaintanceships are evidently termed connections by West Point. Furthermore, while "connection with a Taliban member" is cited by West Point as the most common type of connection,[61] it is undisputed that to have been connected to a member of the Taliban is to have been connected to someone who was a member of what was the ruling party of Afghanistan at the time of its invasion by the United States.[62]

Like the other Level III threat variables, West Point's "Connections" variable is over-inclusive and non-determinative.

III. Level II: "Potential Threat as an Enemy Combatant"

West Point's third level of threat again contains four discrete variables: "Small Arms"; "Commitment"; "Support Roles"; and "Group Affiliations."[63] Although *West Point concedes that classification as a Level II threat does not necessarily indicate threat*, to satisfy one of these four variables is to be classified by West Point as a "Potential Threat." West Point determines that ninety-five percent (95%) of the CSRT unclassified summaries contain data satisfying at least one of its four Level II variables, and thus classifies these 95% of summaries as evidencing "Potential Threat."[64]

---

[58] WP Report at 25.
[59] *Id.*
[60] *Id.* at 24-25.
[61] *Id.* at 25.
[62] *See* SH Profile at 16:
"The Taliban was a religious state which demanded the most extreme compliance of all of its citizens and as such controlled all aspects of their lives through pervasive Governmental and religious operation. Under Mullah Omar, there were 11 governors and various ministers...ministries of the Interior, Public Health, Police, and the Department of Virtue and Prevention of Vice. There was a Health Minister, Governor of the State Bank, an Attorney General, an Education Minister, and an Anti-Drug Control Force. Each city had a mayor, chief of police, and senior administrators.
None of these individuals are at Guantánamo Bay" (emphasis added).
[63] WP Report at 5.
[64] *Id.*

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00136 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC
53355.085

A. Threat Variable: Small Arms

West Point includes CSRT unclassified summaries indicating that a detainee either received small arms training or possessed small arms under its "Small Arms Training/Possession" threat variable.[65] Like other variables above and below it, the "Small Arms" variable is vastly over-inclusive—and in this instance, West Point concedes as much, writing:

> In the Afghanistan-Pakistan region where most of these individuals were captured, familiarization with and possession of AK-47's and other small arms *is a part of daily life for many and not a sufficient indicator of threat*[66] (emphasis added).

Small arms, as West Point concedes, are ubiquitous in the Afghanistan-Pakistan region.[67] Furthermore, and rather importantly, West Point admits that the "Small Arms" variable *is not a sufficient indicator of threat*. It explains that:

> For this reason, [West Point's Combating Terrorism Center] felt it was prudent to identify and separate those unclassified summaries containing evidence of weapons training/possession limited to small arms such as AK-47's and include them as a Level II versus Level I threat.[68]

West Point *explicitly concedes* that the satisfaction of its "Small Arms" variable is not a significant indicator of threat; yet, it treats the satisfaction of that variable as a basis for the categorization of a detainee as a Level II threat. Thus, a detainee's unclassified summary need not allege a sufficient indicator of threat for West Point to categorize him as a Level II threat.

This is a significant error. Since detainees who are categorized as at most level II threats are not actually threatening, this means that the twenty-seven percent (27%) of detainees classified by West Point as at most Level II threats[69] are not in fact threatening.

---

[65] *Id.*

[66] *Id.* at 23.

[67] In fact, United Nations experts estimate that there are approximately 10 million small arms circulating throughout Afghanistan, a country with a population of about 23 million. *Center for Defense Information*. Retrieved October 15, 2007 from file://C:\DOCUME~1\Owner\LOCALS~1\Temp\DVRL9V62htm.

Small arms are similarly commonplace in the United States, where the National Rifle Association claims 3 million members. *National Rifle Association*. Retrieved October 23, 2007 at http://www.nra.org/aboutus.aspx. There are nearly 80 thousand licensed gun dealers in the United States. *The Brady Center*. Retrieved October 10, 2007 from http://www.bradycenter.org/gunindustrywatch/.

[68] WP Report at 23.

[69] Seventy-three percent (73%) of CSRT unclassified summaries rise to West Point's first level of threat. *Id.* at 5.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00137 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.086

B. Threat Variable: Commitment

According to West Point, its "Commitment" threat variable is satisfied by ninety-eight (98) CSRT unclassified summaries indicating that a detainee "expressed a commitment to pursuing violent Jihadist goals."[70] However, little more than the mention of jihad in a detainee's unclassified summary is enough to qualify as "Commitment" for West Point. Out of 516 unclassified summaries, there are exactly *zero* instances where the word "violent" (or any variation thereof) is used in any relation to the word "jihad" (or any variation thereof).[71] Furthermore, in only twenty-six (26) instances can a detainee's commitment to violent jihad be contextually inferred.[72]

Of the ninety-eight (98) unclassified summaries West Point classifies as expressing commitment, forty-seven (47) of these are categorized under "other commitment,"[73] making up the largest subcategory of commitment. West Point does not describe what it means by "other commitment" but does not include in that category any of the following: providing non-combat support in waging "violent jihad"; pledging to continue "violent jihad"; pledging to continue to motivate others to wage "violent jihad"; admitting willingness to follow a fatwa to wage "violent jihad"; and pledging allegiance to Osama bin Laden.[74]

Conceptions of jihad range from one of religious warfare to that of "a ceaseless struggle…to distinguish the compassion, love and beauty of God in all things and to strip away everything else.[75] The following conversation, which occurred between a detainee and CSRT Members—through an interpreter—illustrates how the concept of jihad can often be confusing, even to believers:

Question: Do you believe in jihad?

Response: I believe in Islam. Do not dissect Islam.

Q. I'm not. All I'm asking is do you believe in jihad.

R. I cannot answer that question. It is a mysterious question and I cannot answer it.

Q. Do you know what jihad is?

---

[70] *Id.*
[71] In fact, the word "violent" occurs only once in the whole of the CSRT unclassified summaries. The word "violent" also occurs exactly one time in the unclassified summaries.
[72] Additionally, among unclassified summaries which contain data indicating a detainee's commitment to jihad in any form (violent or non-violent), fifty-six (56) summaries designate the detainee as "hostile," and only fifteen (15) designate the detainee as a "fighter."
[73] WP Report at 22.
[74] *Id.*
[75] Karen Armstrong, *A History of God* 241 (1994).

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00138 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC
53355.087

R. Jihad, as far I'm thinking has many meanings. Just like what he was doing there, helping people or what he was doing when Russia was attacking. Don't think that when you are saying jihad, that you are always talking about somebody killing somebody. Jihad could mean somebody helping other people. Opening schools all these are part of the jihad. So when I went to Pakistan, I went to do just the humanitarian part of the jihad.

Q. But jihad does mean killing people correct?

R. That is true but I'm a coward, I cannot go into these things. All I did for my part of the jihad is helping people. That's why I chose (inaudible).[76]

Although West Point acknowledges that "Commitment" is a "somewhat subjective" measure,[77] the study's authors are not deterred from defining a category for determining "Commitment" that essentially amounts to little more than word-tallying. Instead of appreciating that jihad is a complicated and amorphous concept subject to a multitude of interpretations, West Point concludes that, for every detainee, commitment to any concept of jihad necessitates commitment to personal violence. Again, West Point invents a threat variable that is over-inclusive.

C. Threat Variable: Support Roles

West Point includes CSRT unclassified summaries indicating that a detainee performed roles other than that of a fighter under its "Support Roles" threat variable.[78] West Point names twenty-six (26) subcategories of "Support Roles," including "Accountant," "Driver," "Cook," and "Medical Care Giver."[79]

Of West Point's twenty-six (26) subcategories, "Bodyguard" and "Other" are by far the largest, with "Other" approximately four times greater than the next largest category.[80] Thus, another of West Point's variables is subdivided into categories, the largest or near-largest of which is "Other."

D. Threat Variable: Group Affiliations

West Point includes all CSRT unclassified summaries indicating that a detainee had a relationship "with al-Qa'ida, the Taliban, [or] other terrorist/extremist groups" under its "Group Affiliations" threat variable.[81] The "Group Affiliations" variable is similar to the "Individual Connections" variable, except that the former describes

[76] CSRT Transcript, ISN 589, FOIA 001875.
[77] WP Report at 20.
[78] *Id.* at 19.
[79] *Id.* at 20.
[80] *Id.*
[81] *Id.* at 5.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00139 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.088

individual-to-group relationships—including "informal" as well as formal relationships—while the latter describes individual-to-individual relationships.[82]

Although affiliation with the Taliban is one of West Point's most frequently cited affiliations,[83] it is undisputed that to have been affiliated with the Taliban is to have been affiliated with what was the ruling party of Afghanistan at the time of its invasion by the United States.

IV. Level I: "Demonstrated Threat as an Enemy Combatant"

Comprising West Point's top level of threat are four variables that overlap considerably: "Hostilities"; "Fighter"; "Training Camps"; and "Combat Weapons."[84] West Point contends that seventy-three percent (73%) of the CSRT unclassified summaries contain data satisfying at least one of its four Level I threat variables, and thus classifies these 73% of summaries as evidencing "Demonstrated Threat."[85]

The four variables comprising West Point's top level of threat, in stark contrast to West Point's other variables, are serious and *would seem* to bear a discernible relation to a detainee's actual dangerousness, to the extent that dangerousness can be defined. However, the force of West Point's classification of 73% of unclassified summaries as evidencing "Demonstrated Threat" is weakened by problems with West Point's methodology.

For example, West Point concedes that:

> In addition to RPG's, grenades, explosives, and sniper rifles, forty records contained evidence of training/possession of "other" weapons which were coded separately than [sic] "AK-47's and "Other Small Arms." Records that included weapons in the "other" category were included in the count for the variable "COMBAT WEAPONS[.]"[86]

Thus, where an unclassified summary indicates the possession of any unnamed weapon, West Point imposes a classification of "Combat Weapon" on what is at best unidentified and at worst might be as innocuous as a pocketknife. Nonetheless, to satisfy West Point's problematic "Combat Weapons" threat variable is to be classified as a top level threat.

Another problem arises with the "Training Camps" variable. Here, West Point admits the "commonly accepted understanding [that] the majority of those trained in those camps would not go on to formally join al-Qa'ida." West Point further admits that its training camp criteria relies instead upon "anecdotal evidence suggest[ing] that a large

---

[82] As noted previously in section II(d), West Point counterintuitively determines that there are far fewer unclassified summaries indicating "Connection" than there are summaries indicating "Affiliation."
[83] WP Report at 24.
[84] *Id.* at 5.
[85] *Id.*
[86] *Id.* at 18.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00140 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.089

percentage still did participate in some level of violent of violent Jihad, including participation with the Taliban or associated groups and movements."[87] Furthermore, "Other" occurs once again as the largest or near-largest subcategory of West Point's threat variable—of the fifteen (15) subcategories within "Training Camps," "Other" is by far one of the two largest, and is more than five times greater than the next largest category.[88]

Also worth noting is that, while West Point implies that any additional, unpublished data would support the Department of Defense's determinations of enemy combatant status, the facts suggest otherwise. The recent declaration by Lieutenant Stephen Abraham, dated June 15, 2007 and filed in the United States Supreme Court in *Al Odah v. U.S.*,[89] describes the Department of Defense's refusal to acknowledge whether exculpatory evidence had been withheld from Tribunal Members. If Lieutenant Colonel Abraham's declaration is correct, then there exists unclassified evidence—withheld by the Department of Defense—that would likely have portrayed the detainees in a far more benign light than did the data that the Department of Defense elected to provide.

Part Two in Review

Although West Point, on behalf of the Department of Defense, relies upon circular reasoning and problematic methodology in its attempt to paint a portrait of the Guantánamo detainees as exceedingly dangerous, West Point is nonetheless forced to concede that at least twenty-seven percent (27%) of CSRT unclassified summaries do not indicate that a detainee is threatening. It is only through the use of West Point's implied thirteenth criterion—the incarceration of a detainee in Guantánamo—that West Point can arrive at its conclusions.

[87] *Id.* at 15.
[88] *Id.* at 16.
[89] Supra note 19.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00141 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.090

CONCLUSION

With its response to Seton Hall, West Point supplements, rather than rebuts, Seton Hall's profile in demonstrating the defects in the evidence upon which the Department of Defense determined that detainees were enemy combatants.

West Point's confirmation that ninety-five percent (95%) of detainees were not captured by United States forces—on battlefields or anywhere else—dispels the myth perpetuated by government officials that the Guantánamo detainees were captured by United States soldiers on the battlefield.

West Point's report creates a hierarchy of threat variables in an attempt to evaluate detainees' dangerousness, but when all of its faulty categories are stripped away, all that is left is the Government's definition of "enemy combatant." Problematic categories notwithstanding, West Point concedes that at least twenty-seven percent (27%) of unclassified summaries do not necessarily indicate that a detainee is threatening.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00142 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.091

CTC REPORT

An Assessment of 516 Combatant Status Review Tribunal (CSRT) Unclassified Summaries

25 July 2007

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00143 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.092

LTC JOSEPH FELTER, PH.D.
DIRECTOR, COMBATING TERRORISM CENTER

JARRET BRACHMAN, PH.D.
DIRECTOR OF RESEARCH, COMBATING TERRORISM CENTER

THE COMBATING TERRORISM CENTER
607 CULLUM RD.
UNITED STATES MILITARY ACADEMY
WEST POINT, NY 12518
HTTP://WWW.CTC.USMA.EDU
OFFICE: 845.938.8495
FAX: 845.938.8472

JOSEPH.FELTER@USMA.EDU
JARRET.BRACHMAN@USMA.EDU

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00144 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.083

Authors' Note

On July 20, 2007, a three-judge panel of the U.S. federal appeals court in Washington ordered the U.S. government to release all reasonable information on detainees being held at Guantanamo Bay who are challenging their detention.

The court ruled that meaningful review of the military tribunals would not be possible "without seeing all the evidence." The ruling, written by Douglas H. Ginsburg, the chief judge of the United States Court of Appeals for the District of Columbia Circuit, noted that, "In order to review compliance with those procedures [for determining whether the government's classification of an individual as an enemy combatant was supported by a preponderance of evidence], "the court must be able to view the government information."[1]

This ruling comes in the midst of a highly charged debate over the issue, with critics of the Combatant Status Review Tribunal (CSRT) process arguing that most detainees have no way to contest charges that are based on generalizations and incomplete intelligence reports. As we were not involved in the initial data collection process nor were we present at any of the CSRT hearings, we cannot comment in any meaningful way on the veracity or completeness of data contained in the publicly available CSRT unclassified summaries. We did seek to familiarize ourselves with the various dimensions of the CSRT process by visiting the facilities at Guantanamo Bay where the CSRT hearings were conducted and by meeting with personnel directly involved in the CSRT process.

We are pleased to share the findings of our analysis of this public data as part of the Combating Terrorism Center's ongoing effort to make information related to aspects of terrorism and counterterrorism more accessible for public scrutiny and dialogue. Given the politically sensitive and highly charged nature of this topic, we have tried to be as methodologically rigorous and transparent throughout our report as possible.

We recognize that advocates of America's current detention policy will point to this study as an illustration of the threat posed by these individuals. We also anticipate that those justly concerned with advocating for the legal rights of the detainees will point to this study as further evidence regarding the dearth of information made publicly available by the U.S. government about their cases. It is this debate that we hope to stimulate and inform with this report.

Any inaccuracies or oversights made in this study are entirely the responsibility of the authors as this report does not reflect the official position of the Combating Terrorism Center, the United States Military Academy, the U.S. Army nor the Department of Defense.
We sincerely hope that this report will stand as a useful contribution in the ongoing discussion over U.S. designation and detention of enemy combatants.[2]

Joseph Felter and Jarret Brachman

---

[1] See the 'Bismullah, Haji vs. Gates, Robert' (06-1197a) Opinion Released on July 20, 2007 by the United States Court of Appeals, Washington D.C. Circuit.
http://pacer.cadc.uscourts.gov/docs/common/opinions/200707/06-1197a.pdf (July 2007)

[2] The authors would like to thank faculty at the Combating Terrorism Center and faculty of the Department of Social Sciences at the United States Military Academy, especially Dr. Michael Meese and Dr. Cindy Jebb for their review and comments of this article.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00145 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.094

Executive Summary

Between July 2004 and March 2005, the Department of Defense (DoD) conducted Combatant Status Review Tribunals (CSRT's) for 558 detainees being held at U.S. Naval Base Guantanamo Bay, Cuba (GTMO). The DoD's objective in conducting this tribunal process was to determine whether those detainees continued to warrant the 'enemy combatant' designation through a non-adversarial, administrative status review process.

In early 2005 [3] DoD (the Office for the Administrative Review of the Detention of Enemy Combatants) released 517 CSRT (pronounced "see-cert") unclassified summaries.[4] These unclassified summaries, prepared in advance of the actual hearings, informed the detainees about the unclassified basis for their detention as enemy combatants. Of the 517 unclassified records, one of those records is a duplicate, which brings the total of CSRT unclassified summaries to 516. The DoD posted those 517 unclassified summaries (including the one duplicate) on its public website in response to a Freedom of Information Act (FOIA) request.[5]

In 2007, the Office of Detainee Affairs in the Office of the Secretary of Defense, asked faculty at the Combating Terrorism Center (CTC) at West Point to review information recorded in the 516 CSRT unclassified summaries (hereinafter referred to as "CSRT records") and provide an objective assessment of this information.[6]

After querying the 516 CSRT unclassified summaries, the CTC found that 73% of the unclassified summaries meet the CTC's highest threshold of a 'demonstrated threat' as an enemy combatant. The CTC established two other categories with four discrete proxy characteristics in each[7] ('potential threat' and 'associated threat') in order to help assess whether the information in these records indicated these individuals *posed or potentially posed a threat as an enemy combatant.* The CTC found that six of the publicly available CSRT unclassified summaries contained no evidence that fit any of the CTC's twelve threat variables.

Level 1: Demonstrated Threat as an Enemy Combatant

Data in the CSRT unclassified summaries indicating that a detainee participated, prepared to participate or intended to participate in, direct hostilities against the US and its Coalition

---

[3] The final CSRT hearing was held in January 2005 and the final Convening Authority letter was signed in March 2005.

[4] See Department of Defense website, <http://www.dod.mil/pubs/foi/detainees/OARDEC_docs.html>

[5] See Department of Defense website, <http://www.dod.mil/pubs/foi/detainees/OARDEC_docs.html>

[6] The Combating Terrorism Center was asked to review and address the criticisms raised in an earlier study by a research team affiliated with Seton Hall University and the Denbeaux & Denbeaux law firm. The Seton Hall study draws on the same 516 unclassified CSRT summaries and concludes that the DoD is wrongfully holding individuals who, based on the DoD's own data, neither pose a serious threat to America's national security, nor seem to have been involved in conducting or supporting hostile action against the United States.

[7] Detailed coding criteria are discussed in subsequent sections. CTC faculty worked closely with the Office of Detainee Affairs in order to ensure that the coded data accurately represented the raw data contained in the publicly available 516 CSRT unclassified summaries.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00146 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.095

Allies was placed into the *Demonstrated Threat* as an enemy combatant category. It includes the following detainee activities and attributes:

- HOSTILITIES: Having definitively [8] supported or waged hostile activities against the US/Coalition allies. 56% of the 516 unclassified CSRT summaries met this criteria.
- FIGHTER: Having been identified as a 'fighter' for al-Qa`ida, the Taliban or associated forces. (35% of the CSRT unclassified summaries)
- TRAINING CAMP: Having received training in a training camp run by al-Qa`ida, the Taliban or associated forces. (35% of the CSRT unclassified summaries)
- COMBAT WEAPONS: Received training in the employment of combat weapons *other than or in addition to rifles/small arms* including grenades, rocket propelled grenades, sniper rifles and the construction and/or deployment of explosives and IED's. (27% of the CSRT unclassified summaries)

73% of the publicly available CSRT unclassified summaries contained at least one piece of evidence that meet this threshold definition of demonstrated threat.

Level 2: Potential Threat as an Enemy Combatant

Data in the CSRT unclassified summaries indicating that a detainee *supported* hostile activities or was affiliated with groups that executed and/or supported terrorist acts, or received weapons training/possessed weapons that could be used in support of terrorist activities was placed into the *Potential Threat as an Enemy Combatant* category. Four discrete variables were included in this category:

- SUPPORT ROLES: Evidence of performing a supporting role in terrorist or extremist groups. (27% of the CSRT unclassified summaries)
- COMMITMENT: Having expressed a commitment to pursuing violent Jihadist goals. (19% of the CSRT unclassified summaries)
- SMALL ARMS: Received training in the use of rifles e.g AK-47 and other small arms but not in other combat weapons such as RPG's, grenades, explosives and IED's. (17% of the CSRT unclassified summaries)
- GROUP AFFILIATIONS: Affiliations with al-Qa'ida, the Taliban, and other terrorist/extremist groups. (92% of the CSRT unclassified summaries)

95% of the publicly available CSRT unclassified summaries contain one or more pieces of evidence that meet the criteria considered a *potential threat* as an enemy combatant[9].

[8] By 'definitive' the CTC means that there is an explicit statement made without qualification about that data field in the publicly available CSRT unclassified summary.
[9] Much of this total is attributed to the 92% of the CSRT unclassified records that contain evidence of affiliations with terror groups.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00147 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC
53355.096

Level 3: Associated Threat as an Enemy Combatant

Data contained within the CSRT unclassified summaries indicating that a detainee interacted with members of terrorist groups or exhibited behavior frequently associated with terrorist group members was placed into the *Associated Threat* as an enemy combatant category and includes the following discrete variables:

- CONNECTIONS: Possessing a definitive connection to an al-Qa'ida member and/or other individual affiliated with an extremist groups. (62% of the CSRT unclassified summaries)
- GUEST HOUSE: Evidence of staying at a guest house known or suspected to be used as a way station for individuals enroute to supporting jihad and other terrorist activities. (24% of the CSRT unclassified summaries)
- TRAVEL: Evidence that the detainee traveled to three or more different countries (23% of the CSRT unclassified summaries)
- LARGE SUMS CASH: Detainees carrying large sums of US or foreign currencies.(2% of the CSRT unclassified summaries)

77% of the CSRT unclassified summaries contain evidence associated with terrorist group members and behavior and met the stated criteria as an associated threat as an enemy combatant.

Level 4: No Evidence of Threat

Importantly, six of the publicly available 516 CSRT unclassified summaries (1.16%) do not contain evidence of involvement or attributes fitting any of the aforementioned twelve variables. The CTC does not know whether additional incriminating details on these six detainees are available in their respective classified files.

Recap

A summary of the Level I through Level III attributes identified in the CSRT unclassified summaries is depicted graphically at Figure 1: (Note: Most summaries visualized in this graph and those that follow contain evidence of multiple attributes across all three categories thus the total number often exceeds 516 or 100% of the 516 population)

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00148 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.097

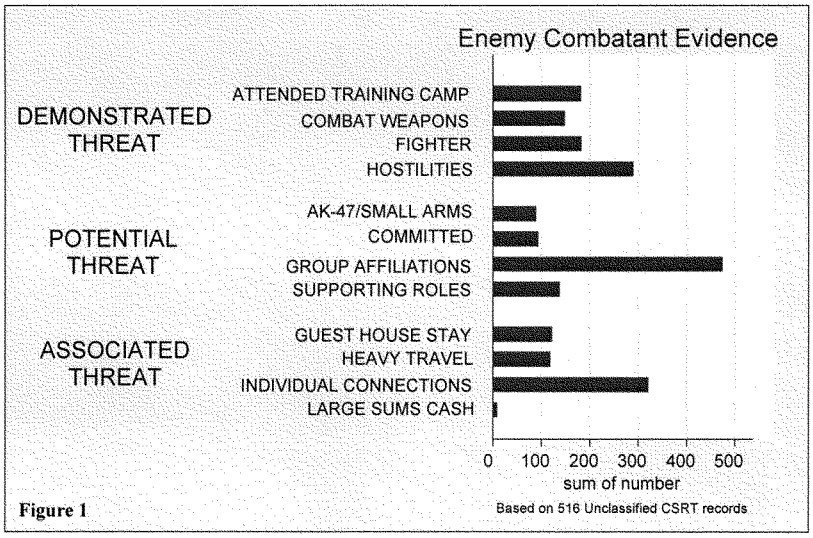


Figure 1

The mean number of attributes across all twelve discrete measures supported by evidence in 516 CSRT unclassified summaries is 4.2. Nearly half of these summaries - 48% - contained 7 or more pieces of evidence that indicated the detainee demonstrated, potentially demonstrated or was associated with threats as an enemy combatant.

The following study is almost entirely informed by the information that is publicly available in the 516 CSRT unclassified summaries, which by their nature are limited in detail. The Department of Defense has kept the remaining information classified as it is being used in support of ongoing military operations.

The authors of this study have sought to be both objective and impartial in their interpretations of this data. They have strived to maintain transparency regarding the coding criteria, as well as their interpretation and analysis of the processed data. The authors visited U.S. Naval Base Guantanamo Bay, Cuba and discussed coding rules and details of the CSRT process with those directly involved. The study's coded data set is available on request. The authors also note that classified files likely contain additional evidence relevant to any decision on detainee status as enemy combatant.

It is the hope of the CTC that this comprehensive data collection and accompanying coding effort will inform a variety of future studies. Ideally, this report and the data from which it was informed will enhance our collective understanding of the threats facing the United States, its allies and its interests.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00149 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.098

Assessment of the 516 Unclassified CSRT Reports

Introduction

Between July 2004 and March 2005, the Department of Defense (DoD) conducted Combatant Status Review Tribunals (CSRT's) for 558 detainees being held at U.S. Naval Base Guantanamo Bay, Cuba (GTMO). The DoD's objective in conducting this tribunal process was to determine whether those detainees continued to warrant the 'enemy combatant' designation through a non-adversarial, administrative status review process.

Each of the detainees under review had been captured during the course of U.S. and Coalition military operations against the Taliban, al-Qa`ida and their associated forces. The 2004-2005 status review tribunal process concluded that 520 of the 558 detainees continued to warrant the enemy combatant status designation. The DoD released the 38 detainees that were determined to be 'No Longer Enemy Combatants' as soon as the appropriate humane treatment assurances were obtained from the receiving countries.

In early 2005 [10] the Department of Defense (Office for the Administrative Review of the Detention of Enemy Combatants) released 517 CSRT (pronounced "see-cert") unclassified summaries.[11] Of the 517 unclassified summaries, one of those summaries is a duplicate, which brings the total of CSRT unclassified summaries to 516. The DoD posted those 517 unclassified summaries (including the one duplicate) on its public website in response to a Freedom of Information Act (FOIA) request.[12]

The 516 publicly released Combatant Status Review Tribunal unclassified summaries, prepared in advance of the actual hearings, informed detainees about the unclassified basis for their detention as enemy combatants. Each unclassified CSRT summary is divided into four sections. Three of those sections are standardized across detainees and refer to more procedural type of information. The only section of those four that significantly varies from detainee to detainee is section 3, which provides an unclassified summary of the details used in the process of determining whether an individual was an unlawful enemy combatant. A sample of section 3 is below:

---

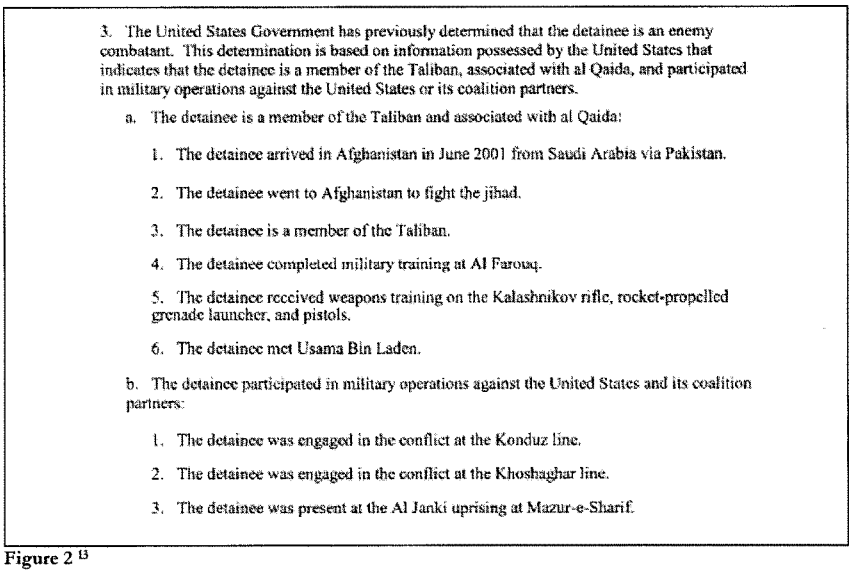
[10] The final CSRT hearing was held in January 2005 and the final Convening Authority letter was signed in March 2005.

[11] See Department of Defense website, <http://www.dod.mil/pubs/foi/detainees/OARDEC_docs.html>

[12] See Department of Defense website, <http://www.dod.mil/pubs/foi/detainees/OARDEC_docs.html>

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00150 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.089



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 the detainee is a member of the Taliban, associated with al Qaida, and participated in military operations against the United States or its coalition partners.

a. The detainee is a member of the Taliban and associated with al Qaida:

1. The detainee arrived in Afghanistan in June 2001 from Saudi Arabia via Pakistan.

2. The detainee went to Afghanistan to fight the jihad.

3. The detainee is a member of the Taliban.

4. The detainee completed military training at Al Farouq.

5. The detainee received weapons training on the Kalashnikov rifle, rocket-propelled grenade launcher, and pistols.

6. The detainee met Usama Bin Laden.

b. The detainee participated in military operations against the United States and its coalition partners:

1. The detainee was engaged in the conflict at the Konduz line.

2. The detainee was engaged in the conflict at the Khoshaghar line.

3. The detainee was present at the Al Janki uprising at Mazur-e-Sharif.

Figure 2 [13]

The summary of details for any given CSRT unclassified summary is neither comprehensive nor all that specific. This is due, in large part, to the fact that much of the information used to determine an individual's status remains classified.

In 2007, the Office of Detainee Affairs in the Office of the Secretary of Defense, asked faculty at the Combating Terrorism Center (CTC) at West Point to review information recorded in the 516 CSRT unclassified summaries and provide an objective assessment of this information.[14] The CTC, a research and education center in the U.S. Military Academy's Department of Social Sciences, was asked to conduct this study given its substantive background on terrorism related issues and a record of conducting rigorous and objective reports.

The Combating Terrorism Center reviewed data from the 516 unclassified CSRT summaries and identified attributes associated with threatening activities that are consistent with research on enemy combatant activities. CTC faculty were not present at the Combatant Status Review Tribunals nor were they part of the process to record or verify the veracity of incriminating information about the detainees. The CTC authors did seek to familiarize themselves with the CSRT process. This report, therefore, focuses exclusively on the

[13] CSRT Summary of Evidence for Combatant Status Review Tribunal - BIN ATEF, Mahrnrnoud Omar Mohammed. 07 October 2004. The full CSRT unclassified summary is available in Annex B.

[14] The Combating Terrorism Center was asked to review and address the criticisms raised in an earlier study by a research team affiliated with Seton Hall University and the Denbeaux & Denbeaux law firm. The Seton Hall study draws on the same 516 unclassified CSRT summaries and concludes that the DoD is wrongfully holding individuals who, based on the DoD's own data, neither pose a serious threat to America's national security, nor seem to have been involved in conducting or supporting hostile action against the United States.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00151 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.100

publicly available information contained within the 516 CSRT unclassified summaries released by the Department of Defense in 2005. The CTC found that evidence could be divided into three broad, analytical categories conceptualized around perceived threat to US interests. They are ordered in the following paragraphs from highest to lowest threat level:

Level I (Demonstrated Threat)- Information that indicates a detainee participated in, prepared to participate in, or intended to participate in, direct hostilities against the US and its Coalition Allies

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

Level II (Potential Threat)- CSRT unclassified summaries that contained evidence that the detainee supported hostile activities or was affiliated with groups that executed and/or supported terrorist acts, or received training that could be used in support of terrorist activities.

This category included evidence of performing a supporting role in terrorist or extremist groups; having expressed a commitment to pursuing violent Jihadist goals; receiving training in the use of rifles e.g AK-47 and other small arms but not in other combat weapons; affiliations with al-Qa'ida, the Taliban, and other terrorist/extremist groups.

Level III (Associated Threat) - Information that a detainee interacted with members of terrorist groups or exhibited behavior common among some terror group members

Data that placed individuals into this category included possessing a definitive connection to terrorist entities or individuals; having stayed at a guest house known or suspected to be used as a way station for individuals enroute to supporting jihad and other terrorist activities; extensive international travel allegedly in support of terrorist activities; carrying large sums of US or foreign currencies.

This assessment proceeds in the following manner: First we provide information about the capture of the detainees. Next, we define each of twelve variables across all three threat categories coded from the unclassified CSRT reports and use them to provide summary statistics on the 516 detainee CSRT unclassified summaries. Lastly, a multivariate analysis of the data is provided in an effort to identify causal patterns within this sample.

Level IV (No Evidence of Threat) - Importantly, six of the publicly available 516 CSRT unclassified summaries (1.16%) do not contain evidence of involvement or attributes fitting any of the aforementioned twelve variables. The CTC does not know whether additional incriminating details on these six detainees are available in their respective classified files.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00152 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.101

Background Information

The 516 detainees hail from 39 different countries around the world.[15]

COUNTRY OF ORIGIN	TOTAL	% of Total
AFGHANISTAN	124	24.03
ALGERIA	24	4.65
AZERBAIJAN	1	0.19
BAHRAIN	6	1.16
BANGLADESH	1	0.19
BELGIUM	1	0.19
BOSNIA AND HERZEGOVINA	1	0.19
CANADA	1	0.19
CHAD	1	0.19
CHINA	22	4.26
EGYPT	5	0.97
ETHIOPIA	1	0.19
FRANCE	2	0.39
INDIA	1	0.19
IRAN	2	0.39
IRAQ	6	1.16
JORDAN	5	0.97
KAZAKHSTAN	3	0.58
KUWAIT	12	2.33
LIBYA	8	1.55
MALDIVES	1	0.19
MAURITANIA	2	0.39
MOROCCO	9	1.74
PAKISTAN	12	2.33
QATAR	1	0.19
RUSSIA	1	0.19
SAUDI ARABIA	112	21.71
SOMALIA	2	0.39
SUDAN	6	1.16
SYRIA	9	1.74
TAJIKISTAN	6	1.16
TUNISIA	10	1.94
TURKEY	2	0.39
UGANDA	1	0.19
UNITED ARAB EMIRATES	2	0.39
UNITED KINGDOM	3	0.58
UZBEKISTAN	5	0.97
WEST BANK	3	0.58
YEMEN	102	19.77
Total	516	100%

Figure 3

[15] The publicly available 516 unclassified CSRT summaries do not contain information about detainees' countries of origin. The CTC requested this information from the DoD's Office of Detainee Affairs in order to provide a more comprehensive picture about the detainee population.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00153 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.102

As clear from Figure 3 above, the highest represented countries of origin include Afghanistan, Saudi Arabia and Yemen. Individuals from China and Algeria are also strongly represented in the population. These trends match with what is already generally known by observers of recent terrorist movements about the primary countries of origins for radical Sunni Islamic combatants and terrorists.

Some of the 516 publicly available CSRT unclassified summaries provide information with regard to the force responsible for capturing a given individual. The CTC found the following break-down with regard to the identity of capturers:

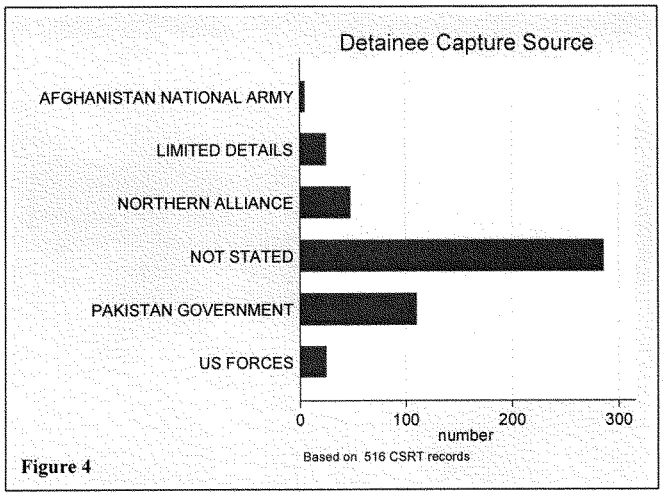


Figure 4

- 110 unclassified summaries have information indicating capture by elements of the Pakistan government
- 25 unclassified summaries have information indicating capture by U.S. Forces
- 48 unclassified summaries have information indicating capture by the Northern Alliance
- 5 unclassified summaries have information indicating capture by the Afghan National Army.
- 42 unclassified summaries have limited details with regard to the capture
- 286 unclassified summaries had no capture data stated.

Of those 42 with limited details on capture data, the following information is available in the publicly available CSRT unclassified summaries:

- Captured by Pashtun tribe members
- Captured by forces of the United Islamic Front for the Salvation of Afghanistan

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00154 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.103

- Captured by Afghan Intelligence Forces
- Captured by Iranian authorities
- Captured by Bosnian authorities

Capturing forces apprehended the 516 individuals in multiple geographic locations. The CTC found that the majority (239) of the publicly available CSRT unclassified summaries contain no information about the capture location. Of those unclassified summaries that do contain this information, the CTC found the following statistics regarding capture location:

CAPTURE LOCATION	TOTAL NUMBER	PERCENTAGE
AFGANISTAN/PAKISTAN	11	2.13
AFGHANISTAN	116	22.48
PAKISTAN	144	27.91
NOT STATED	239	46.32
OTHER LOCATIONS	6	1.16

Figure 5

The next section will examine the actual behaviors and attributes of the 516 individuals drawing exclusively on the data contained in the publicly available 516 CSRT unclassified summaries.

Level I: Evidence of Demonstrated Threat

Hostilities

Upon CTC's review of the data, 291 of the 516 unclassified summaries, or 56%, contain specific information demonstrating involvement with hostile actions. Unclassified summaries with this evidence are included as a Level I threat because they demonstrate that the detainee has demonstrated his capacity to threaten US and/or Coalition interests.

The 291 unclassified summaries with evidence that the detainee directly participated in or supported hostile acts have the following additional information (See Figure 6):

- 56 individuals admitted to fighting the U.S. or Coalition forces
- 104 individuals were found to have manned the front lines
- 9 individuals were found to have participated in a bombing operation, improvised explosives device (IED) attack or other explosives-involved operation
- 98 individuals were found to have directly participated in, or supported the planning or plotting of, a combat operation.
- 3 individuals were found to have purchased weapons for the furtherance of committing hostile acts.
- 21 individuals were found to have engaged in 'other' hostile activities.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00155 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.104

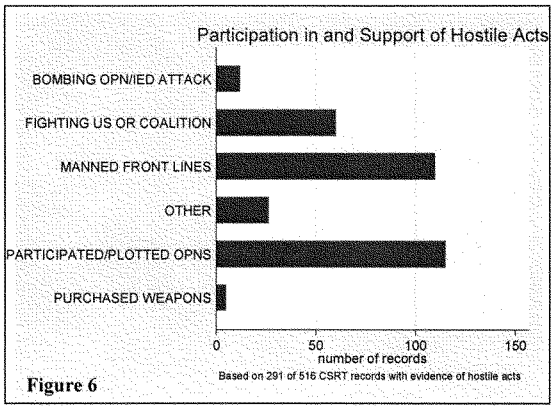


Figure 6

According to the unclassified public CSRT summaries, some of these "Other" hostile activities include guarding weapons, guarding posts, conducting surveillance and reconnaissance in support of operations and transferring weapons.

Fighting Roles

Over 35% of the CSRT unclassified summaries contain evidence that the detainee served in the role of a fighter. Many of the detainees that served as fighters also served in a variety of support roles but were considered fighters - and therefore a Level I threat - if any of the stated roles in their unclassified summary included that of a fighter.

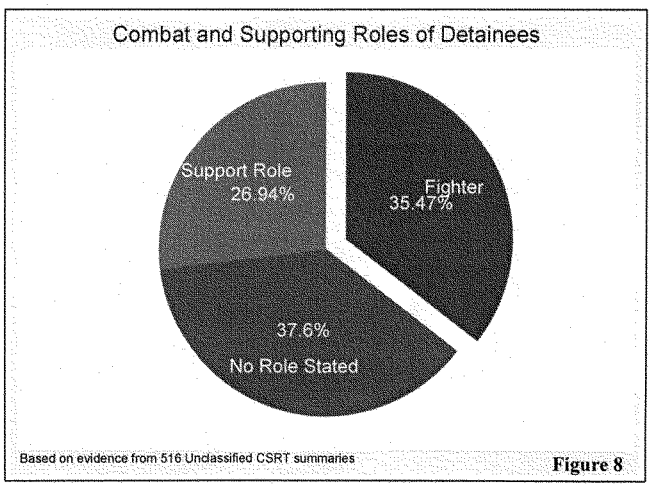


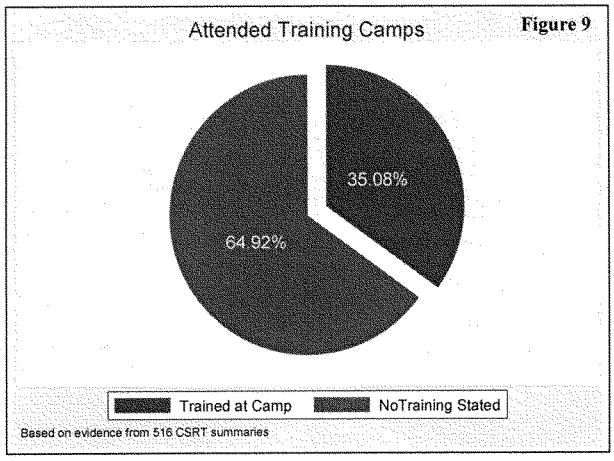
Figure 8

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00156 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC
53355.105

Training Camp Attendance

The Department of Defense uses the phrase, 'terrorist training camp,' when referring to a facility run by al-Qa`ida, the Taliban or associated forces where individuals can come to gain a variety of tactical and operational combat skills. The CTC found that 181 of the 516 CSRT unclassified summaries contain information about whether an individual attended at least one terrorist training camp. This is considered a Level I Threat because attending these camps suggests that the detainee voluntarily chose to prepare for and train on the skills used to directly threaten US/Coalition interests.

Entrance into these training camps is limited to known camp staff, including trainers and coordinators, and trainees. In most cases, camp trainees could only gain access via a sponsor already involved in a related organization and after having undergone a screening process.



Throughout the 1990s, al-Qa`ida and their associates administered a number of these training camps throughout Afghanistan (some estimates place the number over 100). The Afghan training camps provided thousands of militants from around the world with tactical and operational training during the 1990s and through 2001. Although the commonly accepted understanding is that the majority of those trained in those camps would not go on to formally join al-Qa`ida, anecdotal evidence suggests that a large percentage still did participate in some level of violent Jihad, including participation with the Taliban or associated groups and movements. The primary al-Qa`ida camps included al-Farouq, Khaldan, Camp Derunta and Tarnak Farms.

The CTC found that of the 181 individuals with information in their unclassified summary indicating they attended at least one training camp, individuals attended at least 16 different major camps, including:

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00157 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.106

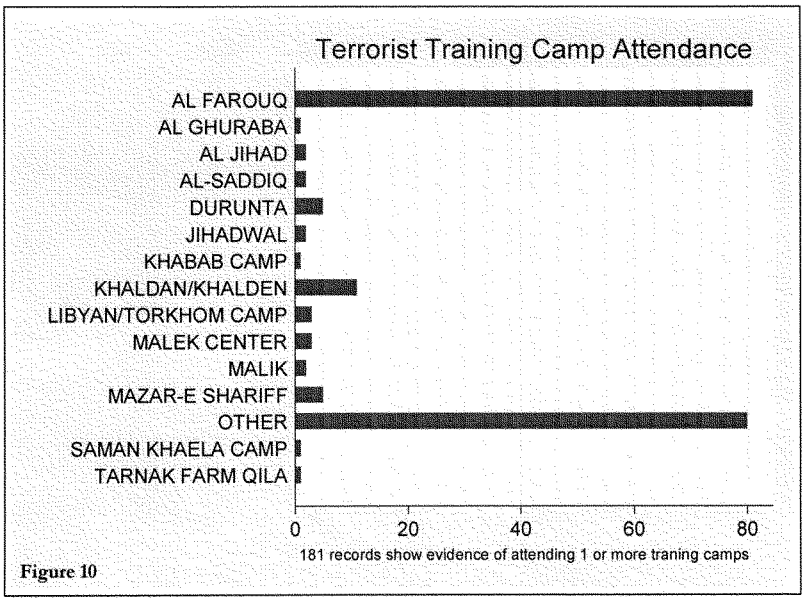


Figure 10

A plurality of those who had record of training in the camps attended al-Farouq Camp (44%). The next most represented training facility was that of Khaldan Camp (5%). Both of these camps provided basic and accelerated military instruction to students, some of whom included 9/11 hijackers.

Al-Farouq Camp was located outside of Kandahar, Afghanistan. It was known for providing training in the following fields:

- weapons familiarization and firing,
- land mines
- tactics
- topography
- field movements
- basic explosives
- guerilla warfare and mountain tactics
- marksmanship
- small team tactics
- ambush
- camouflage
- rendezvous techniques

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00158 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.107

- covert communication [16]

In addition to the major named camps above, a number of the publicly available 516 CSRT unclassified summaries indicate that at least one or more of the 516 detainees trained at 'other' camps and facilities including:

- Syed Ismail Shaheed Camp
- Camp run by the Islamic Movement of Tajikistan near Dushanbe, Tajikistan
- The Khalid Center near Baghram, Afghanistan
- The Dimaj Insitute
- The Mullah Omar Compound
- Camp run by the Islamic Movement of Uzbekistan near Lajard, Tajikistan
- Khoja Khar in Afghanistan
- The Mansehra Jihad military training camp
- The Taliban Center near Khwajajaghar, Afghanistan
- Camp Vietnam in the Philippines
- Moasqr Kari Bilal Camp
- An al-Qa`ida sponsored camp two hours north of Northwest Jalabat, Afghanistan
- Abu Abaida, Jalalabad, Afghanistan
- Uighur camp in the Tora Bora mountains, Afghanistan
- Lashkar-E-Tayyiba camps in Afghanistan
- Camp outside of Konduz, Afghanistan
- Pakistani Center #5 in Pakistan
- Taliban Office of Intelligence, Division 2 in Mazar-e-Shariff, Afghanistan
- Zubair Center near Tora Bora, Afghanistan
- Taliban training camp, "Post" near Imam Saheb, Afghanistan
- Terrorist training camp in Georgia
- Qulio Urdo Taliban training camp
- Dara Sufe
- Mousauwal Compound
- Gund Talimi Military School; Zakar Khel Village, Pakistan; Shamshato Refugee Camp, Pakistan
- Shaker-Dari, Afghanistan; Pul Sayad, Afghanistan
- Quralemsha, Pakistan

Combat Weapons

149 unclassified summaries have evidence that the detainee received training/possessed weapons other than, or in addition to, small arms such as AK-47's. This is included as a Level I threat because it indicates an increased capability to conduct hostilities. Unclassified summaries with weapons information limited to small arms such as AK-47's are omitted

[16] See http://www.dni.gov/announcements/content/DetaineeBiographies.pdf for discussions of various training that high-value detainees (HVD's) received at al-Faruq camp in Afghanistan.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00159 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.108

from this category as training and possession of such weapons are ubiquitous in the region and not necessarily an indicator that the detainee intended to threaten US or Coalition interests.

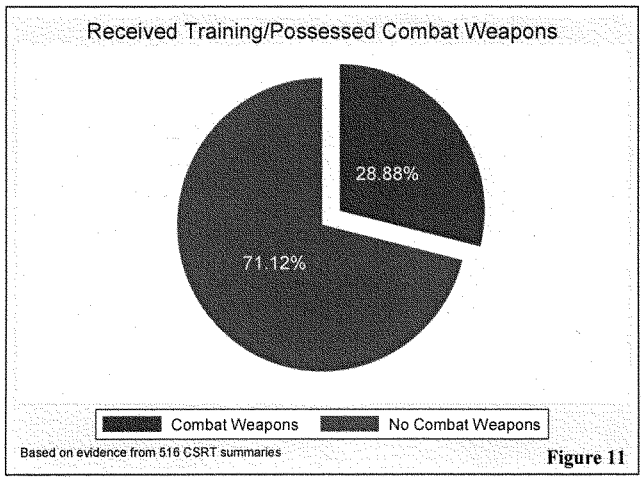


Figure 11

Highlights of the data on weapons training/possession available in the CSRT unclassified summaries include evidence that:[17]

- 55 detainees trained on/possessed rocket propelled grenades (RPG's)
- 28 detainees trained on/possessed grenades
- 24 had training and/or were in possession of explosives/IED's
- 2 received training in the use of sniper rifles

[17] In addition to RPG's, grenades, explosives, and sniper rifles, forty records contained evidence of training/possession of "other" weapons which were coded separately than "AK-47's and "Other Small Arms". Records that included weapons in the "other" category were included in the count for the variable "COMBAT WEAPONS". Some individuals fit into multiple categories, which is why the statistics in this figure exceed the number of 149 summaries containing data.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00160 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.109

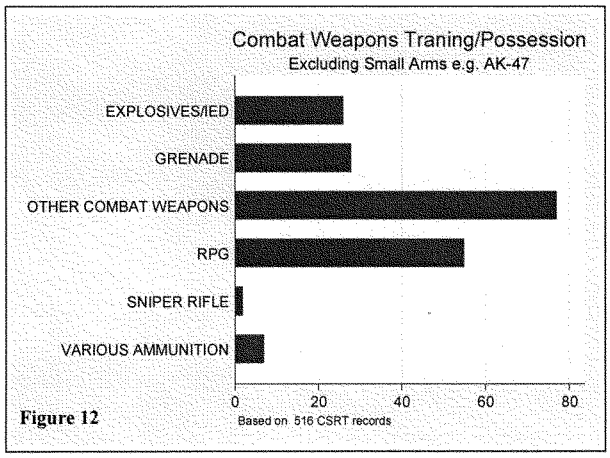


Figure 12

Level II: Evidence of Potential Threat

Supporting Roles

183 CSRT unclassified summaries contain evidence that the detainee performed the role of a fighter and were classified as such. 139 CSRT records include evidence that the detainee performed roles other than that of a fighter and were included in the support role category. These roles include, but are not limited to, accountants, cooks, facilitators, financiers, instructors, trainers, bodyguards, scouts, smugglers, couriers, drivers and recruiters.

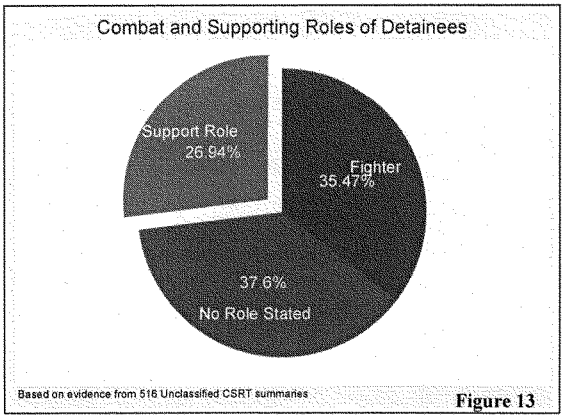


Figure 13

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00161 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.110

Many of those captured with information on their functional role fulfilled multiple roles and functions in support of terrorist groups and organizations. Highlights of these are included in Figure 14.

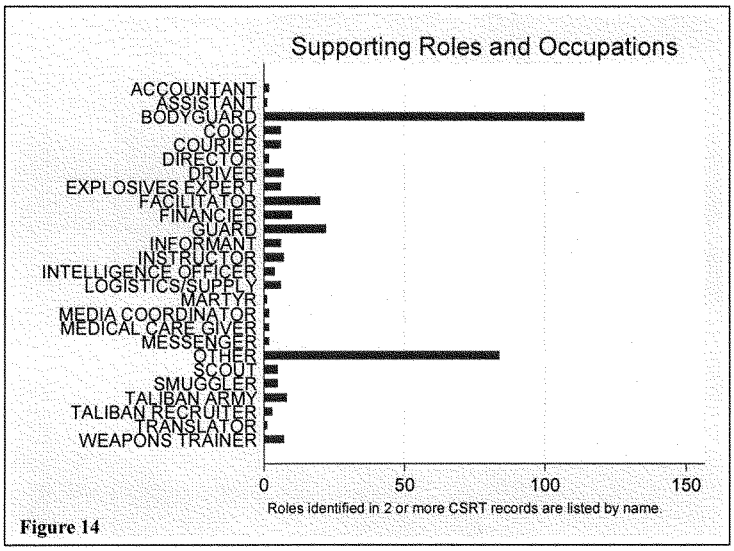


Figure 14

The 'Other' category depicted in Figure 14 above includes a variety of roles such as::

- fundraising
- interpreter
- in charge of an anti-aircraft launcher
- weapons repair and assembly specialist
- document forger
- interrogation
- construction and improvement of camp facilities
- religious authority
- recruiter
- In charge of the police precinct under the Taliban and involved with Taliban conscription and recruitment efforts
- Running a safe house for members of the Karim explosives cell in Khowst
- Airfield Commander

Commitment to Jihad

Commitment is a significant –albeit somewhat subjective- measure, particularly when attempting to determine an individual's long-term threat to the United States. Al-Qa`ida, the Taliban and like-minded groups are, above all else, the manifestation of an ideological

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00162 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.111

movement. The Combating Terrorism Center's previous work on the Jihadi Movement[18] has shown that Movement adherents believe, to some degree, in the following three principles:

- the religious duty to establish the Sharia, or Islamic law throughout the traditional Islamic world (and globally if possible)
- the religious duty to employ violent methods in order to obtain that end-state
- the religious duty to support, whenever and wherever possible, those individuals who are waging violent Jihad when one is unable to directly fight (due to sickness, injury, age, etc..)

Consider the writing of the intellectual forefather of today's violent Jihadist movement, Shaykh Abdallah Azzam. Azzam provided much of the ideological fervor for those young Muslim men traveling to Afghanistan during the 1980s in order to fight against the Soviets. In his famous fatwa, "Defense of Muslim Lands," Azzam wrote that,

> *Whoever can, from among the Arabs, fight jihad in Palestine, then he must start there. And, if he is not capable, then he must set out for Afghanistan. For the rest of the Muslims, I believe they should start their jihad in Afghanistan. It is our opinion that we should begin with Afghanistan before Palestine, not because Afghanistan is more important than Palestine, not at all, Palestine is the foremost Islamic problem. It is the heart of the Islamic world, and it is a blessed land but, there are some reasons which make Afghanistan the starting point.*[19]

Those individuals who express a dedication to the ideological tenets of waging violent Jihad, or those who are pursuing violent Jihad out of a feeling of religious necessity, ought to be considered hostile to the United States, its allies and its interests.

The CTC found that 98 of the 516 CSRT unclassified summaries include some data indicating an individual's level of commitment to pursuing violent Jihad.

---

[18] See the CTC's Militant Ideology Atlas: http://ctc.usma.edu/atlas
[19] Azzam, Abdallah. *Defense of Muslim Lands.* Pg. 23.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00163 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.112

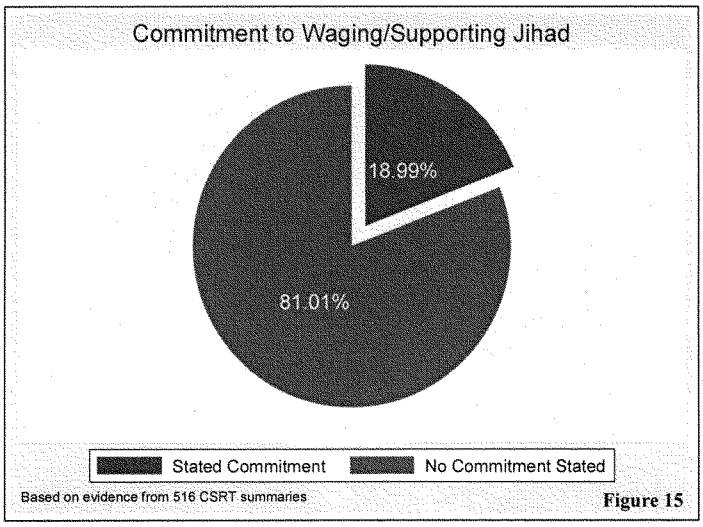


Figure 15

Of these 98 publicly available CSRT unclassified summaries containing explicit data on an individual's ideological commitment to waging violent Jihad, the CSRT unclassified summaries provided the following significant insights:[20]

- 31 provided non-combat support in waging violent jihad
- 6 pledged to continue waging violent jihad
- 5 pledged to continue motivating other to wage violent jihad
- 10 admitted that they would or have followed a fatwa to wage violent Jihad
- 8 pledged bayaat (sworn allegiance) to Usama Bin Laden[21]

[20] 422 summaries provided no data for this field. 47 summaries were coded as 'other' commitment.
[21] As in previous sections, individuals could fit into multiple categories, accounting for why the statistics in the figure exceed the total number of unclassified summaries containing relevant evidence.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00164 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC
53355.113

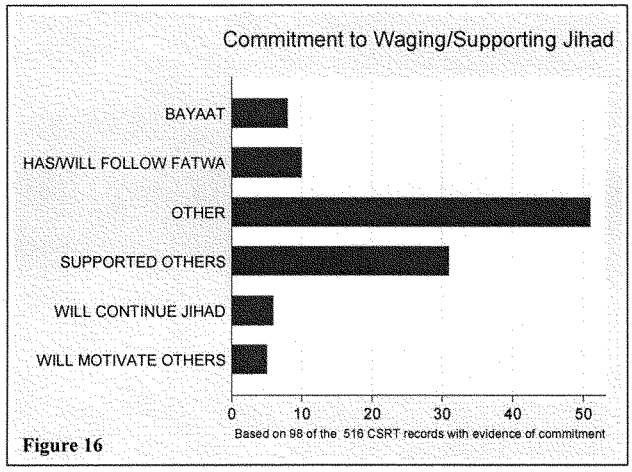


Figure 16

Small Arms Training/Possession

Of the 238 unclassified summaries that contain evidence of training and/or possession of weapons, 89 were limited to AK-47 rifles and other small arms.

In the Afghanistan-Pakistan region where most of these individuals were captured, familiarization with and possession of AK-47's and other small arms is part of daily life for many and not a sufficient indicator of threat. For this reason, the CTC felt it was prudent to identify and separate those unclassified summaries containing evidence of weapons training/possession limited to small arms such as AK-47's and include them as a Level II versus Level I threat.

Group Affiliations

The 516 CSRT unclassified summaries provide a wealth of information about the operational associations maintained between detainees and organizations known to be involved with, in some way, supporting the activities of al-Qa`ida, the Taliban or their associated forces. As described above, the CTC distinguishes 'Connection' between two individuals and 'Affiliation' between an individual and an organization, group or institution.

This measure refers to operational affiliations, including membership, enrollment, allegiance, employment and other types of joined affiliation by detainees and known terrorist groups. Such affiliations are incriminating and suggest a higher likelihood that the detainee supports terrorist groups and their activities and therefore are considered a Level II threat.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00165 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.114

The CTC found in its study that of the 516 CSRT unclassified summaries,

- 476 unclassified summaries show an individual having at least one suspect affiliation
- 239 unclassified summaries show an individual having at least two suspect affiliation
- 40 unclassified summaries show an individual having at least three suspect affiliations
- 6 unclassified summaries show an individual having at least four suspect affiliations

The table below (Figure 17) visually depicts the various groups discussed in the publicly available CSRT unclassified summaries.

Group	1st affiliation	2nd affiliation	3rd affiliation	4th affiliation
55th Arab Brigada	-	-	1	-
AIAI (Al-Ittihad al-Islami)	1	-	-	-
Al-Haramain Foundation	7	-	-	-
al-Qa'ida	314	4	-	-
al-Wafa	2	26	-	-
Anti-Coalition Militia	1	-	-	-
Armed Islamic Group	1	1	-	-
East Turkestan Islamic Movement	5	3	-	-
Egyptian Islamic Jihad (EIJ)	-	1	-	-
Gama'at al-Islamiyah Italian Network	-	-	1	-
Hizb E Islami Gulbuddin (HIG)	12	7	-	-
HUM	1	-	-	-
IIRO (International Islamic Relief Organization	-	-	1	-
Islamic Movement of Uzbekistan	6	1	-	-
Jama'at al-Dawa al-Quran	-	2	-	-
Jama'at al-Tablighi	2	22	1	-
Jama'at Islamiyyah (JI)		2	1	-
Jaish al-Muhammad	1	1	1	-
Kuwait Joint Relief Committee	-	1	-	-
Lashkar E Tayyiba	2	2	1	-
LDI		1	-	-
Libyan Islamic Fighting Group	3	3	2	1
Moroccan Islamic Fighting Group	-	-	1	-
Revival of Islamic Relief Heritage Society	-	1	-	-
Salafist Group for Call and Combat	-	-	1	-
Sanabil	-	1	-	-
The Syrian Group	1	-	-	-
Takfir Wal Hijra	-	1	-	-
Taliban	105	134	21	3
Tunisian Combat Group	1	-	-	-
WAMY (World Assembly of Muslim Youth)	-	-	1	-
Not Disclosed	11	25	7	2

Figure 17

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00166 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.115

Level III- Evidence of Associated Threat

Individual Connections
The CTC refers to an individual-to-individual relationship as a 'Connection.'[22] 321 of the 516 CSRT unclassified summaries include information about an individual's connections to others who have directly supported terrorism.

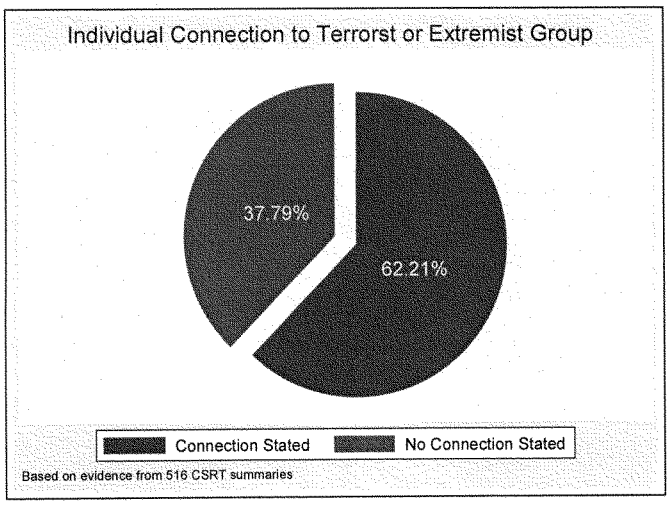


Figure 18

Of those 321 CSRT unclassified summaries where a connection to al-Qa`ida, the Taliban or associated forces is definitively stated, the CTC found that:

- 141 individuals had a definitive connection with an al-Qa`ida member.
- 144 individuals had a definitive connection with a Taliban member.
- 49 individuals had a definitive connection with Usama Bin Laden
- 2 individuals had a definitive connection with at least one of the 9/11 hijackers.
- 39 individuals had a definitive connection with a known terrorist facilitator and/or operative.
- 17 individuals had a definitive connection with a mujahid (Islamic fighter)
- 1 individual had a definitive connection with at least one of the 1998 East Africa embassy bombers.

[22] While related, "Connection" is coded differently than "Affiliation". The CTC coded 'affiliation' as an ongoing relationship between an individual and an organization, group or institution considered by the U.S. government to be hostile or threatening to this country, its nationals or its interests at home and abroad. Affiliation could include membership, employment, allegiance and other types of formal or informal relationships between an individual and established group.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00167 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC
53355.116

- 5 individuals had a definitive connection Jihadists/Jihadi Veterans
- 2 individuals had a definitive connection with Radical Imams
- 4 individuals had a definitive connection a High Value Detainee (HVD)
- 25 individuals had other connections

These relationships are graphically depicted in Figure 19:

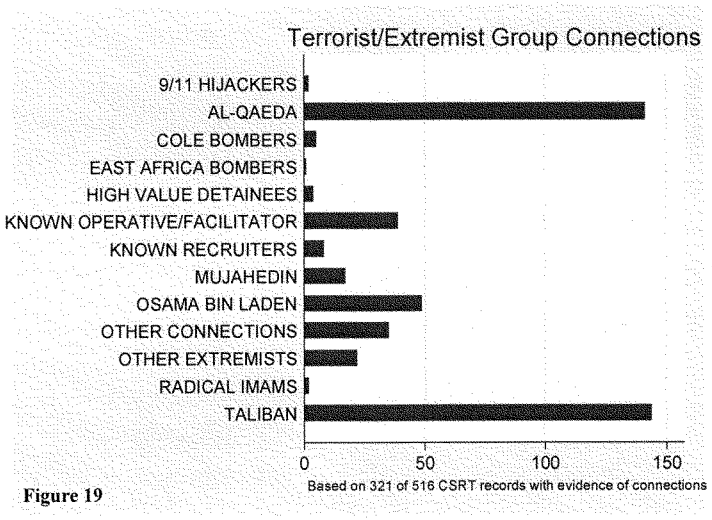


Figure 19

Guest House Stay

Safe-houses, sometimes referred to as 'guest-houses,' facilitate an individual's ability to discretely transit from one location to another by providing them with a place to spend the night, acquire resources, obtain false documentation or secure modes of transportation. Organized crime syndicates, terrorist networks and traffickers all rely on safe-houses to move people from place-to-place. They may be houses, apartments, mosques, stores, refugee camps, barracks, or any other type of infrastructure that houses individuals involved in nefarious activities.

Al-Qa`ida, the Taliban and their associates have leveraged the safe-house network to great ends, particularly in Afghanistan and Pakistan.[23] Many of these houses and apartments, which had been run for the specific purpose of ensuring safe passage for associates of those

[23] Dr. Thomas Fingar, chair of the National Intelligence Council, which released the *National Intelligence Estimate: The Terrorist Threat to the US Homeland* on July 17, 2007, noted that, "Pakistan's inability to root out these safe houses and training compounds is perhaps the most important factor in al Qaeda's revitalization…The existence of the safe haven is critical to al Qaeda's capability to plan, to train, to organize." See 'Al Qaeda's Comeback' by Kevin Whitelaw in *U.S. News and World Report* (7/17/07).

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00168 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC
53355.117

movements, have been identified by the United States in its ongoing counterterrorism operations.

Of the 516 CSRT summaries made public, 122 of them indicate that a detainee had made use of a safe-house. Of those 122 unclassified summaries mentioning the use of at least one safe-house, the following safe-houses were identified:

- 1 individual stayed at Al-Ansar safe-house
- 1 individual stayed at Crescent Mill safe-house
- 1 individual stayed at Ghulam Bacha safe-house
- 1 individual stayed at Hassan safe-house
- 1 individual stayed at Mes Ainak safe-house
- 1 individual stayed at the al-Qa`ida associated Nibras safe-house
- 30 individuals stayed at the Taliban safe-house
- 2 individuals stayed at the Tunisian safe-house
- 2 individuals stayed at the Zubair safe-house

The aforementioned safe-houses are known within the counterterrorism community for being affiliated with the Taliban, al-Qa`ida or associated forces. The CTC's previous research has indicated that al-Ansar safe-house in Kandahar, Afghanistan, for instance, was used as a waiting area for recruits heading into the Afghan training camps. The Crescent Mill safe-house is a transit station located in Faisalabad, Pakistan. Mes Ainak refers to the al-Qa`ida training camp located in an abandoned Soviet copper mine near Kabul that was used to train and house recruits.[24]

The publicly available unclassified CSRT summaries provide a great deal of additional information on safe-house stays not particular to a specific safe-house. The CTC found a number of other mentions to safe-houses including:

- A safe-house in Khost, Afghanistan
- A safe-house near the front lines in vicinity of Konduz, Afghanistan
- A safe-house in Akbar Kan neighborhood of Kabul, Afghanistan
- The Uighur safe-house in Kabul, Afghanistan
- The Uighur safe-house in Jalabad, Afghanistan
- An al-Qa`ida safe-house in Kandahar, Afghanistan
- An al-Qa`ida safe-house in Kabul, Afghanistan
- A safe-house in Faisalabad, Pakistan
- The Libyan Islamic Fighting Group (LIFG) safe-house in Jalalabad, Afghanistan
- An al-Qa`ida safe-house owned by Abu Zabayda
- The Jalozai refugee camp
- An Algerian house in Jalalbad, Afghanistan
- A safe-house in Lahore, Pakistan
- A Taliban safe-house in Quetta, Pakistan

[24] As in previous sections, individuals could fit into multiple categories.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00169 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.118

- A Yemeni house in Faisalabad, Pakistan
- The Daftar Al-Taliban Guesthouse
- A safe-house in Peshawar, Pakistan
- An al-Qa`ida safe house in Karachi, Pakistan

International Travel

445 of the 516 unclassified summaries contain information about an individual's foreign operationally relevant travel history. Operationally relevant travel can include any foreign travel taken by an individual in order to gain training, acquire or transfer necessary resources for committing or supporting hostile action, meeting with personnel or conducting other related activities that support hostile action.

While not determinative of an individual's threat or propensity to commit hostile acts, operationally relevant travel history does help to provide a much more complete picture about an individual's potential involvement with hostile activities, ideological commitment, social networks and previous experiences. There are multiple known al-Qa`ida and Jihadist international travel routes that have been established over the past two decades in order to facilitate operations.

The CTC found that a number of the publicly available CSRT unclassified summaries discuss operationally relevant travel by the detainees to Afghanistan/Pakistan, North Africa, Europe/North America, Middle East, parts of Africa, China and Central Asia.

As an interesting point-of-fact, half of those captured individuals who had been to the United Kingdom had spent time at the Finsbury Park mosque, which became associated with supporting militant strains of Islamist thought in the early 2000's, primarily due to its relationship with the radical cleric, Abu Hamza al-Masri. Al-Qa`ida operatives including Richard Reid and Zaccarias Moussaoui both attended the mosque as have a number of other local radical militants.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00170 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.119

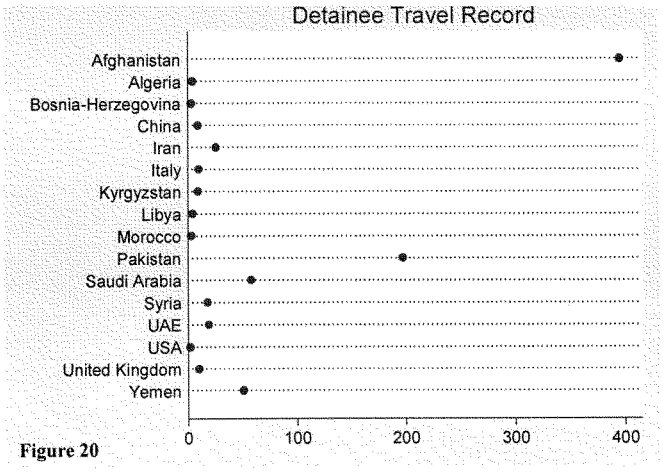


Figure 20

A measure for extensive operationally relevant travel -"High Travel" - was coded and assigned to detainee records with evidence of conducting operationally relevant travel to three or more countries. 119 of the 516 unclassified summaries met this threshold definition of "High Travel".[25]

Pocket Litter

Pocket litter is a phrase commonly used by law enforcement and intelligence communities to refer to everything on the person and in an individual's possession at the time of capture. It most often refers to written material, including names, addresses, phone numbers, email addresses, letters, documents and other similar types of material. In the case of the publicly available CSRT unclassified summaries, the CTC found that limited information was available with regard to three variables, including: possessing a large amount of U.S. dollars, possessing a large amount of foreign currency, possessing a digital watch.

While in itself possession of large amounts of currency is not a highly concerning indicator of threat, when taken in concert with other variables, including being in an active combat zone, possession of large amounts of currency (U.S. dollars or other) tends to provide some sense of an individual's role within an organization, specifically as a financier, courier or an operative. The CTC found that eight detainees had large amounts of U.S. currency in their possession at the time of capture. Two individuals (one of whom also had large sums of U.S. currency) had large sums of other currency in their possession at the time of capture. The CTC found that two individuals had documents in their possession with the names of

[25] As in previous sections, individuals could fit into multiple categories, accounting for why the statistics in the figure exceed the total number of unclassified summaries containing relevant evidence.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00171 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.120

known al-Qa`ida members on them. Fifteen of the individuals had digital watches of a concerning type in their possession at the time of capture.[26]

Recap of Summary Statistics

The evidence from the unclassified CSRT reports presented in the preceding section is summarized at Figure 21. (Note: As emphasized earlier, detainee CSRT unclassified summaries contain multiple pieces of evidence meeting the criteria of many of the twelve attributes assessed in this study.)

Detainee Attribute	# CSRT Evidence	% Population
Demonstrated Threat	***377***	***73%***
HOSTILITIES	291	56%
FIGHTER	183	35%
ATTENDED TRAINING CAMP	181	35%
COMBAT WEAPONS	149	29%
Potential Threat	***488***	***95%***
SUPPORTING ROLE	139	27%
COMMITMENT	98	19%
AK-47/SMALL ARMS	89	17%
GROUP AFFILIATION	475	92%
Associated Threat	***397***	***77%***
INDIVIDUAL CONNECTIONS	321	62%
GUEST HOUSE	122	24%
LARGE SUMS CASH	10	2%
HIGH TRAVEL	119	23%
(Demonstrated Threat+Potential Threat)>0	**505**	**98%**
(Demonstrated Threat+Potential Threat+ Associated Threat)>0	**510**	***99%***

Figure 21

Of the 27% of the 516 unclassified CSRT unclassified summaries that contain no definitive evidence meeting the threshold definition of Demonstrated Threat, 34% contain evidence of playing a support role; 12% meet the criteria of commitment to jihad; 8% received/possessed training in small arms; 89% have affiliations with known terrorist organizations.

Six unclassified summaries contain no evidence meeting the threshold criteria of any attribute in any category defined in this study. 48 unclassified summaries – 10% of the population had evidence of 7 or more attributes. Figure 22 provides a detailed breakdown of

[26] Law enforcement and intelligence agencies have found that certain models of everyday digital watches have a dual-use capability to serve as an easily programmable triggering mechanism for explosive devices. While possession of this brand of digital watch is not, in itself, concerning, when taken in concert with other variables, such as having trained on explosives at an al-Qa`ida sponsored camp, it does provide an additional indicator of an individual's threat.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00172 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.121

the total number of attributes identified in the 516 unclassified summaries across all twelve measures[27].

Total # of Attributes Across All 3 Categories (Demonstrated Threat + Potential Threat+ Associated Threat)	# CSRT Unclassified Summaries	Percent of 516 CSRT Unclassified Summaries Total
0	6	1%
1	26	5%
2	61	12%
3	90	17%
4	95	18%
5	109	21%
6	81	16%
7	37	7%
8	10	2%
9	1	<1%
10	0	0
11	0	0

Figure 22

Of the 27% of the 516 records that do reflect evidence assessed as a *Demonstrated Threat*, nearly half - 49% - contain evidence of two or more attributes included in this category. A quarter of the detainee population assessed possessed at least three of the four attributes assigned to the Demonstrated Threat category – hostilities, fighter, combat weapons or training camp attendance. Almost 10% of the records assessed had evidence of all four *Demonstrated Threat* measures.

Total *Demonstrated Threat* Attributes (4xTotal)	# CSRT Unclassified Summaries	% 516 Total
0	139	27%
1	125	24%
2	123	24%
3	83	16%
4	46	9%

Figure 23

95% of the 516 CSRT unclassified summaries have evidence of at least one of the four attributes assigned to the *Potential Threat* category, which include playing a supporting role, training/possession of an AK-47 or other small arms, a stated commitment to violent jihad, and affiliations with know terror groups. Given that 92% of the unclassified summaries contain evidence of an affiliation with a known terror group, this skewed this measure considerably. That said, almost half of the 516 detainee unclassified summaries -49%- contained two or more attributes that fell into the *Potential Threat* category. Figure 24

[27] Evidence meeting the criteria for the variables COMBAT WEAPONS and SMALL ARMS is mutually exclusive- a record cannot be classified as both.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00173 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.122

contains a break down of the number of unclassified summaries with evidence across the four attributes in this category.

Total *Potential Threat* Attributes (4xTotal)	# CSRT Unclassified Summaries	% 516 Total
0	28	5%
1	239	46%
2	188	36%
3	58	11%
4	3	2%

Figure 24

23% of the detainee unclassified summaries contain no evidence meeting the criteria of any of the four measures assigned to the Associated Threat category while nearly half contained evidence of at least one attribute. See Figure 25 for a breakdown of this category. (Note: Carrying large sums of cash was an indicator included in this category but shared by only 8 detainees- 2% of the total population assessed.)

Total *Associated Threat* Attributes (4xTotal)	# CSRT Unclassified Summaries	% Total
0	119	23%
1	250	48%
2	120	23%
3	26	5%
4	1	1%

Figure 25

The mean number of total attributes found in these CSRT records is 4.2. A breakdown of the mean, standard deviation and range of observations in the 516 unclassified summary population is depicted at Figure 26 below.

Evidence Category	Observations	Mean	Standard Deviation	Min-Max
Total	516	4.22	1.76	0-9
Demonstrated Threat	516	1.56	1.29	0-4
Potential Threat	516	1.25	.90	0-4
Associated Threat	516	1.19	.554	0-4

Figure 26

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00174 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.123

Multivariate Test Results and Analysis

Results of multivariate regressions testing the statistical and substantive significance of all twelve independent variables across the three threat categories introduced earlier on the *Demonstrated Threat* and select *Potential Threat* variables are presented in Figure 27.

Linear Probability Model Results[28] **Figure 27**

	Model 1 DV Hostilities	Model 2 DV Fighter	Model 3 DV Training Camps	Model 4 DV Combat Weapons	Model 5 DV Support Role	Model 6 DV Committed
Hostilities		0.453*** (0.040)	-0.027 (0.045)	0.129*** (0.043)	0.156*** (0.051)	-0.039 (0.042)
Fighter	0.510*** (0.483)		0.068 (0.057)	0.298*** (0.056)	-0.703*** (0.052)	0.161*** (0.053)
Training Camps	-0.026 (0.043)	0.073** (0.037)		0.307*** (0.042)	-0.018 (0.043)	0.021 (0.039)
Combat Weapons	0.155*** (0.050)	0.225*** (0.045)	0.382*** (0.051)		0.131** (0.056)	0.021 (0.048)
Support Role	0.168*** (0.055)	-0.689*** (0.030)	-0.015 (0.048)	0.096** (0.047)		0.101** (0.044)
Committed	-0.049 (0.052)	0.166*** (0.048)	0.027 (0.051)	0.011 (0.050)	0.120** (0.049)	
Rifle Only	0.078 (0.055)	0.261*** (0.049)	0.214*** (0.062)	-0.633*** (0.040)	0.156** (0.061)	-0.019 (0.052)
Affiliations	0.032 (0.079)	0.207** (0.081)	0.103 (0.068)	-0.024 (0.077)	0.262*** (0.064)	0.003 (0.054)
Connections	0.0001 (0.041)	0.095** (0.037	-0.016 (0.042)	-0.070* (0.038)	0.185*** (0.050)	0.050 (0.034)
Guest Stay	-0.038 (0.045)	-0.034 (0.040)	-0.007 (0.046)	0.056 (0.043)	-0.067 (0.049)	0.079* (0.042)
High Travel	-0.086* (0.044)	0.005 (0.039)	0.095* (0.051)	0.054 (0.044)	-0.036 (0.050)	0.002 (0.041)
Cash	0.064 (0.164)	-0.318*** (0.120)	-0.005 (0.143)	-0.047 (0.114)	0.055 (0.161)	0.332** (0.166)
Constant	0.296*** (0.796)	-0.188** (0.084)	0.089 (0.068)	0.095 (0.075)	-0.026 (0.063)	0.058 (0.054)
Number of Observations	516	440†	516	473†	425†	516
R^2	0.260	0.504	0.162	0.318	0.250	0.057

*** p<.001 ** p<.05 * p<.10

All standard errors in parentheses are robust in order to correct for heteroskedasticity

† When originally regressed with all observations included, this model had a number of fitted values greater than 1 or less than zero. These poor observations were dropped from the model; thus resulting in less than 516 observations. As a precaution, we also ran a multi-variant

[28] Results from multivariate logit tests using the same independent and dependent variables are posted at Annex B.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00175 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.124

logit model which fitted all the values between 0 and 1. This backup model showed no substantial deviation from the linear probability model in the magnitude, direction, or significance of our parameter estimates. The results of these logit tests are at Annex B.

Model I-Dependent Variable: Hostilities

Evidence of performing the role of a fighter was-as expected-the most statistically and substantively significant predictor of committing or participating in hostilities against the United States or Coalition Allies. CSRT records denoting a detainee was a fighter were 51% more likely to also contain evidence of committing or directly participating in hostilities. CSRT records that contained evidence the detainee served in a supporting role for a terrorist group were 17% more likely to have evidence of hostilities while evidence of training in/possession of combat weapons including RPG's, grenades, explosives and IED's predicted a 16% greater chance of participation and/or support of hostilities. Interestingly, evidence of possession/training in only small arms -e.g. AK-47 rifle -was not a statistically significant predictor of hostile actions. This lends support to the conclusion that small arms training and possession are ubiquitous in regions such as Afghanistan and not limited to terrorists and other unlawful combatants. Detainees with evidence of operational travel to three or more countries were 9% *less* likely to have evidence they participated or supported hostilities albeit not quite as statistically significant. ($P < .05$)

Model 2-Dependent Variable: Fighter

CSRT records with evidence of participation in hostilities were 45% more likely to list fighter as one of the roles performed by the detainee. Training/possession in small arms such as AK-47 rifles predicted a 26% greater likelihood of accompanying evidence of performing as a fighter while combat weapons training/possession predicted somewhat surprisingly slightly smaller likelihood of serving in a fighter role at 23%. Detainees whose CSRT unclassified summaries have evidence of affiliation with terrorist group(s) were 21% more likely to contain information linking the detainee with service as a fighter. Commitment to jihad, and individual connections to terrorists/terrorist groups predicted a 17% and 10% greater likelihood of performing the role of a fighter respectively. Detainees captured with large amounts of US or foreign currency, however, were 4% *less likely* to have accompanying evidence of service as a fighter.

Model-3 Dependent Variable: Training Camps

Evidence of training in combat weapons- e.g. RPG's, grenades, sniper rifles, explosives and IED's make it 38% more likely there will be evidence that a detainee attended training camp(s). Those records with evidence of training/possession in weapons limited to small arms were 21% more likely to contain evidence of training camp attendance. These findings are consistent with the activities known to occur in the jihadi training camps and lends support to the accuracy of the model. CSRT unclassified summaries that indicate a detainee traveled to three or more countries were nearly 10% more likely to include evidence of training camp attendance although somewhat less significant statistically than combat weapons and small arms.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00176 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.125

Model 4- Dependent Variable: Combat weapons

Evidence that a detainee attended one or more Jihadi training camps is far and away the most significant predictor of having received training in or possession of combat weapons. CSRT records indicating the detainee attended one or more Jihadi training camps are 31% more likely to include evidence that they were trained/possessed combat weapons which is consistent with expectations. Records identifying detainees as fighters have a 30% greater chance of including evidence that they received training or possessed combat weapons. Both of these findings are consistent with expectations. The next predictors in order of statistical and substantive significance are evidence of participation in hostile acts and serving in a support role for a terrorist organization which predict a 13% and 10% greater chance a detainees' record contains information that he received combat weapons training. Evidence of an individual connection to terrorists predicted a 7% smaller chance of information linking the detainee to training in combat weapons albeit just within the threshold of statistical significance ($p<.10$)

Model 5-Dependent Variable: Support Role

CSRT records with information indicating an affiliation with a terrorist group or individual connections to terrorists/terrorist groups predicted a 26% and 19% greater likelihood of evidence the detainee served in a support role for terrorist groups respectively. This is plausible as such affiliations and connections facilitated the relationships, communication and contacts needed to support terrorist activities. Detainee CSRT records with evidence of participating in or directly supporting hostilities were 16% more likely to also contain evidence of serving in a supporting role for terrorists groups while those records indicating commitment to jihad were 12% more likely to contain such evidence. Records with evidence of training/possession of AK-47's/other small arms were 16% more likely to have evidence of performing a support role-this is 3% higher than the increase in probability that training/possession of combat weapons adds to the likelihood this information is included in the unclassified CSRT record.

Model 6 - Dependent Variable: Committed

The most significant predictor of commitment in this sample was carrying large sums of cash which increased the likelihood a record contained evidence of commitment by 33%. Evidence of being a fighter boosts the chances of also containing evidence of commitment to jihad by 16%. Detainee records with evidence of playing a supporting role for terror groups are 10% more likely to have evidence of commitment while information linking a detainee to a guest house stay increases the chance there is also evidence of commitment by 8%.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00177 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.126

Recap of Evidence and Conclusions

Based on analysis of the information contained in the publicly available 516 unclassified CSRT records, the Combating Terrorism Center's study concludes that varying degrees of evidence exist within these CSRT unclassified summaries relevant to determining the status of those individuals as enemy combatants.

The analyses conducted in this assessment determined that 56% of the unclassified summaries contain information that an individual supported or waged hostile activities against the US and/or Coalition allies. 35% of the records contain evidence that an individual could be definitively identified as a fighter for al-Qa`ida, the Taliban or associated forces. 35% of the CSRT unclassified records show evidence that an individual received training at a formal training camp and 27% provided evidence that an individual received training in the use of combat weapons *other than or in addition to rifles/small arms* including grenades, rocket propelled grenades, sniper rifles and the construction and/or deployment of explosives and IED's. Overall, 73% of the records contain at least one piece of evidence that met the threshold definition developed in this study to classify them as a demonstrated threat.

The CTC found that 95% of the publicly available CSRT unclassified summaries contained evidence that a detainee *supported* hostile activities in some way or was affiliated with groups that executed and/or supported terrorist acts, or received weapons training or possessed weapons that could be used in support of terrorist activities. These records are deemed to meet this study's definition of potential threat. 77% of these records met the stated criteria to be considered an associated threat as an enemy combatant. This included interacting with members of terrorist groups or exhibiting behavior frequently associated with terror group members.

Coding and interpretation of raw data is not a precise process. It unavoidably requires making subjective assessments over whether data definitively meets threshold criteria for many of the variables defined. The authors of this study sought to be both objective and impartial in their interpretations of the data. They have strived to maintain transparency regarding the coding criteria and their interpretation and analysis of the processed information. The authors visited U.S. Naval Base Guantanamo Bay, Cuba and discussed the details of the CSRT process with those directly involved. The study's coded data set is available on request. Classified records may contain additional evidence relevant to any decision on detainee status as enemy combatant.

Importantly, this study is almost entirely informed by the information that is publicly available in the 516 CSRT unclassified summaries, which are by their nature limited in detail. It is the hope of the CTC that this assessment of the available information from the Combatant Status Review Tribunals, and the accompanying coded data set, will inform a variety of future studies. Ideally, this report and the data from which it was informed will enhance our collective understanding of the threats facing the United States, its allies and its interests and how we can best respond to them.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00178 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.127

Annex A-Multivariate Logit Results

	Model 1 DV hostilities	Model 2 DV fighter	Model 3 DV training_camps	Model 4 DV combat_weapons	Model 5 DV support_role	Model 6 DV committed
hostilities		2.69*** (.323)	-.158 (.243)	.775*** (.279)	.714*** (.249)	-.296 (.279
fighter	2.55*** (.296)		.331 (.289)	1.58*** (.330)		1.18*** (.356)
tngcamps	-.142 (.243)	.471 (.1) (.318)		1.69*** (.251)	-.074 (.290)	.118 (.259)
combat_wpns	.867*** (.276)	1.51*** (.349)	1.76*** (.247)		.625* (.337)	.136 (.300)
support_role	.702*** (.245)		-.069 (.277)	.659** (.333)		.817** (.328)
committed	-.308 (.277)	1.38*** (.395)	.138 (.257)	.058 (.303)	.645* (.342)	
rifle_only	.364 (.303)	1.50*** (.382)	1.06*** (.280)	-.226 (.476)	.742** (.373)	-.104 (.340)
affiliations	.190 (.380)	1.11** (.530)	.596 (.164 (.428)	-.426* (.258)	1.53*** (.519)	.050* (.515)
connections	.018 (.219)	.659** (.292)	-.086 (.213)	.315 (.290)	.897*** (.257)	.368 (.256)
guest_stay	-.211 (.249)	-.193 (.323)	-.022 (.239)	.272 (.289)	-.395 (.297)	.507** (.257)
high_travel	-.481* (.254)	.039 (.334)	.476** (.237)	-.337 (.962)	-.222 (.303)	.040 (.276)
cash	.342 (.715)	-2.99** (1.44)	-.010 (.753)	-2.16*** (.488)	.296 (.714)	1.69*** (.665)
_cons	-.913** (.383)	-4.26*** (.620)	-2.05*** (.440)	.775*** (.279)	-2.75*** (.560)	-2.54 (.530)
N	516	516	516	516	516	516
Pseudo R^2	.212	.393	.123	.242	.113	.060

*** p<.001 ** p<.05 * P<.10

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00179 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.128

Annex B

UNCLASSIFIED

Combatant Status Review Board

TO: Personal Representative

FROM: OIC, CSRT (07 October 2004)

Subject: Summary of Evidence for Combatant Status Review Tribunal – BIN ATEF, Mahmmoud Omar Mohammed.

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 the detainee is a member of the Taliban, associated with al Qaida, and participated in military operations against the United States or its coalition partners.

a. The detainee is a member of the Taliban and associated with al Qaida:

1. The detainee arrived in Afghanistan in June 2001 from Saudi Arabia via Pakistan.

2. The detainee went to Afghanistan to fight the jihad.

3. The detainee is a member of the Taliban.

4. The detainee completed military training at Al Farouq.

5. The detainee received weapons training on the Kalashnikov rifle, rocket-propelled grenade launcher, and pistols.

6. The detainee met Usama Bin Laden.

b. The detainee participated in military operations against the United States and its coalition partners:

1. The detainee was engaged in the conflict at the Konduz line.

2. The detainee was engaged in the conflict at the Khoshaghar line.

3. The detainee was present at the Al Janki uprising at Mazur-e-Sharif.

UNCLASSIFIED

Exhibit R 1

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00180 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.129

UNCLASSIFIED

4. The detainee has the opportunity to contest his designation as an enemy combatant. The Tribunal will endeavor to arrange for the presence of any reasonably available witnesses or evidence that the detainee desires to call or introduce to prove that he is not an enemy combatant. The Tribunal President will determine the reasonable availability of evidence or witnesses.

UNCLASSIFIED

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00181 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.130

A RESPONSE TO THE SETON HALL STUDY

An Assessment of 516 Combatant Status Review Tribunal (CSRT) Unclassified Summaries

25 July 2007

LTC JOSEPH FELTER, PH.D.
DIRECTOR, COMBATING TERRORISM CENTER

JARRET BRACHMAN, PH.D.
DIRECTOR OF RESEARCH, COMBATING TERRORISM CENTER

THE COMBATING TERRORISM CENTER
607 CULLUM RD.
UNITED STATES MILITARY ACADEMY
WEST POINT, NY 12518
HTTP://WWW.CTC.USMA.EDU
OFFICE: 845.938.8495
FAX: 845.938.8472

JOSEPH.FELTER@USMA.EDU
JARRET.BRACHMAN@USMA.EDU

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00183 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.132

Annex A - Assessment of the Seton Hall Report Findings

In early 2005 [1] the Department of Defense (Office for the Administrative Review of the Detention of Enemy Combatants) released 517 Combatant Status Review Tribunals (CSRT) unclassified summaries.[2] Of the 517 unclassified records, one of those records is a duplicate, which brings the total of CSRT unclassified summaries to 516. The DoD posted those 517 unclassified summaries (including the one duplicate) on its public website in response to a Freedom of Information Act (FOIA) request.[3]

The release of these 516 unclassified Combatant Status Review Tribunal (CSRT) summaries has contributed to the public debate over the ethical, legal and procedural dimensions of detention policy, enemy combatant status and the need for the Guantanamo Bay detention facility.

A research team affiliated with Seton Hall University and the Denbeaux & Denbeaux law firm conducted one of the first studies on the CSRT process drawing on the same 516 unclassified CSRT summaries used in this study.[4] The first report in the Seton Hall series concludes that the DoD is wrongfully holding individuals who, based on the DoD's own data, neither pose a serious threat to America's national security, nor seem to have been involved in conducting or supporting hostile action against the United States. Specifically, the Seton Hall study argues, "the data analyzed by [its] Report would suggest that many other detainees should likewise not be classified as enemy combatants."(SH, page 21).

The CTC's assessment and analysis of the same 516 CSRT reports used by the authors of the Seton Hall study, however, does not support that conclusion. Coding data from the CSRT summaries is not a precise process and does require some subjective interpretation. However, a number of the Seton Hall report's findings do not appear to be supported available evidence. This Annex identifies the CTC's comments with the Seton Hall study's methodology, data coding process, interpretation of statistical results and analyses. The CTC has three primary concerns with the Seton Hall report on the 516 CSRT summaries:

1. The Seton Hall study excludes a number of the data fields used in the CTC study from consideration. Disregarding this relevant information limits the explanatory potential of the Seton Hall study and provides a much less robust analysis of the data available on the detainees.

2. In multiple instances the Seton Hall study interprets language contained in the 516 unclassified CSRT summaries in ways that disregards the contextual meaning of the

[1] The final CSRT hearing was held in January 2005 and the final Convening Authority letter was signed in March 2005.
[2] See Department of Defense website, <http://www.dod.mil/pubs/foi/detainees/OARDEC_docs.html>
[3] See Department of Defense website, <http://www.dod.mil/pubs/foi/detainees/OARDEC_docs.html>
[4] Available: <http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf>

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00184 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.133

summaries. By doing so, the Seton Hall report mischaracterizes the nature of a number of important variables.

3. In a number of cases, the Seton Hall report makes conclusions about the detainee data that lack factual support.

With regard to the first concern, the Seton Hall report limited its investigation to select variable fields. The Seton Hall report's selected variables, while important pieces of the overall picture of a given detainee, are still only a small number of the possible data fields that can be extracted from the CSRT unclassified summaries. The CTC chose to expand the variables reviewed and analyzed. Below is a comparison of the variables included in the CTC's study as compared to the Seton Hall report's study.

Variables Analyzed	CTC Report	Seton Hall Report
Captured By	YES (pg. 11-12)	YES (pg. 15)
Hostile Acts Conducted	YES (pg. 12)	YES (pg. 11-13)
Fighter Status	YES (pg. 13-14)	YES (pg. 8-10)
Training Camps Attended	YES (pg. 14-15)	NO
Combat Weapons Training	YES (pg. 17-18)	NO
Fulfilled Support Role	YES (pg. 18-19)	NO
Commitment to Violent Jihad	YES (pg. 20-21)	NO
Small Arms Training	YES (pg. 22)	YES (pg. 19)
Suspicious Group Affiliation	YES (pg. 22-23)	YES (pg. 8-10)
Suspicious Individual Connection	YES (pg. 23-25)	NO
Guest House Stay	YES (pg. 25-26)	YES (pg. 20)
Operationally Relevant Travel	YES (pg. 26-27)	NO
Pocket-Litter	YES (pg. 27-28)	MENTIONED (pg. 20)

Figure 29

The CTC's selected variables are important for any analysis of terrorist threats as they provide metrics for understanding the extent of one's involvement, knowledge, skill-sets, social connectivity and commitment to furthering violent Jihad.

With regard to the second point, in several instances, the Seton Hall report interprets language contained in the 516 unclassified CSRT summaries in ways that fail to consider the contextual meaning of the summaries. For instance, the Seton Hall report inaccurately defines the term 'safe-house' – a well-known tool leveraged by criminals and terrorists to facilitate discrete movement of associates – as an innocuous residence used by American tourists and travel agencies. By defining a safe-house as being equivalent with a youth hostel, arguing that "stopping at such facilities is common for all people traveling in the area," the Seton Hall report ignores the large amount of available data on the security challenges posed by Afghan and Pakistan based safe-houses, particularly with regard to terrorism (SH, page 20).

Additionally, language in the Seton Hall study can potentially mislead readers by suggesting that if a CSRT record does not contain a direct reference to a piece of evidence, that it does not exist. For instance, the Seton Hall report contends that "the Government concluded

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00185 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.134

that the detainee did not commit such an act and omitted the entire 3(b) section from the CSRT summary" (SH, page 7). This assumption neglects to recognize the inherently limited nature of these documents.

With regard to the affiliations of detainees to known organizations, the Seton Hall report asserted that only a fraction of the associations are considered hostile in nature. Specifically, the Seton Hall report argues:

> *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. (SH, page 18)*

The Seton Hall report is unclear about how it generated this list of 72 organizations. Presumably, the list of organizations is contained in the Seton Hall report's untitled Appendix B. However, that list in Appendix B contains 74 separate fields, not 72. An examination of the Appendix B in the Seton Hall report's list of detainee organizational associations highlights serious coding problems that call into question conclusions in this section. Below is the list of the problematically coded organizations in the Seton Hall report. The number before each listing refers to the row order in which it appeared in the Seton Hall report's unnumbered list.

3. Al Harmain - (the Seton Hall report double-counts this with **"12. Al-Haramayn"** the only difference being in the transliteration of the Arabic into English. These are not two separate organizations and ought not be coded as such in the Seton Hall report).

6. Al Nashiri - (this is not an organization, but most likely an individual from Saudi Arabia).

7. Al Wa'ad - (this is not an organizational delineation).

11. Algerian resistance group - (this is a generic term used to refer to any one of a number of groups. It is not an organizational delineation).

16. Ariana Airlines - (this is a civil Afghanistan-based air carrier still in service today. Although the U.S. government alleges that individuals may have used the company to advance terrorism, it is inappropriate to code the company as a terrorist organization).

19. Chechen rebels - (this is not an organizational delineation, it is a collection of individuals and groups in a loosely tied violent resistance movement).

23. Extremist organization linked to al-Qaeda - (this is not an organizational delineation).

28. Jama'at al Tablighi - (The Seton Hall report double-counts this coded

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00186 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.135

organization with **30. Jamat al Taligh,** the same organization only spelled incorrectly. These are not two separate organizations and ought not be coded as such).

42. Jemaah Ilamiah Mquatilah – (The Seton Hall report double-counts this coded organization with its English translation, **49. LIFG or the Libyan Islamic Fighting Group**).

43. Jihadist - (this is the term used to designate anyone who ideologically adheres to the principles of waging Jihad by the sword).

47. Lash ar-e-tayyiba – (The Seton Hall report double-counts this coded organization with its correct spelling, **48. Lashkar-e-Tayyiba**).

51. mujahadin - (this is an Arabic term for fighter, not a group).

53. mulahadin - (this is a mis-spelling of the Arabic term, mujahidin).

56. Pacha Khan - (he is a former Afghan provincial governor, not an organization).

60. Samoud – (this is not an organizational delineation).

62. Sharqawi Abdu Ali al-Hajj – (he is an individual, not an organization)

63. small mudafah in Kandahar – (this phrase refers to a guesthouse in Kandahar, not an organization and ought not to be so coded).

71. Turkish radical religious groups - (this is not an organizational delineation).

72. Uighers - (this is not an organizational delineation, it is a collection of individuals and groups in a loosely tied violent resistance movement).

74. Yemeni mujahid - (this is referencing an unknown individual, not an organization, and ought not be coded as such).

The Seton Hall report appears to either double-count or mischaracterize a number of Arabic words and phrases as organizations in their coding of organizational affiliation in at least 20 identifiable cases (or 27%). By incorrectly coding names of people, places and concepts as discrete organizations, and then using their list of 74 organizations as a basis for comparison against American government watch-lists, the Seton Hall report's conclusions are problematic.

Further, the Seton Hall report spent considerable time comparing its coded list against a variety of other government terrorist watch-lists in an effort to demonstrate inconsistencies across U.S. government agencies with regard to which organizations constitute a legitimate terrorist threat. Specifically, the Seton Hall report contended that it coded,

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00187 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.136

> *"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." (SH, page 19).*

This list of 74 terrorist groups produced by U.S. Customs and Border Protection in 2004, is meant, according to the document itself, to identify the "main players and organizations." The reference guide's purpose is stated below (and is also quoted in full in the Seton Hall study):

> *"Purpose: The purpose of the Terrorist Organization Reference Guide is to provide the Field with a who's who in terrorism. The main players and organizations are identified so the CBP Officer and BP Agent can associate what terror groups are from what countries, in order to better screen and identify potential terrorists."* [5]

The operative language in the 2004 document's purpose is "main players and organizations." The document does not claim to be, nor is it, an exhaustive list of the multitude of organizations who move in and out of existence, and maintain often unknown ties to groups like al-Qa`ida, the Taliban and their associated forces. In practice, it is a useful compilation of generally well-known organizations involved in terrorism: a rough guide for officers in the field. [6]

As an example of the third point about the Seton Hall report's problematic conclusions, the CTC found that the Seton Hall study focused considerable attention on the 'captured by' variable field. For example, Seton Hall researchers contend that:

> *"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. 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." (SH, pages 2-3)*

The CTC did confirm that only 5% of the publicly released 516 CSRT unclassified summaries provide information that an individual was captured by U.S. forces. CTC faculty also found that the majority of those captured, for whom the CSRT unclassified summaries provide data, were captured by forces other than the United States.

---

[5] "Terrorist Organization Reference Guide." U.S. Department of Homeland Security. U.S. Customs and Border Protection. Office of Border Patrol. January 2004. Available: http://www.mipt.org/pdf/TerroristOrganizationReferenceGuide.pdf>

[6] The U.S. government's most comprehensive base-line for comparison would have been the regularly updated list resulting from "Executive Order 13224 blocking Terrorist Property and a summary of the Terrorism Sanctions Regulations (Title 31 Part 595 of the U.S. Code of Federal Regulations), Terrorism List Governments Sanctions Regulations (Title 31 Part 596 of the U.S. Code of Federal Regulations), and Foreign Terrorist Organizations Sanctions Regulations (Title 31 Part 597 of the U.S. Code of Federal Regulations), " available at, <http://www.treasury.gov/offices/enforcement/ofac/programs/terror/terror.pdf>, in which many of the suspect organizational associations identified in the 516 CSRT unclassified summaries can be found. The CTC will expand this discussion in the Part II.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00188 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.137

The CTC's findings do, however, question the Seton Hall report's logic for concluding that the individuals are any less culpable for their actions if they were captured by non-U.S. forces on the two grounds put forth by the Seton Hall study: 1) because bounties were being offered for the capture of those individuals involved in committing or supporting hostile activities, or 2) because these individuals were captured by parties other than the United States.

Regarding the issuance of bounties, it is important to keep in mind that Taliban, al-Qa`ida and their associated forces had inhabited areas throughout Afghanistan and Pakistan for over a decade. In so doing, many of these individuals and groups employed bribes, threats, kinship bonds and friendships with local populations in order to continue operating in these areas. There is little reason to doubt that some people were motivated, for a multitude of reasons including profit incentives and vendettas, to identify and turn-in suspected militants. Each of these captured individuals, however, was subject to a screening process where the enemy combatant status of the detainee was assessed.

Regarding the fact that non-U.S. forces captured these individuals, the United States has found great success hunting down al-Qa`ida, Taliban and associated forces when it does so by proxy: through the use of non-U.S. forces. This technique is effective according to al-Qa'ida's own internal communications.[7] Allies of the United States, including Pakistan and the Northern Alliance, have consistently supported counterterrorism efforts in the region. As the Coalition bombing began on Sunday evening, October 7, 2001, many of the al-Qa`ida fighters, Taliban fighters and fighters of their associated forces began fleeing toward the Pakistani border, so the fact that Pakistani forces captured these individuals should not be viewed as surprising.

[7] For further discussion on this issue, please see the CTC's *Jihadi After Action Report on Syria* and *Stealing Al-Qa`ida's Playbook*, both available at http://www.ctc.usma.edu

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00189 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.138

THE MEANING OF "BATTLEFIELD"

AN ANALYSIS OF THE GOVERNMENT'S REPRESENTATIONS OF "BATTLEFIELD" CAPTURE AND "RECIDIVISM" OF THE GUANTÁNAMO DETAINEES

By
Mark Denbeaux
Professor, Seton Hall University School of Law and Director of Seton Hall Law Center for Policy and Research,
Joshua Denbeaux, and R. David Gratz,
Denbeaux & Denbeaux
Counsel to two Guantánamo detainees

Co-Authors

Grace Brown, Jillian Camarote, Douglas Eadie,
Jennifer Ellick, Daniel Lorenzo, Mark Muoio
Courtney Ray, and Nebroisa Zlatanovic
Student Research Fellows (Class of 2009), Center for Policy and Research

Contributors

Matthew Darby, Shana Edwards, Daniel Mann, Megan Sassaman, and Helen Skinner, (class of 2008) and Adam Deutsch, James Hlavenka, Gabriella Hughes, Brianna Kostecka, Michael Patterson, Salvatore Tartore, and (Class of 2010) Student Research Fellows and John Gregorek, Senior Fellow.

"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.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00191 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.140

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.*

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00192 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.141

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—

---

[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.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00193 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.142

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.

"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.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00194 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.143

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.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00195 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.144

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.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00196 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.145

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.

---

[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.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00197 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.146

C. The Department of Defense Identifies Fifteen (15) Alleged Recidivists; Each of These Identifications is Problematic.

"Return to the Fight" vs. "Return to the Battlefield"

Recent statements by Department of Defense officials have attempted to reframe prior statements, including the statement made by Daniel J. Dell'Orto, Deputy Counsel of the Department of Defense, before the Senate Arms Committee in April 2007.[19] While Mr. Dell'Orto had claimed that thirty former detainees had been captured or killed "on the battlefield," two Defense Department statements—both made on May 9, 2007—attempted to reframe the language of this prior statement, and provided instead that the same number of ex-detainees had "returned to the fight."[20] As the substance of the July 2007 news release reveals, this term is distinguishable from "captured or killed on the battlefield," but these two terms, among others, are significantly conflated by the Department of Defense in its public statements. Neither Tipton, England, nor an Albanian refugee camp fall within the typical definition of battlefield—but both must fall within the definition upon which the Department of Defense relies, for the Department to arrive at its claim that thirty (30) former detainees have returned to the battlefield.

The phrase "returned to the fight" implies a taking up of arms, or some other act of overt aggression, but the Department of Defense concludes in its July 2007 news release that fifteen (15) detainees have "returned to the fight"—but fails to justify its conclusion with any indication that a majority of these fifteen (15) have participated in any "fight" besides appearing in a film or writing an opinion piece for the New York Times.

The "Tipton Three"

The "Tipton Three"—Shafiq Rasul, Asif Iqbal and Ruhel Ahmed—are three childhood friends from England who became the first English-speaking detainees released from Guantánamo after they had been imprisoned without charges for more than two years.[21] Since their release in 2004, the young men have been living freely in their native Britain, and have not been charged with any crime. They have, however, been vocal regarding what they perceive to be the injustices suffered by them during their detention.

In 2006, the "Tipton Three" recounted their Guantánamo experiences for Michael Winterbottom's commercial film, *The Road to Guantánamo*, which has been shown at major film festivals including Berlin and Tribeca.[22] The film features interviews with the men, as well as dramatic re-enactments of them being bound in "stress" positions for hours and forced to listen to painfully loud music.[23]

---

[19] *See* Appendix I for timeline of quotes.
[20] *Id.*
[21] David Rose, "Using Terror to Fight Terror" *The Observer*, February 26, 2006. Retrieved November 26, 2007 at http://film.guardian.co.uk/features/featurepages/0,,1717953,00.html.
[22] Caryn James. "Critics Notebook: At the Tribeca Film Festival, Foreign Movies Hit Close to Home" *New York Times*. Retrieved November 26, 2007 at http://www.roadtoguantanamomovie.com/reviews/nytimes/nyt_01.html.
[23] *Supra* note 21.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00198 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.147

The men's contributions to the film are not "militant" in nature, and cannot constitute a return to the battlefield. The "Tipton Three" have participated neither in "battle" or "fighting" of any kind; nor do they fall in the category of having been "re-captured" or "killed." For the Department of Defense, however, the men's participation in *The Road to Guantánamo*—in the absence of any other allegations—is apparently enough to justify their inclusion among the "at least 30 former GTMO detainees [who] have taken part in anti-coalition militant activities after leaving U.S. detention."[24]

The Uighurs

Five Uighurs—ethnic Chinese who practice Islam—were extradited in May 2006 from Guantánamo Bay to Albania, where they were taken in as refugees.[25] Following three years of incarceration at Guantánamo, the five men were released to the same refugee camp in Tirana, Albania. A May 5, 2006 certification by Samuel M. Whitten, a representative of the Department of State, certified that these men had been transferred "to Albania for resettlement there as refugees."[26] Mr. Whitten noted that "[a]s applicants for refugee status, [the men] are free to travel around Albania, and once refugee status has been granted will be free to apply for travel documents permitting overseas travel." According to the camp director, Hidajet Cera, "They are the best guys in the place. They have never given us one minute's problem."[27] Since that time, four have since been resettled in apartments in Tirana, and one has joined his sister in Sweden, where he has applied for permanent refugee status.

The Department of Defense has never recanted its assertion that the Uighurs had been improperly classified as "enemy combatants," but it has not accused the Uighurs of any wrongdoing since their release. They have been neither "re-captured" nor "killed."

Most likely, the Department of Defense categorizes as "anti-coalition militant activity" an opinion piece, written by one of the Uighur men and published in the New York Times, which urged American lawmakers to protect habeas corpus.[28] This would at least be consistent with the Department of Defense's apparent inclusion of speech—if critical of the United States Government—as "anti-coalition militant activity."

[24] *Supra* note 10.
[25] *Id.*
[26] Emergency Motion to Dismiss as Moot, Abu Bakkar Qassim et. al. v. George W. Bush, et. al., Filed May 5, 2006 in the U.S. Court of Appeals for the District of Columbia.
[27] Jonathan 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.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00199 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.148

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

---

[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.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00200 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.149

similar names were still imprisoned when Ghaffar was allegedly killed.[40] One other detainee with a similar name was still in Guantánamo until at least March 1, 2004—more than a year after the government alleges Maulavi Abdul Ghaffar was released.[41]

Mohammed Ismail

The Department of Defense accuses this individual of "participating" in an attack against United States forces "near Kandahar," and alleges that at the time of his re-capture, he was carrying "a letter confirming his status as a Taliban member in good standing."[42]

The name "Mohammed Ismail" does appear on the official list of Guantánamo detainees. However, there is a discrepancy as to the date of birth. News sources consistently pinpoint Mohammed Ismail's age at approximately thirteen (13) at the time of his initial capture, and fifteen (15) at the time of release in 2004.[43] However, the Department of Defense lists Mohammed Ismail's year of birth as 1984, which would make him several years older.[44] Despite this discrepancy,[45] the authors of this report extend the benefit of the doubt to the Government, and assume that this individual was in fact formerly detained at Guantánamo.

Abdul Rahman Noor

The name "Abdul Rahman Noor" does not appear in either of the official lists of prisoners that the Department of Defense was ordered to release in 2006.[46] However, a similar name, "Abdul Rahman Noorani," does appear. It is possible that these two names refer to the same individual, but (a) "Abdul" and "Rahman" are very commonplace names in the region, and (b) the Department of Defense does not indicate that these two names refer to the same person, whereas it did so indicate with respect to another alleged recidivist with an alias, "Mullah Shazada." It would seem that the Department of Defense would have indicated whether the alleged recidivist was listed under a different name; in this case it did not. Thus, one cannot conclude that "Abdul Rahman Noor" was ever officially detained in Guantánamo. According to the Government, this individual was released in July 2003, before Combatant Status Review Tribunals were convened. The Department of Defense claims to have identified Abdul Rahman Noor "fighting against U.S. forces near Kandahar," but he apparently has neither been captured nor killed.[47]

---

[40] *Supra* note 14.
[41] "Abdullah Ghofoor," ISN 351, was listed as being in Guantánamo as of March 1, 2004 in documents released by the Department of Defense.
[42] *Supra* note 10.
[43] *See*, for example, http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/02/08/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.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00201 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.150

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.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00202 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

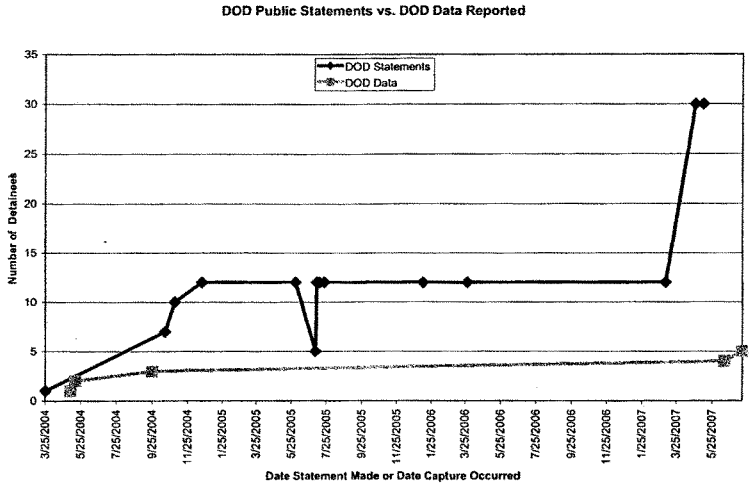
53355.151

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.



VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00203 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.162

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.

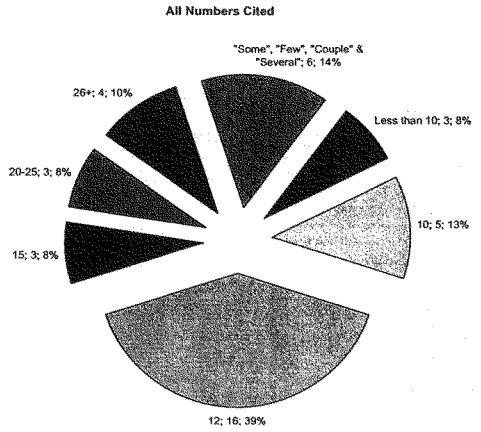
VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00204 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.153

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.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00205 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.154

(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.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00206 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.165

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.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00207 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.156

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**" "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

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00208 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.157

			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

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00209 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.168

ıne 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
ıne 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
1ay 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
1ay 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
1ar. 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
1ar. 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
eb.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
an. 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

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00210 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.159

ıly 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
ıly 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
ıly 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
ıly 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
ıly 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
ıne 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
ıne 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

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00211 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.160

			were again attacking our forces."	
une 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
une 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
une 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
une 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
une 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
une 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
une 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

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00212 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.161

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

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00213 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.162

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).
3	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).
4	H.R. Subcomm. on Intl. Org., Human Rights, and Oversight, and the Subcomm. on Europe of the Comm. on For. Affairs, *Extraordinary Rendition in the U.S. Counterterrorism Policy: The Impact on Transatlantic Relations*, 100th Cong. 19 (Apr. 17, 2007).
5	H.R. Comm. On Armed Services, *Guantánamo Bay*, Statement of Patrick F. Philbin Associate Deputy Attorney U.S. Department of Justice, 110th Cong. (Mar. 29, 2007).
6	153 Cong. Rec. S 2865 (Mar. 8, 2007).
7	U.S. Dept. of Def., *Annual Administrative Review Boards for Enemy Combatants Held at Guantánamo Attributable to Senior Defense Officials*, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902 (Mar. 06, 2007).
8	U.S. Dept. of Just., *Prepared Remarks of Attorney General Alberto R. Gonzales at the U.S. Air Force Academy Regarding Civil Liberties and the War on Terrorism*, http:// www.usdoj.gov/ag/speeches/2006/ag_speech_061120.html (Nov. 20, 2006).
9	152 Cong. Rec. S 10270 (Sept. 27, 2006).
10	George W. Bush, *Remarks on the War on Terror*, Sept. 11, 2006 Pub. Papers.
11	Sen. Comm. On the Judiciary, *U.S. Senator Arlen Specter (R-PA) Holds a Hearing on the Detainee Trials*, 110th Cong. (Aug. 2, 2006).
12	Sen. Comm. On Armed Services, *U.S. Senator John W Warner (R-VA) Holds a Hearing on Detainee Trails Following Supreme Court Ruling in Hamdan v. Rumsfeld*, 110th Cong. (July 19, 2006).
13	U.S. Senator Jeff Sessions, *Senate Floor Statement of Senator Sessions: National Defense Authorization Act for Fiscal Year 2007*, http://sessions.senate.gov/pressapp/record.cfm?id=257513 (June 20, 2006).
14	152 Cong. Rec. S 6113 (June 20, 2006).
15	Vince Crawley, *Releasing Guantánamo 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).

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00214 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.163

16	John D. Banusiewicz, *Rice Responds to Call for Guantánamo Detention Facility's Closing*, http://www.defenselink.mil/news/newsarticle.aspx?id=15706 (May, 21 2006).
17	U.S. Dept. of Def., *Defense Department Update, March 28, 2006 – GTMO Detainees: U.S. Navel Station Guantánamo Bay, Cuba*, http://www.defenselink.mil/home/dodupdate/For-the-record/documents/20060328a.html (Mar. 28, 2006).
18	U.S. Dept. of Just., *Prepared Remarks by Attorney General Alberto R. Gonzales at the International Institute for Strategic Studies*, http://www.usdoj.gov/ag/speeches/2006/ ag_speech_060307.html (Mar. 7, 2006).
19	U.S. Embassy in Tirana – Albania, *The Truth About Guantánamo*, http://tirana.usembassy.gov/06pr_0214.html (Feb. 14, 2006).
20	Gerry J. Gilmore, *Detention Puts Terrorists Out of Action, DoD Official Says*, http:// www.defenselink.mil/news/newsarticle.aspx?id=14649 (Jan. 10, 2006).
21	U.S. Dept. of St., *United States Intent on Repatriating as Many Detainees As Possible, State Department's Prosper says release tied to risk-management issues*, http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2005&m=July&x=20050721 153553sjhtrop0.8918726 (July 21, 2005).
22	Sen. Comm. On Armed Services, *U.S. Senator John W. Warner (R-VA) Holds a Hearing on Guantánamo Bay Detainee Treatment*, 110th Cong. (July 13, 2005).
23	U.S. Dept. of Def., *Defense Department Special Briefing on Administrative Review Boards for Detainees at Guantánamo Bay, Cuba*, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3171 (July 8, 2005).
24	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).
25	Shaun Waterman, *Released detainees return to fighting U.S.*, http://www.upi.com/International_Intelligence/Analysis/2004/07/05/released_detainees_return_to_fighting_us/4578/ (July 5, 2005).
26	151 Cong. Rec. S 7398 (June 27, 2005).
27	The White House, *Press Briefing by Scott McClellan*, http://www.whitehouse.gov/news/releases/2005/06/20050620-20.html (June 20, 2005).
28	Donna Miles, *Bush: Guantánamo Detainees Receiving Humane Treatment*, http://www.defenselink.mil/news/newsarticle.aspx?id=16359 (June 20, 2005).
29	The White House, *Radio Interview of the Vice President by Steve Gill, The Steve Gill Show*, http://www.whitehouse.gov/news/releases/2005/06/20050617-9.html (June 17, 2005).
30	The U.S. House of Rep., *Shuster Calls for Detainees to Remain at Guantánamo*, http://www.house.gov/list/press/pa09_shuster/Guantánamo.html (June 16, 2005).
31	Elisabeth Bumiller, *Cheney Calls Guantánamo Prison Essential*, http://www.nytimes.com/2005/06/

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00215 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.164

	14/politics/14cheney.html?ex=1276401600&en=2a8f657e230d562a&ei=5090&partner=rssuserland&emc=rss June 14, 2005.
32	The White House, *Press Briefing by Scott McClellan*, http://www.whitehouse.gov/news/releases/2005/06/20050613-3.html (June 13, 2005).
33	Jim Garamone, *Myers Discusses Guantánamo Detention Facility*, http://www.defenselink.mil/news/newsarticle.aspx?id=16477 (June 6, 2005).
34	U.S. Dept. of Def., *DoD News Briefing*, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3209 (June 1, 2005).
35	U.S. Dept. of Def., *Special Defense Department Briefing on Status of Military Tribunals*, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2043 (Dec. 20, 2004).
36	Samantha L. Quigley, *Former Detainees Released by U.S. Rejoining Fight*, http://www.defense.gov/news/newsarticle.aspx?id=24933 (Nov. 3, 2004).
37	The White House, Vice President and Mrs. Cheney's Remarks and Q&A at a Town Hall Meeting in Carroll, Ohio, http://www.whitehouse.gov/news/releases/2004/10/20041019-19.html (Oct. 19, 2004).
38	CBS News (AP), *Gitmo Detainees Return To Terror, 7 Ex-Prisoners Allegedly Violated Pledge To Renounce Violence*, http://www.cbsnews.com/stories/2004/09/24/terror/main645493.shtml (Oct. 17, 2004).
39	U.S. Dept. of Def., *Defense Department Operational Briefing*, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2366 (Mar. 25, 2004).
40	U.S. Dept. of St., *Guantánamo Detainees*, http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2004&m=March&x=20040316162613maduobba0.2819483 (Mar. 16, 2004).

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00216 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.165

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.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00217 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.166

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.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00218 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.167

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.

000806

Unclassified

Page 1 of 1 Exhibit R-1

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00219 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.168

Statement of Senator Richard J. Durbin

Hearing on "The Legal Rights of Guantánamo Detainees: What Are They, Should They Be Changed, and Is an End in Sight?"

Senate Judiciary Committee
Subcommittee on Terrorism, Technology and Homeland Security
December 11, 2007

Thank you, Chairman Feinstein, for holding this hearing. It is hard to overstate the damage done to our national interest by this Administration's interrogation and detention policies. These policies are not true to American values. They have hurt our efforts to fight terrorism and they have put our brave men and women in uniform at even greater risk.

Despite the exemplary service of our troops, Guantánamo has become a divisive, negative symbol of America. Some of our closest allies have called on us to close Guantánamo. Our country's image and reputation has suffered greatly around the world.

As Colin Powell has said: "We have shaken the belief the world had in America's justice system by keeping a place like Guantánamo open and creating things like the military commission. We don't need it and it is causing us far more damage than any good we get for it."

I hope this hearing will help us find a path away from Guantánamo and back towards restoring our values and the rule of law.

The Administration's policy for detaining, interrogating and trying terrorist suspects held in Guantánamo has been a strategic and legal failure. Look at the dismal track record. Over six years after 9/11, the Administration has only one conviction, obtained through a plea bargain and resulting in a nine-month sentence for low-level operative David Hicks, to show for its efforts. None of the planners of the 9/11 attacks have been brought to justice.

The Supreme Court has ruled against the Administration both times it has examined the rights of Guantánamo detainees. The Supreme Court is currently considering yet another challenge to the Administration's Guantánamo policies.

The Administration claims that its Combatant Status Review Tribunals, or CSRTs, are an adequate and effective substitute for habeas. However, CSRTs rely on evidence a detainee cannot see, prohibit the assistance of counsel, permit statements obtained by torture and other forms of coercion, and often refuse the requests of detainees to call witnesses or present exculpatory evidence. These CSRTs are neither independent nor neutral.

Lieutenant Colonel Stephen Abraham, who worked on the CSRTs, has stated that the panels frequently made decisions based on generic and outdated information that didn't even relate to the specific detainees in question. He also said that what were supposed to be "specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence." Lieutenant Colonel Abraham found that the panels were pressured to find that detainees were enemy combatants and to conduct "do-overs" on those rare occasions where the panels found the detainees were not enemy combatants.

Three retired Judge Advocates General, including Admiral Hutson, who will testify on the second panel, filed an amicus brief in the Guantánamo case currently before the Supreme Court. They stated that the "CSRTs depart significantly from standards followed by the military for decades" and that the CSRTs "were irretrievably infected with the pernicious effects of command influence."

Like Senator Feinstein, I was one of 34 Senators to vote against the Military Commissions Act, or MCA, which was rushed through the Republican-controlled Congress after the Supreme Court rejected the Administration's military commissions and, of course, before last year's elections. The MCA violates longstanding rules of criminal procedure and evidence by allowing evidence obtained through coercion and hearsay evidence, permitting the conviction of individuals for acts that were not illegal when they were committed, and greatly limiting the possibility for judicial review.

We must close Guantánamo. We must signal to the world that, despite the threat of terrorism, we will still follow the rule of law. We must keep America safe, but protect our values in the process. I hope today's hearing will begin the process of putting behind us the failed Guantánamo experiment and establishing policies for detaining and prosecuting suspects that protect us while adhering to the fundamental human rights and rule of law principles that define us.

Department of Justice

STATEMENT OF

STEVEN A. ENGEL
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

THE LEGAL RIGHTS OF GUANTANAMO DETAINEES: WHAT ARE THEY, SHOULD THEY BE CHANGED, AND IS AN END IN SIGHT?

PRESENTED

DECEMBER 11, 2007

STATEMENT OF STEVEN A. ENGEL
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
U.S. DEPARTMENT OF JUSTICE

BEFORE THE SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON THE LEGAL RIGHTS OF GUANTANAMO DETAINEES

DECEMBER 11, 2007

Thank you, Chairwoman Feinstein, Ranking Member Kyl, and Members of the Subcommittee. I appreciate the opportunity to appear here today to discuss the legal rights of the enemy combatants detained at Guantanamo Bay, Cuba, both under the Constitution and the laws that Congress has passed.

The Subcommittee conducts this hearing less than one week after the Supreme Court heard oral argument in *Boumediene v. Bush*, No. 06-1195, a case that may well shed considerable light on the questions now before the Subcommittee. In the *Boumediene* case, the D.C. Circuit held that Congress had acted within its constitutional authority in passing the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006. Those statutes confirmed that the alien enemy combatants captured abroad and detained now in Guantanamo Bay could not challenge their detention through the writ of habeas corpus. The statutes did not leave the detainees without a day in court, but instead provided that the Guantanamo detainees, after receiving fair hearings before military status tribunals, could seek review of those decisions before the D.C. Circuit.

The Supreme Court now is considering whether the Guantanamo detainees may claim any constitutional entitlement to the writ of habeas corpus and, if they do, whether

the judicial review procedures established by Congress would satisfy such an entitlement. This morning, I would like to explain the legal rights that the detainees enjoy under our law and why the existing system under the Detainee Treatment Act is not only a fair and constitutionally adequate alternative to habeas corpus, but one that is manifestly superior to habeas in protecting our Nation's ability to prosecute the war against al Qaeda, the Taliban, and their associated forces in Afghanistan and elsewhere.

The United States is currently engaged in an armed conflict unprecedented in our history. The attacks of September 11th demonstrated that, like past enemies we have faced, al Qaeda and its affiliates possess both the intention and the ability to inflict catastrophic harm on this Nation and its citizens. Al Qaeda, the Taliban, and their associated forces, however, show no respect for the law of war—they do not wear uniforms; they do not carry arms openly; and they direct their attacks primarily against innocent civilians. They have murdered thousands in attacks against the World Trade Center, the Pentagon, the *U.S.S. Cole*, and American embassies in Kenya and Tanzania, to name just a few. They have also plotted further attacks against the Empire State Building, the Sears Tower, the Library Tower, Heathrow Airport, Big Ben, NATO headquarters, and the Panama Canal among others.

To prevent further attacks on our homeland, United States forces and our coalition partners have captured enemy combatants, including members of al Qaeda, the Taliban, and their associated forces, who have harbored and aided al Qaeda. As in past armed conflicts, the United States has found it necessary to detain some of these combatants while military operations continue. During the ongoing conflict, we have seized more than 10,000 enemy combatants. About 775 of these combatants—including many of the

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00224 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.173

most dangerous—have been transferred to a detention facility on the United States military base at Guantanamo Bay, Cuba. Of those 775, well over half have been released or transferred from Guantanamo Bay to other countries. The United States continues to hold approximately 305 detainees at Guantanamo Bay. Although many of these detainees remain a threat to our country, approximately 80 have been determined eligible for release or transfer.

The United States Provides Alien Enemy Combatants Detained At Guantanamo Bay, Cuba With An Unprecedented Set of Rights.

One of the bedrock principles of the law of war is reciprocity. The Geneva Conventions oblige a party to an armed conflict to provide an enemy force with greater protections based upon the enemy force's respect for the provisions of the Conventions. Paradoxically perhaps, the refusal of members of al Qaeda and the Taliban to show any respect for the law of war—their refusal to wear uniforms or to distinguish themselves from the civilian population—in fact has resulted in the United States providing them with an unprecedented degree of legal process, including civilian judicial review, to assure ourselves that the individuals detained at Guantanamo Bay in fact pose a continuing threat to the United States.

In 2004, after having already released some 200 Guantanamo detainees through its own review processes, the Department of Defense established Combatant Status Review Tribunals ("CSRTs") to review, in a formalized process akin to other law-of-war tribunals, whether the remaining detainees met the criteria to be designated as enemy combatants. These CSRTs afford detainees greater procedural protections than ever before provided, by the United States or any other country, for wartime status determinations. Indeed, the CSRTs afford even greater protections than those deemed by

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00225 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.174

the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), to be appropriate for United States citizens detained as enemy combatants on American soil. The CSRTs also afford greater protections than those used to make status determinations under Article 5 of the Third Geneva Convention.

Under the CSRT procedures, each detainee receives notice of the unclassified basis for his designation as an enemy combatant and an opportunity to testify, call witnesses, and present relevant and reasonably available evidence. Each detainee also receives assistance from a military officer designated to serve as his personal representative. Another military officer must present to the tribunal evidence that might suggest the detainee is not an enemy combatant. Each tribunal consists of three military officers sworn to render an impartial decision and in no way involved in the detainee's prior apprehension or interrogation. Each tribunal decision receives at least two levels of administrative review. Of the 558 CSRT hearings conducted through the end of 2006, 38 resulted in determinations that the detainee in question no longer met the definition of an enemy combatant.

To ensure that enemy combatants are not held any longer than necessary, the Department of Defense also established separate tribunals known as Administrative Review Boards ("ARBs"). Those tribunals reassess, on an annual basis for each detainee, the need for continued detention. The review includes an assessment of the degree to which a detainee remains a continuing threat to the United States and its allies and whether there are other factors bearing on the need for continued detention. Before each ARB hearing, a designated military officer provides the Board with all reasonably available and relevant information. The detainee receives a written unclassified summary

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00226 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.175

of this information, and may present testimony on his own behalf. Another military officer is assigned to assist the detainee. The detainee's home government receives notice of, and may provide information at, the hearing. As a result of ARB proceedings conducted in 2005 and 2006, 188 detainees have been approved for release or transfer to another country. ARB proceedings have also been conducted throughout 2007.

Congress has provided the detainees with even greater rights and protections through two recently passed statutes. In the Detainee Treatment Act of 2005 ("DTA"), Congress provided for judicial review of final CSRT decisions regarding enemy-combatant status and imposed certain additional procedural requirements on the CSRT process. At the same time, Congress removed the statutory jurisdiction over habeas corpus that the Supreme Court had recognized in *Rasul v. Bush*, 542 U.S. 466 (2004). Congress judged that such a measure was necessary to curtail the unprecedented flood of detainee litigation that had followed the *Rasul* decision. The DTA reflects Congress's judgment that the CSRT process, with judicial review before the D.C. Circuit, constitutes the appropriate means through which the detainees can challenge their detention. Indeed, the DTA provides a more than adequate substitute for habeas, even if, contrary to existing precedent, the Guantanamo detainees might lay claim to a constitutional right to habeas corpus.

Congress again addressed the detention and prosecution of alien enemy combatants in the Military Commissions Act of 2006 ("MCA"). The MCA implemented the holding of *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), which had concluded that military commission proceedings were not authorized under then-existing law and that Common Article 3 of the Geneva Conventions applies to the armed conflict between the

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00227 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.176

United States and al Qaeda. The MCA addressed *Hamdan* by establishing a military commission system for alien unlawful enemy combatants, *see* § 2, and clarifying the treatment standards required by Common Article 3, *see* § 6. The military-commission procedures imposed by Congress provided defendants with far greater protections than the procedures the United States used to conduct war-crimes prosecutions during World War II, and greater protections than many international war-crimes tribunals.

Alien Enemy Combatants Captured and Detained Outside the United States Have Never Enjoyed The Right To Petition For A Writ of Habeas Corpus.

The MCA also confirmed and reiterated Congress's judgment under the DTA that the writ of habeas corpus is not an appropriate vehicle for alien enemy combatants to challenge their detention by the military. As many have recognized, the writ of habeas corpus, which traces its origins to Magna Carta, represents a fundamental protection under Anglo-American law. It is important to understand, however, that the writ of habeas corpus is fundamentally a doctrine tailored for peacetime circumstances. The Constitution specifically grants Congress the authority to suspend the writ, even as it applies to American citizens, during times of rebellion or invasion. *See* U.S. Const. art. I, § 9. The Founders of the Constitution likely would have been surprised to think that such an action would have been required with respect to the rights of alien enemy combatants. In the nearly 800 years of the writ's existence, no English or American court has ever granted habeas relief to alien enemy soldiers captured and detained during wartime.

The Supreme Court is currently considering the scope of the writ in the *Boumediene* case. Although the Court may provide additional guidance in the coming months, the Court last addressed this topic 50 years ago, holding in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that aliens outside the sovereign territory of the United

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00228 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.177

States have no constitutional right to habeas corpus under the Suspension Clause, particularly during times of armed conflict. In emphatic terms, the Court explained that such habeas trials

> [w]ould bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to the enemies of the United States.

Id. at 779. No less decisively, *Eisentrager* also rejected "extraterritorial application" of the Fifth Amendment to aliens. *See id.* at 784-85 ("No decision of this Court supports such a view. None of the learned commentators of our Constitution has ever hinted at it. The practice of every modern government is opposed to it.").

The Supreme Court's decision in the *Rasul* case several years ago was fully consistent with the underlying constitutional holdings of *Eisentrager*. *Rasul* held that the Guantanamo detainees could avail themselves of the writ of habeas corpus, but the Court emphasized that its holding was based upon its interpretation of the modern habeas corpus statute, and not the underlying question of what the Constitution requires. *See* 542 U.S. at 476-77. Following *Rasul*, Congress twice clarified that the habeas corpus statute did *not* extend to the Guantanamo detainees, and the D.C. Circuit held those restrictions to be constitutional in the decision now under review by the Supreme Court.

The Detainee Treatment Act Procedures Would Constitute An Adequate And Effective Alternative To Any Habeas Corpus Right.

It is important to remember that the CSRT process was established to provide the alien enemy combatants detained at Guantanamo with the due process standards that the

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00229 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.178

Supreme Court held in *Hamdi* to be adequate for an American citizen detained as an enemy combatant. Justice O'Connor's controlling opinion in *Hamdi* stated that the due process requirements for enemy combatants could potentially be satisfied "by an appropriately authorized and properly constituted military tribunal," such as the Article 5 tribunals constituted under Army Regulation 190-8. *Hamdi*, 542 U.S. at 538. The CSRT procedures build upon Army Regulation 190-8 and, indeed, provide additional process by giving the detainee the assistance of a personal representative and authorizing the military officers conducting the CSRT to consider all reasonably available evidence bearing upon whether the detainee is, or is not, an enemy combatant.

The DTA further provides for the review of the CSRT determination by the D.C. Circuit, a right to civilian judicial review not called for by the Geneva Conventions and indeed, never before provided to alien enemy combatants. The D.C. Circuit can consider all available constitutional and statutory arguments with respect to the detainee's detention; the court can ensure that the military followed its own procedures in conducting the proceeding; and the court can review the evidence and confirm that the military tribunal properly applied the requirement that a decision to hold the detainee as an enemy combatant be supported by a preponderance of the evidence.

Judicial review under the DTA, together with CSRT procedures built under the principles laid out in *Hamdi*, provide an unprecedented degree of process to alien enemy combatants. Indeed, the scope of judicial review goes beyond the very limited right to habeas corpus that the Supreme Court recognized in reviewing the criminal judgments (including death sentences) of military tribunals convened during World War II. The Court made clear that the role of the federal courts in those cases was limited to

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00230 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.179

considering the jurisdiction of the tribunal itself; the federal courts neither weighed the sufficiency of the evidence nor reviewed the military's compliance with its own procedures. *See In re Yamashita*, 327 U.S. 1, 23 (1946) ("[T]he commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts"); *Ex parte Quirin*, 317 U.S. 1, 25 (1942) ("We are not here concerned with any question of the guilt or innocence of petitioners."). In view of these precedents, and the *Hamdi* decision, the DTA procedures clearly constitute a fully "adequate and effective" alternative to habeas corpus that would satisfy any constitutional right to habeas corpus that would be enjoyed by an alien enemy combatant. *Swain v. Pressley*, 430 U.S. 372, 381 (1977); *see also INS v. St. Cyr*, 533 U.S. 289, 305-06 (2001); *Felker v. Turpin*, 518 U.S. 651, 664 (1977) ("[J]udgments about the proper scope of the writ are normally for Congress to make.") (quotation marks omitted).

The Detainee Treatment Act Procedures Are More Sensitive to Military Operations Than The Traditional Peacetime Writ of Habeas Corpus.

Although the DTA procedures provide a constitutionally adequate alternative to habeas corpus, they do so through procedures more sensitive and properly adapted to the "weighty and sensitive governmental interests" at stake when it comes to the ability of the United States safely to detain those aliens who fight against us. *See Hamdi*, 542 U.S. at 531. The Department of Defense has built on existing law of war precedents in spelling out the CSRT rules in considerable detail, and Congress has provided additional guidance under the DTA. As the recent litigation in the *Bismullah* case suggests, questions remain over the scope of these rules. Those questions, however, pale by comparison to the uncertainties that would prevail were habeas corpus rights recognized at Guantanamo Bay. The CSRTs have been readily convened at Guantanamo Bay and

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00231 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.180

conducted in the presence of the detainees. Would we be required to bring the detainees into the United States for habeas hearings? What rules of evidence and discovery would apply? How would classified evidence be protected? Could a detainee compel a U.S. soldier to return from Afghanistan or Iraq to testify? There is a reason why, when the Supreme Court in *Hamdi* considered the procedures that apply on habeas to a citizen enemy combatant, it endorsed the Article 5 tribunals embodied in Army Regulation 190-8, rather than the traditional procedures governing peacetime habeas corpus.

As Justice Jackson explained in *Eisentrager*, it would be "difficult to devise a more effective fettering" of military operations than by extending habeas rights to aliens captured and held abroad as enemy combatants during ongoing hostilities. *See* 339 U.S. at 779. Justice Jackson's prescient warning was amply confirmed during the brief habeas experience between 2004, when *Rasul* was decided, and 2006, when Congress most recently and most definitively restored the statutory holding of *Eisentrager*. During that brief time, more than 200 habeas actions were filed on behalf of more than 300 Guantanamo detainees. The Department of Defense was forced to reconfigure its operations at a foreign military base, in time of war, to accommodate hundreds of visits by private habeas counsel. To facilitate their claims, detainees urged the courts to dictate conditions on the base ranging from the speed of Internet access to the extent of mail deliveries. Through a series of interlocutory habeas actions, military-commission trials were enjoined before they had even begun. Perhaps most disturbing, habeas litigation impeded interrogations critical to preventing further terrorist attacks. One of the detainees' coordinating counsel boasted about this in public: "The litigation is brutal for [the United States]. It's huge. We have over one hundred lawyers now from big and

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00232 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.181

small firms to represent these detainees. Every time an attorney goes down there, it makes it that much harder [for the U.S. military] to do what they're doing. You can't run an interrogation * * * with attorneys. What are they going to do now that we're getting court orders to get more lawyers down there?" *See* 151 Cong. Rec. S14256, S14260 (Dec. 21, 2005). Finally, whatever burdens were imposed by briefly extending habeas to the few hundred detainees recently held at Guantanamo Bay would pale in comparison to the havoc in larger conflicts were the habeas statute generally extended to aliens held abroad as wartime enemy combatants. In World War II, for example, the United States held over two million such enemy combatants. For military operations of that scale, imposing the litigation standards that prevailed at Guantanamo Bay between 2004 and 2006 would be unthinkable.

Perhaps the most serious question that would arise with respect to granting habeas rights to enemy combatants held at Guantanamo would be whether such detainees would have the right to review classified information justifying their continued detention, and whether they could potentially force the United States to decide between either exposing highly sensitive intelligence sources to members of al Qaeda, the Taliban, or their associated forces, or instead releasing such detainees. We simply cannot maintain a system in which the Government can detain these fighters only at the cost of disclosing classified information about our intelligence sources and methods. This is particularly true in light of the fact that contrary to myth, Guantanamo Bay has not been a base for permanent detention. More than half of the detainee population already has been transferred, and we have learned that more than 30 detainees whom we have released in fact have returned to the battle to fight American soldiers.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00233 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.182

Extending habeas corpus to the detainees at Guantanamo would not only be unwise from the standpoint of our national security, but it would be completely unnecessary in view of the extensive and unprecedented procedures currently provided to the detainees. As explained above, both Congress and the Executive recently have extended to detainees protections unprecedented in the history of armed conflict. The DTA affords the detainees with a CSRT hearing that goes beyond the procedures required by the Geneva Conventions, and implemented by Army Regulation 190-8, and the DTA further permits the detainees to obtain judicial review of that decision before the D.C. Circuit.

In sum, although the DTA procedures provide a more than constitutionally adequate substitute for habeas corpus—even if the writ were to apply—they do so in a manner that is sensitive to the needs of our ongoing conflict against al Qaeda, the Taliban, and their associated forces, including the need to protect classified information and the need to ensure that detainees are not able to undermine our war effort from within the courtroom. The existing system goes well beyond what we have provided in past armed conflicts, and well beyond what other nations have provided in like circumstances. It represents a careful balance between the interests of detainees and the exigencies of wartime, and a careful and constitutional compromise painstakingly worked out between the political branches.

Thank you, Chairwoman Feinstein and Ranking Member Kyl. I look forward to answering any questions.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00234 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.183

Statement of U.S. Senator Russ Feingold
Senate Judiciary Committee
Subcommittee on Terrorism, Technology and Homeland Security
Hearing: "The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and Is an End in Sight?"
December 11, 2007

The horror that we experienced on 9/11 forced upon us a great challenge: responding aggressively to those infamous acts of terrorism, and to the very real threat posed by al Qaeda, without abandoning our freedoms and democratic values.

So far, we have not successfully met that challenge, and Guantanamo is a major reason for that failure. We now live in a country where the government claims the right to pick up anyone, even an American citizen, anywhere in the world; designate that person an "enemy combatant" even if he never engaged in any actual hostilities against the United States; and lock that person up possibly for the rest of his life unless he can prove, without a lawyer and without access to all, or sometimes any, of the evidence against him, that he is not an "enemy combatant."

I fear that some have forgotten the very reasons for the due process protections enshrined in our Constitution. These protections are in place, not to coddle the guilty, but to protect against executive overreaching or even simple human error. One need not think ill of this Administration or even disagree with its policies to conclude that at least some of the 750-plus people detained in Guantanamo were incorrectly designated "enemy combatants." One need only acknowledge the indisputable fact that this Administration is capable of mistakes.

For people erroneously designated as "enemy combatants" and imprisoned in Guantanamo, the Combatant Status Review Tribunals are not a safeguard – they are a Kafka-esque nightmare. The sacrosanct principle of "innocent until proven guilty" that forms the bedrock of our justice system is turned on its head. And the available transcripts of the CSRT hearings vividly illustrate the impossibility of proving your innocence when you are not even allowed to see the evidence against you. One detainee was told that he had associated with a known terrorist, but when he asked for the name of that person, the request was denied. In effect, the only way this person could prove his innocence would be to prove that he never associated with *anyone* who could conceivably be called a terrorist.

The Administration claims that this process is more than the detainees deserve, and that no enemy combatant in history has ever had the protections that the current detainees are seeking. But no Administration in history has ever claimed, as this one does, that a person who writes a check to a charity without knowing

53355.184

that the charity is a front for a terrorist group is an "enemy combatant." And no Administration before this one has defined the conflict in such a manner that it can never truly end, thus making wartime detention a possible life sentence.

Review by an independent and neutral judiciary has always been the one true safeguard against wrongful executive detention. Last week, however, the Solicitor General argued to the Supreme Court that enemy combatants are not entitled to avail themselves of the great writ of Habeas Corpus. I hope that the Supreme Court will reject this cramped reading of the Constitution. But even if it doesn't, the Supreme Court cannot absolve us of our moral responsibility to decide what kind of nation we wish to be. As one of today's witnesses, Admiral John Hutson, told us two years ago, "The legal analysis provides the floor, but the United States should strive for higher aspirations."

I have joined Senator Feinstein in calling for the closure of Guantanamo. I did so because Guantanamo has become synonymous in the Arab and Muslim world with American abuses. It is harming our ability to gain the respect and cooperation of other nations, and I fear that it is giving the terrorists a potent recruiting tool. But closing Guantanamo will accomplish little if we simply continue the same or worse detention policies at other sites. The question is much broader and much deeper than simply whether to close Guantanamo. The question is how to combat al Qaeda while maintaining our principles and our values. I believe that we can – and must – do both.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00236 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.185

Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security
Tuesday, December 11, 2007
226 Dirksen Senate Office Building
Statement of Brigadier General Thomas W. Hartmann
Legal Advisor to the Convening Authority for the Office of Military Commissions

Madam Chairwoman, Ranking Member Kyl, thank you for inviting me to participate in this morning's hearing. I am the Legal Advisor to the Convening Authority for the Military Commissions. In this role, I am responsible for providing legal advice to the Convening Authority, an independent quasi-judicial figure who administers the Office of Military Commissions. I also supervise the Chief Prosecutor's Office.

Today's military commissions are the result of the Executive, Legislative and Judicial branches of our government working together to answer the central question of this hearing: "Detainees rights, what are they?"

Just over a year ago, this chamber sent the Military Commissions Act to the President. In that legislation, Congress made clear its view that even persons alleged to have committed the most heinous and egregious of war crimes should enjoy certain fundamental rights. The rights guaranteed to detainees include many of those we recognize as essential for service members under the military justice system and for our own citizens in civilian courts. The rights guaranteed to an accused in a military commission include the right: to be present for all proceedings; to have

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00237 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.186

detailed military defense counsel at no cost, obtain civilian counsel at no cost to the Government or represent himself; to trial by jury before a competent judge; to review and respond to all of the evidence the members of the commission (or jury) will see; to have the members of the commission instructed that the accused is presumed innocent until proven guilty beyond a reasonable doubt; to call witnesses and present evidence on his own behalf; and to question and to challenge the impartiality of the presiding judge and the members of the commission. A detainee cannot be compelled to testify against himself. An accused may have a foreign consultant present and, with concurrence of the judge, be seated at the defense table during commission proceedings. The attorney-client, husband-wife, and clerical privileges are also respected in the rules of evidence governing the proceedings.

Indeed, in the recent Khadr and Hamdan trials we have seen most of these rights exercised. For example, Mr. Hamdan had five counsel at his table, one detailed military defense counsel, two civilians from a law firm, one DOD civilian detailed defense counsel and one other civilian counsel.

Commissions are transparent and provide a window through which the world can view military justice in action during war. The press has been

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00238 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.187

allowed, even encouraged, to attend commission hearings. Nearly 30 members of the press corps attended the recent hearings in Khadr. Five Non-Governmental Organizations (NGOs), Amnesty International, Human Rights First, Human Rights Watch, The American Civil Liberties Union (ACLU) and The American Bar Association (ABA), are regularly invited to attend commission proceedings.

Military commissions are anchored in court-martial practice. When an accused walks into a commission courtroom, he is protected by the M.C.A., the commission rules of evidence and procedure, the military judge (appointed by the TJAGs), and the zealous representation of the military counsel detailed to defend him, along with any civilian counsel.

Post-trial rights deserve mention as well. As in a court-martial, if an accused is convicted, he is permitted to submit material to the Convening Authority for her to review. In submitting the additional information, the accused is not hindered by admissibility or other evidentiary rules. As legal advisor to the Convening Authority, I am required to conduct a comprehensive review of the record and provide legal advice on the trial's result. The Convening Authority has the complete and unencumbered discretion to approve, reject, or reduce the commission sentence as well as

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00239 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.188

set aside a finding of guilty, or change a finding of guilty to a lesser included offense. The Convening Authority's review is unique to military justice. As such, it is a right available to a commission accused that is unavailable even to an American citizen.

If the Convening Authority approves the sentence, the conviction is automatically reviewed by the Court of Military Commission Review (C.M.C.R.), another right that does not exist in civilian judicial systems but which derives from court-martial practice. This appellate court consists of seasoned military and civilian judges. Already active, the C.M.C.R. heard arguments in August regarding the jurisdictional provisions of the M.C.A. Like any appellate court, the C.M.C.R. committed itself to an examination of the facts and the law in rendering its opinion. It did that in Khadr, and rendered an opinion within 90 days of the appeal.

Further, an accused may appeal the final decision of a military commission to the U.S. Court of Appeals for the D.C. Circuit if his conviction is sustained by the C.M.C.R. From there, a Writ of Certiorari is available for review by the Supreme Court. In total, after conviction, an accused has four levels of review and appeal.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00240 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.189

Critics often pick at the seams of the commission process. Few of them, however, acknowledge the extensive layers of protection for the accused that exist within the system and ensure that no one will be convicted and punished except after a manifestly fair proceeding in which guilt has been proven beyond a reasonable doubt to extensive post trial review.

Senators, I ask that you evaluate these extraordinary detainee rights and privileges at a commission trial in light of the ongoing hostilities. We are prosecuting these cases in the midst of a "hot war." No other tribunal, from Nuremburg through Sierra Leone, can make that claim. The U.S. is trying alleged alien unlawful enemy combatants as the global war on terror continues. While our military forces engage the enemy abroad, we provide military attorneys to represent these individuals at no cost to the accused. While our intelligence operatives penetrate deep into the al Qaeda network, we provide volumes of documents to suspected al Qaeda members and their counsel in pre-trial discovery. While our brave men and women give their lives to advance the cause of freedom and to protect ours, we bestow upon our enemy the rights we, and others, deem fundamental to a fair process under the rule of law. That is what makes America the most benevolent nation in the history of warfare.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00241 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.190

But we continue to try to improve. We are conducting an exhaustive internal review of the Manual for Military Commissions, the Regulation for Trial by Military Commission, the Military Commission Trial Judiciary Rules of Court, and the Court of Military Commission Review Rules of Practice for compliance with the M.C.A. and for internal consistency among documents.

In summary, Senators, let me answer this subcommittee's question directly. Detainee rights before military commissions are clearly articulated in the M.C.A., are expounded upon in the Manual for Military Commissions, and are protected and enforced by the military judges and counsel in the commission courtroom and throughout the appellate process. They are unprecedented. They are fair. They are factual. They are open and transparent.

Chairwoman Feinstein, Senator Kyl, I thank you again for holding this important hearing and for permitting me the opportunity to testify. I look forward to answering your questions.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00242 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.191

Statement
JOHN D. HUTSON
RADM JAGC USN (ret)
Dean and President, Franklin Pierce Law Center
Before the Senate Judiciary Subcommittee on
Terrorism, Technology and Homeland Security
December 11, 2007

The prison at Guantanamo Bay has been a black eye on the face of the United States for far too long. Closing it should be at the top of the detention and interrogation policy "to-do" list. It has been an impediment and a distraction. At the very least, it is a national embarrassment that so many voices of authority, including the President and Secretary of Defense along with a host of domestic and international observers and commentators, have called for its closure and yet we can't seem to do it. It portrays the United States as weak and dithering; a feckless shadow of the great nation that won World War II. It would be hard to imagine the "Greatest Generation" incapable of closing Guantanamo. We should close it not because we must, but because we can. It would be a sign of strength and courage, not weakness and fear. At its worst, its continued existence impedes the remedy of the basic ill of indefinite detention which results from the seriously flawed Combatant Status Review Tribunals and equally flawed military commission process.

We aren't dealing with thousands of prisoners. It's a few hundred. Finding places to hold them securely would not be an insurmountable obstacle. Thousands of World War II prisoners of war were successfully incarcerated on U.S. soil. Last year there were over 193,000 prisoners in federal custody and over 1.5 million total prisoners in the United States. Absorbing 350 detainees from Guantanamo would not be overly difficult if we really wanted to close it.

The real problem is not where to hold the detainees, it is what to do with them. Presently, we have two legal processes to deal with them, the Combatant Status Review Tribunal (CSRTs) and military commissions. Both are irredeemably flawed. We were told from the outset by the President, the Vice President, the Secretary of Defense and others that the detainees in Guantanamo were the worst of the worst, all trained killers captured on the battlefield, and so forth. Now, in December 2007 we have simply released half of them and prosecuted exactly one of them, ironically perhaps, a former kangaroo skinner from Australia. This is not a system that is working well by any measure.

The United States decided early on in the war that rather than using the Article 5 "Competent Tribunals" which are mandated by the Geneva Conventions as the forum

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00243 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.192

to determine the status of an individual and whether his detention should be continued, we would bring these detainees to Guantanamo. The original goal was to use a location that would be beyond the reach of any law but the Supreme Court dashed that hope in Rasul. The Administration responded with the creation of the novel CSRTs. Unfortunately but predictably, they have not withstood close scrutiny because their procedure was reverse engineered to ensure continued confinement.

While the British debate whether they should amend their rules so they can hold alleged terrorists without charges for a maximum of 48 days instead of 24 days as their present law provides, we have detainees we have held without charge for six years.

I strongly urge that if the Supreme Court doesn't restore Habeas Corpus as the result to the cases it recently heard, that Congress do so unilaterally. That is the last, best hope of emptying the confinement facility of those men who shouldn't be there, while retaining those that should. Regardless of whether we are required by the Constitution to afford them the right of Habeas Corpus, it is a proven method for making that critical determination. It is a tool we should use. If it had been used in the beginning, we wouldn't be in this mess. (Nor would we be if we had used the Article 5 Competent Tribunals as we had done in the past.) Those who remain after a legitimate determination can then be prosecuted. That presents the next question: how are they prosecuted?

The military commissions are a failure and a sham. They are even a failure as a sham. A considerable and important aspect of justice is the appearance of justice. The commissions certainly fail by that measure as have the CSRTs. The shortcomings of the military commissions are completely transparent and have been amply cataloged elsewhere so I won't reiterate them here. No one can reasonably argue that they have been successful. The important question for the Congress is what to do about it. After removing whatever number of those men who shouldn't have been confined in the first place by use of Habeas Corpus, the best way to reduce the population in Guantanamo is to prosecute those who should be prosecuted.

We got off on the wrong track early on and never permitted ourselves a way to recover. At least in part the problem is that we are trying to do something that hasn't been done before and even though it clearly isn't working we stubbornly stick with it. That is, we are trying to prosecute alleged enemy combatants during the course of the hostilities. Moreover, we are looking to prosecute relatively minor players. During prior wars, captured drivers, assistant cooks, and the like, essentially the equivalent of low ranking enlisted personnel, were imprisoned and released at the cessation of the hostilities. The war trials took place at the end of the war for the most part and were reserved for those who were truly the "worst of the worst" not just rhetorically so.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00244 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.193

We have confused prosecution of criminals with the prosecution of the war. The latter is a function for the Commander in Chief; the former is a judicial function. The military can shoot them, but they shouldn't prosecute them, certainly not the way we are trying to do it now. When the criminal prosecutions become part of the war effort, the natural tendency is to prosecute the people like we prosecute the war—assuring victory becomes assuring convictions because they are, after all, the enemy. It is a wrongheaded strategy and doomed to failure.

When we consider the judicial function, we argue that this is a war and they have to be treated like the enemy so we shouldn't provide them certain rights. When we look at the war fighting side of the equation, we say they are not POWs but criminals and have to be prosecuted. Trying to have it both ways and slip sliding from one argument to the other depending on which is the most advantageous at the moment is causing us insurmountable problems and raining down on us the opprobrium of the national and international communities.

The United States can justifiably and proudly claim two of the finest judicial system on Earth—the military court-martial under the Uniform Code of Military Justice and the Manual for Courts-Martial and the U.S. federal court system. Rather than hiding them under the leaky bushel of the military commissions, we should be touting them from the rooftops. We should use this as an opportunity to showcase to the rest of the world what America thinks justice, human rights, and the rule of law mean. It's not a human right if it only applies to certain humans, and it's not a rule of law if it applies only when it is convenient. We need to get these cases into courts-martial or U.S. District Courts.

Happily, this also makes practical sense. While the military commissions have fiddled and diddled, federal courts have successfully and justly prosecuted and convicted a large number of terrorists. We can't be afraid to use them. In truth, using the federal court system may mean there is an occasional acquittal. If we aren't willing to risk an acquittal, we might as well be honest about it and just let the kangaroos run the court.

The court-martial process would work equally well. Indeed, the familiarity that the court-members, military judge, and prosecutors would have with the vagaries of war would serve as an advantage.

There is very little that would have to be changed in order to accommodate the unique aspects of prosecuting alleged terrorists. One rule that could not be modified is guilt beyond a reasonable doubt. If there is no evidence of a crime, there can't be a conviction. We can't base a conviction simply on the fact that somebody, somewhere, at some time, decided someone was a terrorist.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00245 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.194

We can't say to them, "There is a guy, we can't tell you who; but he gave us information, we can't tell you what; that indicates you are a terrorist, we can't tell you why. Based on evidence you can't see, we find you guilty."

There is a third option which I hesitate to even mention because I don't believe it is the best option and it may be a fix that appears superficially to be face saving and therefore too tempting. Therefore, I don't recommend it. We could amend the Military Commission Act to bring it up to Common Article 3 standards, at the very least. This would required several major changes. First, all hint of political influence or partiality in the process must be removed. No trial finishes well if it doesn't start well. It can't start well if a lack of impartiality appears to influence the pretrial process: investigations, referral of charges, detailing counsel and members, and the whole gamut of pretrial decisions. Even if the decision on balance was correct, if there is even the hint of partiality, the result will be suspect and therefore flawed. Trial lawyers know that the real work often goes on behind the scenes and often before the charges are even referred. The public sees (or not, if the trial is closed) what happens in the courtroom but what happens in the courtroom is largely determined by what has happened outside the courtroom. Recently, the military commissions have at least appeared to lack impartiality.

Secondly, the review process must be changed. I would recommend that the military review for courts-martial be used through the Service appellate courts and the Court of Appeals of the Armed Forces. It is tried and true, and would bring the process in closer compliance with the Geneva Convention mandate of using the same criminal prosecution system as we use for our own troops.

Also, significantly, all evidence in the hands of the prosecution, whether incriminating or exculpatory, must be made reasonably available to the accused and/or his lawyer. We can't continue to countenance secret evidence at secret trials.

This option fails to showcase our extant judicial systems or take advantage of their experience. It runs the very real risk of more problems like the silly but real one we saw most recently of whether a CSRT determination of "enemy combatant" equates to "unlawful enemy combatant" for purposes of the military commissions. We must stop having to amend the process in reaction to court decisions. We need to do it right from the beginning.

The touch stone for prosecutions must be the higher standard between what Americans think is appropriate and Common Article 3 of the Geneva Conventions. The CA3 standard of those "judicial guarantees considered indispensible by civilized peoples" is not a difficult one to apply even if there is disagreement about certain nice evidentiary or procedural matters. For example, there must be a legitimate review of

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00246 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.195

findings but how that review is accomplished is a matter of debate. Using the Federal Court system or courts-martial resolves much of that debate.

So in the end there are three things that must be done: 1. Close Guantanamo and move the detainees to a prison or prisons in CONUS; 2. Provide Habeas Corpus to those who wish to challenge their detention; and 3. Prosecute those who remain custody in Federal District Court or at a General Court-Martial.

This solution will generate cries of anguish from those who point out that we never did this in World War II or other wars. The comparison misses the point by using the slippery but often used debate tactic of arguing this is a war like other wars when that supports the position offered, but it is unlike prior wars when it is not helpful to the argument.

The point is not to repeat what we did sixty years ago; rather, it is to do the right thing now under the present circumstances. German and Japanese prisoners were captured on real battlefields and were clearly combatants. That is not the case now. Each of the individual detainees may or may not be a criminal, some surely are, but their situation now is nothing like the situation of enemy POWs in prior wars. The duration of the hostilities alone requires we employ different treatment. This is not to molly coddle the detainees. Unlike enemy soldiers in WWII, if these terrorists are convicted, they will face years in prison or death, not repatriation to Japan or Germany after only months or up to perhaps four years in prison camps.

The United States simply can't continue to do business as we have been doing it thus far. We must have the courage to look anew at the problems and make the necessary course corrections. We have been embarked on a Quixotic quest for the bottom, trying to figure out the absolute minimum rights we are required to afford the detainees. This mindset has caused us to redefine torture and the defenses to torture, use secret prisons and extraordinary rendition, disclaim the Geneva Conventions and ignore a host of other domestic laws. Notably, it has caused us to forsake our time honored judiciary for an ad hoc system that simply hasn't worked. Far too often the federal courts, notably including the U.S. Supreme Court, have had to step in to fix problems of our own making that should never have existed in the first place. We would be much better off if the appellate courts were reviewing appropriate convictions, rather than flawed pretrial procedures. Our mantra should be "close Guantanamo, release those we should, and prosecute the bad guys."

There is another concern that should be raised here although there isn't a convenient place to do it. There are reports of many thousand detainees being held in prisons elsewhere around the world. Given our track record for the several hundred located 90 miles from Miami, one wonders what is going on elsewhere. I urge Congress to require an accounting for them.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00247 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.196

Statement of Senator Patrick Leahy,
Chairman, Senate Judiciary Committee
On "The Legal Rights of Guantanamo Detainees"
December 11, 2007

Today we consider our treatment of detainees at Guantanamo Bay and how best to secure our nation while holding on to those rights and values that make us American. I thank Senator Feinstein for holding this important hearing.

As today's testimony potently reminds us, the attack on America on September 11, 2001 was a devastating and tragic blow, and we must take all possible steps to prevent such a tragedy from happening again. But as so much of our history has shown, and as the events of the last six years have again made clear, disregarding the rule of law does not make us safer; it undermines our safety and our place in the world.

Over the last few years, Guantanamo has become for much of the world a symbol of injustice and boundless exercise of power. As General Colin Powell said, "Essentially, we have shaken the belief that the world had in America's justice system by keeping a place like Guantanamo open."

The Washington Post detailed last week the story of a man whom United States and European intelligence services concluded was innocent, but who is nonetheless still languishing years later in a cell at Guantanamo. The flawed review process there found him to be dangerous, contrary to the clear findings of the intelligence community. These stories are too common. The administration likes to call the detainees at Guantanamo the worst of the worst, but military and government officials have told *The New York Times* and others that many of the detainees appear to be people who were in the wrong place at the wrong time, and do not pose a threat.

Senator Specter and I have fought hard, and will continue fighting, to restore the great writ of habeas corpus, the legal doctrine that allows someone detained by the government to at least go to a court to say he or she is being held in error. The last Republican Congress and this administration took away that right for any non-citizen held under mere suspicion of being an enemy combatant, or merely "awaiting determination" as to whether that status applied. This is a change in the law that puts every one of the millions of legal, permanent residents in this country at risk, and Guantanamo is the ultimate illustration of the fate they risk sharing. How many more people could end up sitting in cells, unable even to challenge the basis for their detention, forever?

This government has stumbled forward in its handling of the Guantanamo detainees, apparently without rhyme or reason. Some detainees may have been released without a sufficient assurance that they are not dangerous. Others repeatedly found not to be dangerous remain at Guantanamo with no end in sight. The cursory process meant to review whether the detainees are being held properly has been revealed again and again to be hopelessly flawed. We must start over with a fair system based in our law – the kind of system I proposed setting up soon after September 11 and the kind that Senators Specter and Durbin likewise proposed.

Nothing has done more, though, to damage America's image and our place in the world as a beacon of human rights than the revelations that we have used cruel interrogation techniques and perhaps even torture. We have just learned that the Central Intelligence Agency destroyed videotapes of harsh interrogations, including the use of waterboarding. One of the CIA employees who participated in interrogating one of the detainees apparently appeared in the videotapes, said that waterboarding was used, that it is torture, and that "Americans are better than that." I agree.

Senator Specter and I sent a letter yesterday to Attorney General Mukasey asking a series of questions about the Justice Department's knowledge of and involvement in the CIA's possession and subsequent destruction of these videotapes. We requested a complete account of the Justice Department's own knowledge of and involvement with these matters.

America has always been a country that does not torture and one that stands against torture. This administration has abandoned our historic commitment to human rights by repeatedly stretching the law and the bounds of executive power to authorize torture and cruel treatment. All the while, it has tried to keep its policies and actions secret, knowing that they could not withstand scrutiny in the light of day. That is the real message coming out of the recent revelation of the CIA tapes being destroyed, that their practices could not stand up to scrutiny. That matter is not one in which to scapegoat lower level officers but one that raised fundamental questions about what this administration has allowed despite our laws and treaties against torture and cruel and degrading treatment. Until this administration finally comes clean with Congress and the American people about its policy on torture and cruel interrogation techniques, we cannot restore America's standing as the world leader in protecting and preserving human rights, and only by doing so can we truly safeguard our national security.

Closing the facility at Guantanamo Bay and restoring justice to the way we treat detainees and the legal process we give them would be a good start toward reaffirming the values for which America has always stood.

# # # # #

SHEARMAN & STERLING LLP

599 LEXINGTON AVENUE | NEW YORK | NY | 10022-6069

WWW.SHEARMAN.COM | T +1.212.848.4000 | F +1.212.848.7179

rweerasinghe@shearman.com
212 848-7088

January 18, 2008

Senator Dianne Feinstein
U.S. Senate Judiciary Subcommittee on
Terrorism, Techhnology and Homeland Security
Attn: Adriane Wynn
851 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Feinstein:

On behalf of Shearman & Sterling LLP, thank you for the opportunity to provide information for the record of the December 11, 2007 hearing before the Subcommittee on Terrorism, Technology and Homeland Security. We are pleased to provide our perspective on our firm's representation of detainees at Guantanamo.

As we have in the past, we continue to take serious exception to Debra Burlingame's criticism of our representation of the twelve Kuwaiti detainees. Like all Americans, we recognize the need to defend our country against all those who would cause us harm, but we reject any suggestion that we should abandon the rule of law by denying the detainees the right to legal representation.

We decided to undertake the representation because of the important constitutional principle at stake: the right of any individual detained within the jurisdiction and control of the U.S. government to have a fair hearing before a neutral judge to decide whether they should continue to be held indefinitely or should be charged, tried and, if convicted, punished. This right is embodied in the centuries-old "Great Writ" of habeas corpus, and protected by the United States Constitution.

We realized, of course, that such a principled undertaking might be unpopular, but it is an established tradition of the legal profession to ensure that unpopular causes are represented where fundamental rights are at issue. The Supreme Court, in *Rasul v. Bush*, confirmed our position that the Guantanamo detainees have the right to habeas corpus.

SHEARMAN & STERLING LLP IS A LIMITED LIABILITY PARTNERSHIP ORGANIZED IN THE UNITED STATES UNDER THE LAWS OF THE STATE OF DELAWARE, WHICH LAWS LIMIT THE PERSONAL LIABILITY OF PARTNERS.

VerDate Nov 24 2008 14:44 Nov 16, 2009 Jkt 053355 PO 00000 Frm 00250 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53355.TXT SJUD1 PsN: CMORC

53355.199

We also participated in the debate in Congress and in the media about the principles implicated in proposals to terminate habeas rights for detainees. We did not, as Ms. Burlingame has again incorrectly asserted in her testimony before the Subcommittee, hire a public relations firm.

We are as proud of our role in this important legal debate as we are of our successful pro bono representation of the families of twenty-one victims of 9/11 on whose behalf we obtained $35 million in awards from the Victim Compensation Fund. On a pro bono basis, we have also joined with more than a dozen other law firms in seeking the Supreme Court's reaffirmation of its ruling in *Rasul*.

I am certain the Subcommittee understands that we did not agree to represent the detainees out of any sympathy with terrorists or enemy combatants. But in the fight against terrorism, we should not lose sight of the fundamental human rights on which our country was founded.

Sincerely,

Rohan S. Weerasinghe

NYDOCS01/1158534.1