

THE MEANING OF “BATTLEFIELD”

AN ANALYSIS OF THE GOVERNMENT’S REPRESENTATIONS
OF “BATTLEFIELD” CAPTURE AND “RECIDIVISM”
OF THE GUANTÁNAMO DETAINEES

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“The general number is around—just short of thirty, I think...It’s a combination of thirty we believe have either been captured or killed on the battlefield, so some of them have actually died on the battlefield.”

— *Daniel J. Dell’Orto,*
Principal Deputy General Counsel,
Department of Defense
April 26, 2007

EXECUTIVE SUMMARY

The Department of Defense has continually relied upon the premise of “battlefield capture” to justify the indefinite detention of so-called “enemy combatants” at Guantánamo Bay. The “battlefield capture” proposition—although proven false in almost all cases—has been an important proposition for the Government, which has used it to frame detainee status as a military question as to which the Department of Defense should be granted considerable deference. Further, just as the Government has characterized detainee’s initial captures as “on the battlefield,” Government officials have repeatedly claimed that ex-detainees have “*returned* to the battlefield,” where they have been re-captured or killed.

Implicit in the Government’s claim that detainees have “returned to the battlefield” is the notion that those detainees had been on a battlefield *prior* to their detention in Guantánamo. Revealed by the Department of Defense data, however, is that:

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

Just as the Government's claims that the Guantánamo detainees "were picked up on the battlefield, fighting American forces, trying to kill American forces," do not comport with the Department of Defense's own data, neither do its claims that former detainees have "returned to the fight." The Department of Defense has publicly insisted that "just short of thirty" former Guantánamo detainees have "returned" to the battlefield, where they have been re-captured or killed, but to date the Department has described at most fifteen (15) possible recidivists, and has identified only seven (7) of these individuals by name. According to the data provided by the Department of Defense:

- at least eight (8) of the fifteen (15) individuals alleged by the Government to have "returned to the fight" are accused of nothing more than speaking critically of the Government's detention policies;
- ten (10) of the individuals have neither been re-captured nor killed by anyone;
- and of the five (5) individuals who are alleged to have been re-captured or killed, the names of two (2) do *not* appear on the list of individuals who have at any time been detained at Guantánamo, and the remaining three (3) include one (1) individual who was killed in an apartment complex in Russia by local authorities and one (1) who is not listed among former Guantánamo detainees but who, after his death, has been alleged to have been detained under a different name.

Thus, the data provided by the Department of Defense indicates that every public statement made by Department of Defense officials regarding the number of detainees who have been released and thereafter killed or re-captured on the battlefield was *false*.

I.

The Return to the Battlefield?

Implicit in the allegation that one has *returned* to the battlefield is that one has been on a battlefield previously. Our earlier report, *The Empty Battlefield and the Thirteenth Criterion*—which, like this report, relied upon the Department of Defense’s own data—revealed that no more than twenty-one (21) of 516 Combatant Status Review Tribunal (“CSRT”) unclassified summaries¹ of the evidence alleged that a detainee had ever been on any battlefield.² Thus, only four percent (4%) of Guantánamo Bay detainees for whom a CSRT had been convened were ever alleged by the United States Government to have been on a battlefield to which they might return.³ The report further revealed that only twenty-four (24) detainees—just five percent (5%)—were alleged to have been captured by United States forces.⁴

A comparison of the two data sets reveals that *exactly one* detainee was alleged to have been captured on a battlefield by United States forces. That lone detainee is Omar Khadr (ISN⁵ 66), a Canadian citizen who was captured when he was fifteen (15) years old.⁶ In his sixth year of detention, Khadr is one of the first Guantánamo detainees to face a military tribunal.

Although the vast majority of detainees were neither captured by United States forces nor captured by anyone else on any battlefield—and eighty-six percent (86%) may have been sold to the United States for a bounty⁷—the Department of Defense and other highest level Government officials have continuously represented the detainees as having been captured on the battlefield and having returned to the battlefield upon release.⁸ The battlefield capture proposition—

¹ The purpose of the CSRT unclassified summary of the evidence, or the “R-1,” is to summarize the Government’s bases for detention of the individual for whom the CSRT is convened. The Government conducted 558 CSRTs, and eventually made 516 CSRT unclassified summaries public. See our first *Report on Guantánamo Detainees* (2006), available at http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

² Available at http://law.shu.edu/news/empty_battlefield_final.pdf.

³ This report does not consider the recent “high value detainees” transferred to Guantánamo in September 2006. See “High Value Detainees Moved to Gitmo; Bush Proposes Detainee Legislation,” (Sept. 6, 2006). Retrieved November 8, 2007 at <http://www.defenselink.mil/news/NewsArticle.aspx?ID=721>.

⁴ *Supra* note 2.

⁵ “ISN” is an abbreviation for “Internment Serial Number.” Each Guantánamo detainee was assigned an ISN.

⁶ The R-1 of Omar Khadr, ISN 66, appears at Appendix 4.

⁷ *Supra* note 1.

⁸ “These are people picked up off the battlefield in Afghanistan....They were picked up on the battlefield, fighting American forces, trying to kill American forces.” President Bush, June 20, 2005. Retrieved November 4, 2007 from http://www.theatlantic.com/doc/prem/200602u/nj_taylor_2006-02-07.

“The people that are there are people we picked up on the battlefield, primarily in Afghanistan. They’re terrorists. They’re bomb makers. They’re facilitators of terror. They’re members of Al Qaeda and the Taliban....We’ve let go those that we’ve deemed not to be a continuing threat. But the 520-some that are there now are serious, deadly threats to the United States.” Vice President Cheney, June 23, 2005. Retrieved November 4, 2007 from http://www.theatlantic.com/doc/prem/200602u/nj_taylor_2006-02-07.

“If we do close down Guantánamo, what becomes of the hundreds of dangerous people who were picked up on battlefields in Afghanistan, who were picked up because of their associations with [al-Qa`ida].” Condoleezza Rice, quoted by John D. Banusiewicz for American Forces Press Service, May 21, 2006. Retrieved November 3, 2007 from <http://www.defenselink.mil/news/newsarticle.aspx?id=15706>.

although false in almost all cases—has been an important proposition for the Government, which has used it to justify the casting of detainee status as a military question as to which the Department of Defense should be granted great deference.

Similarly to “battlefield capture” claims, “*return to the battlefield*” claims have abounded in public statements made by senior Government officials—and are almost entirely refuted by the data provided by the Department of Defense.

II.

The Department of Defense’s Own Data Indicates that Instances of “Recidivism” Are Far Fewer Than Government Officials Have Publicly Claimed.

The Department of Defense has repeatedly claimed that some thirty (30) former Guantánamo detainees have been released only to return to the battlefield, where they have been either re-captured or killed.⁹ In July 2007, the Department of Defense issued a news release in which it attempted to identify these alleged “recidivists”;¹⁰ its attempt falls considerably short. Instead of identifying the thirty (30) individuals it alleges are recidivists, the Department describes at most fifteen (15) possible recidivists, and identifies only seven (7) of these individuals by name. Further, two of the individuals included have not been “re-captured or killed,” as the Government claimed, but, apparently, are believed to be engaged in some kind of unspecified military operations.

More importantly, the majority of the individuals identified by the Department of Defense as recidivists appear to be miscategorized. Eight (8) of them are accused of nothing more than speaking critically of the Government’s detention policies, and ten (10) have neither been re-captured nor killed. Of the five (5) who are alleged to have been re-captured or killed, two (2) are not listed as ever having been detained at Guantánamo, and the other three (3) include one (1) who was killed in an apartment complex in Russia by local authorities and one (1) who is not listed among former Guantánamo detainees but who, since his death, has been alleged to have been detained under a different name.

There appears to be a single individual who is alleged to have both been detained in Guantánamo and later killed or captured on some battlefield.

“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/d20070712formertgmo.pdf>.

A. The Department of Defense’s Definition of “Anti-Coalition Activity” is Over-Inclusive.

The July 2007 news release contains a preamble followed by brief descriptions of the Government’s bases for asserting that each of seven identified “recidivists” has “returned to the fight.”

The preamble, in relevant part, reads as follows:

Former Guantánamo Detainees who have returned to the fight:

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

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

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

With this preamble, interestingly, the Department of Defense abandons its oft-repeated allegation that at least thirty (30) former detainees have “returned to the battlefield” in favor of the far less sensational allegation that “at least 30 former GTMO detainees have taken part in *anti-coalition militant activities* after leaving U.S. detention.”¹¹

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

¹¹ Emphasis added.

The Department of Defense's retreat from "return to the battlefield" is signaled, in particular, by the Department's assertion that it is "aware of dozens of cases where they have *returned to militant activities, participated in anti-US propaganda or other activities*[".]"¹² Although the "anti-US propaganda" to which the news release refers is not militant by even the most extended meaning of the term, the Department of Defense apparently designates it as such, and is consequently able to sweep distinctly non-combatant activity under its new definition of "militant activities."

As a result, the Uighurs in Albania and "The Tipton Three,"—who, upon release from Guantánamo, have publicly criticized the way they were treated at the hands of the United States—are deemed to have participated in "anti-coalition militant activities" despite having neither "returned to a battlefield" nor committed any hostile acts whatsoever. "The Tipton Three" have been living in their native England since their release. The Uighurs remained in an Albanian refugee camp until relatively recently; they now have been resettled in apartments in Tirana—except for one, who lives with his sister in Sweden and has applied for permanent refugee status. Despite having been neither re-captured nor killed, these eight (8) individuals are swept under the banner of former Guantánamo detainees who have "returned to the fight."

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

B. The Department of Defense (1) Identifies "Recidivists" Who Have Never Been Identified as Guantánamo Detainees, and (2) Admits That It Does Not Keep Track of Former Detainees.

On April 19, 2006, the Government published the names of the 558 detainees for whom CSRT proceedings had been convened at Guantánamo.¹³ On May 15, 2006, the Government published a second list of 759 names representing every individual ever detained at Guantánamo.¹⁴ Additionally, the Government has released transcripts and other documents related to Administrative Review Board hearings, which also contain detainee names.¹⁵ Contained in these three sets of records are more than 900 different names. The full CSRT returns, among other Government documents, increase the number of different names to more than 1000. This abundance of names does not discredit the Government's assertion that only 759 detainees have passed through Guantánamo "between January 2002 and May 15, 2006"¹⁶—but it does demonstrate the difficulty the Government has had in identifying the detainees by name.

¹² Emphasis added.

¹³ Available at: http://www.defenselink.mil/pubs/foi/detainees/detainee_list.pdf.

¹⁴ Available at: <http://www.defenselink.mil/pubs/foi/detainees/detaineesFOIArelease15May2006.pdf>.

¹⁵ Procedures provide that, for each prisoner determined to be an "Enemy Combatant," a yearly Administration Review Board (ARB) must be convened.

¹⁶ This is the language used to describe the list of 759 detainee produced by the Government on May 15, 2006.

The Government's identification problems have created difficulties for the detainees, as well. One detainee, Mohammed Al Harbi—who remains at Guantánamo Bay—objected to the allegation that his name was found “on a document.” The detainee stated:

There are several tribes in Saudi Arabia and one of these tribes is Al Harbi. This is part of my names [sic] and there are literally millions that share Al Harbi as part of their name. Further, my first names Mohammad and Atiq are names that are favored in that region. Just knowing someone has the name Al Harbi tells you where they came from in Saudi Arabia. Where I live, it is not uncommon to be in a group of 8-10 people and 1 or 2 of them will be named Mohammed Al Harbi. In fact, I know of 2 Mohammed Al Harbis here in Guantánamo Bay and one of them is in Camp 4. The fact that this name is recovered on a document is literally meaningless.¹⁷

The detainee's concern illustrates one of the difficulties in deciphering the Department of Defense's July 2007 news release. The release identifies seven (7) individuals by name, but does not identify a single detainee by his Internment Serial Number (“ISN”), despite that doing so would have simplified the identification process, as well as made the Government's representations more readily verifiable.¹⁸

Compounding the confusion surrounding the identification process is the Government's curious admission that it does “not generally track ex-GTMO detainees after repatriation or resettlement[.]” It is unclear how the Government is able to identify Guantánamo recidivists if it does not keep itself apprised of ex-detainee whereabouts. Furthermore, it seems counterintuitive that the Government would elect not to keep track of former detainees, given its continuing insistence that more than thirty former detainees have “returned to the fight.”

In any event, none of the available information regarding the detainees supports the claim of the news release that any of three individuals identified by the Department of Defense as having “returned to the fight”—Abdul Rahman Noor, Abdullah Mehsud and Maulavi Abdul Ghaffar—have ever been identified as having been detained at Guantánamo.

¹⁷ Mohammad Atiq Al Harbi, ISN 333, goes on to state that there are documents available to the United States that will prove that his classification as an enemy combatant is wrong. He also objects to anonymous secret evidence: “It is important you find the notes on my visa and passport because they show I was there for 8 days and could not have been expected to go to Afghanistan and engage in hostilities against anyone. . . . I understand you cannot tell me who said this, but I ask that you look at this individual very closely because his story is false. If you ask this person the right question, you will see that very quickly. I am trusting you to do this for me.”

¹⁸ Identifying former detainee by ISN is significantly more helpful than by name. The Department of Defense has a demonstrated inability to clearly identify prisoners by name. A potential criticism regarding the Government's “return to the battlefield” statements is that, if a former detainee had in fact been recaptured or killed on the battlefield, then the Government should be able to specifically identify that former detainee by his ISN.

C. The Department of Defense Identifies Fifteen (15) Alleged Recidivists; Each of These Identifications is Problematic.

“Return to the Fight” vs. “Return to the Battlefield”

Recent statements by Department of Defense officials have attempted to reframe prior statements, including the statement made by Daniel J. Dell’Orto, Deputy Counsel of the Department of Defense, before the Senate Arms Committee in April 2007.¹⁹ While Mr. Dell’Orto had claimed that thirty former detainees had been captured or killed “on the battlefield,” two Defense Department statements—both made on May 9, 2007—attempted to reframe the language of this prior statement, and provided instead that the same number of ex-detainees had “returned to the fight.”²⁰ As the substance of the July 2007 news release reveals, this term is distinguishable from “captured or killed on the battlefield,” but these two terms, among others, are significantly conflated by the Department of Defense in its public statements. Neither Tipton, England, nor an Albanian refugee camp fall within the typical definition of battlefield—but both must fall within the definition upon which the Department of Defense relies, for the Department to arrive at its claim that thirty (30) former detainees have returned to the battlefield.

The phrase “returned to the fight” implies a taking up of arms, or some other act of overt aggression, but the Department of Defense concludes in its July 2007 news release that fifteen (15) detainees have “returned to the fight”—but fails to justify its conclusion with any indication that a majority of these fifteen (15) have participated in any “fight” besides appearing in a film or writing an opinion piece for the New York Times.

The “Tipton Three”

The “Tipton Three”—Shafiq Rasul, Asif Iqbal and Ruhel Ahmed—are three childhood friends from England who became the first English-speaking detainees released from Guantánamo after they had been imprisoned without charges for more than two years.²¹ Since their release in 2004, the young men have been living freely in their native Britain, and have not been charged with any crime. They have, however, been vocal regarding what they perceive to be the injustices suffered by them during their detention.

In 2006, the “Tipton Three” recounted their Guantánamo experiences for Michael Winterbottom’s commercial film, *The Road to Guantánamo*, which has been shown at major film festivals including Berlin and Tribeca.²² The film features interviews with the men, as well as dramatic re-enactments of them being bound in “stress” positions for hours and forced to listen to painfully loud music.²³

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.roadtoguantanamo.com/reviews/nytimes/nyt_01.html.

²³ *Supra* note 21.

The men's contributions to the film are not "militant" in nature, and cannot constitute a return to the battlefield. The "Tipton Three" have participated neither in "battle" or "fighting" of any kind; nor do they fall in the category of having been "re-captured" or "killed." For the Department of Defense, however, the men's participation in *The Road to Guantánamo*—in the absence of any other allegations—is apparently enough to justify their inclusion among the "at least 30 former GTMO detainees [who] have taken part in anti-coalition militant activities after leaving U.S. detention."²⁴

The Uighurs

Five Uighurs—ethnic Chinese who practice Islam—were extradited in May 2006 from Guantánamo Bay to Albania, where they were taken in as refugees.²⁵ Following three years of incarceration at Guantánamo, the five men were released to the same refugee camp in Tirana, Albania. A May 5, 2006 certification by Samuel M. Whitten, a representative of the Department of State, certified that these men had been transferred "to Albania for resettlement there as refugees."²⁶ Mr. Whitten noted that "[a]s applicants for refugee status, [the men] are free to travel around Albania, and once refugee status has been granted will be free to apply for travel documents permitting overseas travel." According to the camp director, Hidajet Cera, "They are the best guys in the place. They have never given us one minute's problem."²⁷ Since that time, four have since been resettled in apartments in Tirana, and one has joined his sister in Sweden, where he has applied for permanent refugee status.

The Department of Defense has never recanted its assertion that the Uighurs had been improperly classified as "enemy combatants," but it has not accused the Uighurs of any wrongdoing since their release. They have been neither "re-captured" nor "killed."

Most likely, the Department of Defense categorizes as "anti-coalition militant activity" an opinion piece, written by one of the Uighur men and published in the New York Times, which urged American lawmakers to protect habeas corpus.²⁸ This would at least be consistent with the Department of Defense's apparent inclusion of speech—if critical of the United States Government—as "anti-coalition militant activity."

²⁴ *Supra* note 10.

²⁵ *Id.*

²⁶ Emergency Motion to Dismiss as Moot, Abu Bakkar Qassim et. al. v. George W. Bush, et. al., Filed May 5, 2006 in the U.S. Court of Appeals for the District of Columbia.

²⁷ Jonathan Finer, "After Guantanamo, An Empty Freedom" Washington Post Foreign Service. October 17, 2007. Page A13. Retrieved November 26, 2007 at <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/16/AR2007101602078.html>.

²⁸ Abu Bakker Qassim. "The View From Guantánamo" New York Times. September 17, 2006. Retrieved November 26, 2007 at http://www.nytimes.com/2006/09/17/opinion/17qassim.html?_r=2&oref=slogin&oref=slogin.

Mullah Shazada

According to the Department of Defense, Mullah Shazada “was killed on May 7, 2004 while fighting against U.S. forces.”²⁹ The name Mullah Shazada does not appear on the official list of Guantánamo detainees;³⁰ however, after Mullah Shazada’s death, the Government announced that he had been previously detained in Guantánamo under the name “Mohamed Yusif Yaqub.”³¹ There is a “Mohammed Yusif Yaqub” listed as being detained in Guantánamo, but he was released before Combatant Status Review Tribunals were convened. Thus, his name appears only on the government’s list of 759 detainees that were detained in Guantánamo.³² That list indicates an individual named “Mohammed Yusif Yaqub,” but the detainee is one of seven (7) Afghan detainees for whom a date of birth is “unknown.”³³ The authors of this report extend the benefit of the doubt to the Government, however, and assume that these two names refer to one individual who was in fact previously detained in Guantánamo.

Abdullah Mehsud

Abdullah Mehsud committed suicide during a raid by Pakistani authorities in what the Department of Defense characterizes as a “suicide bombing.”³⁴ (No one but Mehsud was harmed in this episode.)³⁵ The name “Abdullah Mehsud” does not appear in the official list of detainees³⁶; neither does the name “Noor Alam”—another name that has been associated with Abdullah Mehsud³⁷—appear on the list. According to the Government, Abdullah Mehsud was released from Guantánamo in March 2004, before Combatant Status Review Tribunals were convened.

Maulavi Abdul Ghaffar

Maulavi Abdul Ghaffar was reportedly “captured in early 2002 and held at GTMO for eight months.”³⁸ He was “killed in a raid by Afghan security forces” in September 2004.³⁹ The name “Maulavi Abdul Ghaffar” does not appear on the list of detainees. Two detainees with

²⁹ *Supra* note 10.

³⁰ *Supra* note 14.

³¹ *Supra* note 10.

³² *Supra* note 14.

³³ *Id.*

³⁴ *Supra* note 10.

³⁵ “Pakistani Militant Blows Self Up To Avoid Arrest” Associated Press. July 24, 2007. Retrieved November 26, 2007 at <http://www.msnbc.msn.com/id/19923800/>.

³⁶ Although not a very close match to “Abdullah Mehsud,” the government does list one “Sharaf Ahmad Muhammad Masud” (ISN 170) as a detainee in Guantánamo. This detainee, however, cannot be the individual to which the government refers, as he had both a Combatant Status Review Tribunal and Administrative Review Board hearings. These hearings occurred significantly after the March 2004 release claimed by the Department of Defense.

³⁷ “Profile: Abdullah Mehsud” BBC, October 15, 2004. Retrieved November 26, 2007 at http://news.bbc.co.uk/2/hi/south_asia/3745962.stm.

³⁸ *Supra* note 10.

³⁹ *Supra* note 10. Both “Abdul Ghafour,” ISN 954, and “Abdul Ghafaar,” ISN 1032, had Combatant Status Review Tribunal and Administrative Review Board hearings. These hearings occurred significantly after the September 2004 death claimed by the Department of Defense.

similar names were still imprisoned when Ghaffar was allegedly killed.⁴⁰ One other detainee with a similar name was still in Guantánamo until at least March 1, 2004—more than a year after the government alleges Maulavi Abdul Ghaffar was released.⁴¹

Mohammed Ismail

The Department of Defense accuses this individual of “participating” in an attack against United States forces “near Kandahar,” and alleges that at the time of his re-capture, he was carrying “a letter confirming his status as a Taliban member in good standing.”⁴²

The name “Mohammed Ismail” does appear on the official list of Guantánamo detainees. However, there is a discrepancy as to the date of birth. News sources consistently pinpoint Mohammed Ismail’s age at approximately thirteen (13) at the time of his initial capture, and fifteen (15) at the time of release in 2004.⁴³ However, the Department of Defense lists Mohammed Ismail’s year of birth as 1984, which would make him several years older.⁴⁴ Despite this discrepancy,⁴⁵ the authors of this report extend the benefit of the doubt to the Government, and assume that this individual was in fact formerly detained at Guantánamo.

Abdul Rahman Noor

The name “Abdul Rahman Noor” does not appear in either of the official lists of prisoners that the Department of Defense was ordered to release in 2006.⁴⁶ However, a similar name, “Abdul Rahman Noorani,” does appear. It is possible that these two names refer to the same individual, but (a) “Abdul” and “Rahman” are very commonplace names in the region, and (b) the Department of Defense does not indicate that these two names refer to the same person, whereas it did so indicate with respect to another alleged recidivist with an alias, “Mullah Shazada.” It would seem that the Department of Defense would have indicated whether the alleged recidivist was listed under a different name; in this case it did not. Thus, one cannot conclude that “Abdul Rahman Noor” was ever officially detained in Guantánamo. According to the Government, this individual was released in July 2003, before Combatant Status Review Tribunals were convened. The Department of Defense claims to have identified Abdul Rahman Noor “fighting against U.S. forces near Kandahar,” but he apparently has neither been captured nor killed.⁴⁷

⁴⁰ *Supra* note 14.

⁴¹ “Abdullah Ghofoor,” ISN 351, was listed as being in Guantánamo as of March 1, 2004 in documents released by the Department of Defense.

⁴² *Supra* note 10.

⁴³ *See*, for example, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/02/08/wguan08.xml>.

⁴⁴ *Supra* note 14.

⁴⁵ The discrepancy is also noted at by the anti- death penalty organization, Reprieve. Retrieved December 3, 2007 at <http://ejp.icj.org/IMG/AppendixK.pdf>.

⁴⁶ *Supra* note 14.

⁴⁷ *Supra* note 10.

Mohammed Nayim Farouq

According to the Department of Defense, Mohammed Nayim Farouq—who was released from Guantánamo in July 2003, before Combatant Status Review Tribunals were convened—“has since become re-involved in anti-Coalition militant activity,” but has neither been re-captured nor killed.⁴⁸

Ruslan Odizhev

Ruslan Odizhev, a Russian, reportedly was killed in an apartment complex by Russia’s Federal Security Service in June 2007.⁴⁹ The Service did not specify why it was trying to detain him.⁵⁰ The name “Ruslan Odizhev” does not appear in the official lists of prisoners the Department of Defense was ordered to release in 2006, but “Ruslan Anatolovich 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 Guantánamo⁵¹—three (3) detainees, or less than one percent (1%), have subsequently returned to the battlefield to be captured or killed. Two (2) other detainees (Abdul Rahman Noor and Mohammed Nayim Farouq), while not re-captured or killed, are claimed to be engaged in military activities, although the information provided by the Government in this regard cannot be cross-checked.

⁴⁸ Id.

⁴⁹ “Russian Agents Kill Ex-Gitmo Detainee” CBS News. June 27, 2007. Retrieved November 26, 2007 at <http://www.cbsnews.com/stories/2007/06/27/world/printable2987393.shtml>.

⁵⁰ Id.

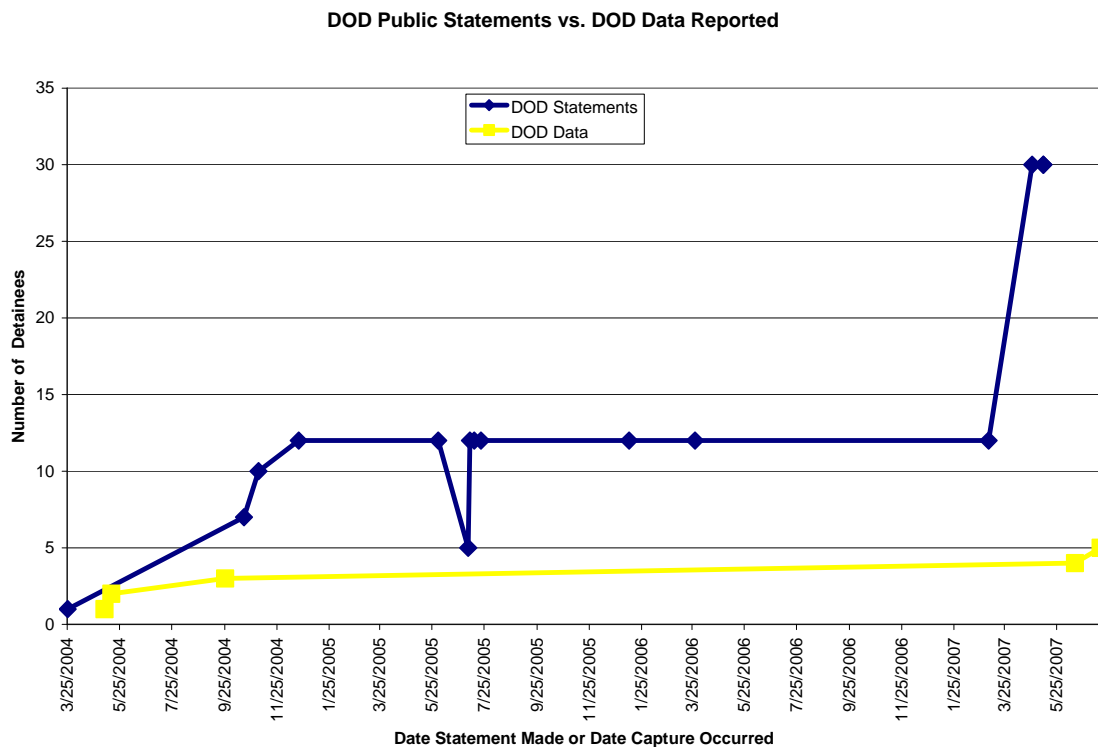
⁵¹ “Detainee Transfer Announced,” Department of Defense (September 29, 2007), Retrieved on December 8, 2007 at <http://www.defenselink.mil/releases/release.aspx?releaseid=11368>.

D. Statements Made Publicly by the Department of Defense and Other Government Officials Do Not Reflect the Department of Defense's Own Data.

The Department of Defense has made at least twelve (12) different statements as to the number of released Guantánamo detainees who have returned to the battlefield to be captured or killed. The range of numbers proffered by the Defense Department is similar to the range of numbers given by other Government departments.

The Department of Defense's statements about the number of recidivists who returned to militant activities and were killed or captured on the battlefield consistently ranges from between ten (10) and twelve (12) from November 2004 to March of 2007. (See graph below.) In March 2007, a total of twelve (12) recidivists were "confirmed" by the Department of Defense, but it was suggested by the Government that "another dozen have returned to the fight." By April, the number cited by the Department of Defense was thirty (30). No explanation has been offered for this precipitous increase in the cited numbers.

The line graph below represents each instance that a Department of Defense official stated a specific number (or range of numbers) of Guantánamo recidivists, as well as the date when the statement was made. A second line on the graph represents the number of ex-detainees claimed to have been killed or captured on the battlefield by the July 12, 2007 Department of Defense news release.



The July 2007 news release issued by the Department of Defense contradicted all of the claims that had been made by Government officials—including Department of Defense officials—that any more than three (3) former detainees could have been killed or captured on a battlefield after being released from Guantánamo. The Department of Defense, in its release, identifies seven (7) individuals by name, but: as many as three (3) of those seven (7) named were never in Guantánamo according to the Department of Defense’s official list of detainees; two (2) of the remaining four (4) have neither been killed captured; and of the three (3) who remain, one (1) was killed in his apartment complex in Russia by local authorities—*after* Daniel J. Dell’Orto, the Deputy General Counsel of Department of Defense, testified before Congress in April 2007.

The July 2007 news release indicates that every single statement made publicly by the Department of Defense as to the number of Guantánamo recidivists was erroneously inflated—including the Deputy General Counsel’s claim to the Senate Armed Services Committee on April 26, 2007 that: “[I]t’s a combination of 30 we believe have either been captured or killed on the battlefield, so some of them have actually died on the battlefield.” Mr. Dell’Orto did not identify the thirty (30) “returnees” by name or ISN, but the Department of Defense’s subsequent news release makes clear that that his representation was incorrect.

The July 2007 news release claimed that five (5) former detainees were captured or killed on the battlefield: two (2) in May 2004; one (1) in September 2004; one (1) in October 2004; and one (1) in June 2007 (although not all of the named individuals appear of the Government’s official list of former detainees). Thus, any time prior to June 2007 that a Department of Defense spokesperson or any other Government official represented that more than four (4) former detainees had been killed or captured on a battlefield, that representation was false. Any public representations made after June 2007, asserting that more than five (5) former detainees had been killed or captured on a battlefield, were likewise false.

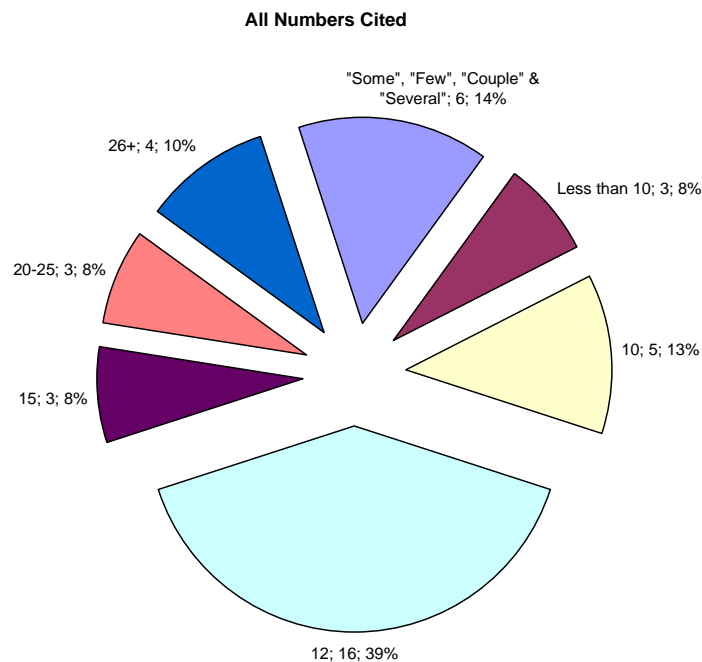
Such incorrect representations include not only statements made by Mr. Dell’Orto to the Senate Armed Services Committee, but also statements made by former Secretary of Defense Donald Rumsfeld, who stated on January 10, 2006 that twelve (12) detainees who had been released from Guantánamo had returned to the battlefield and had been re-captured by United States forces.

Officials from all branches of the Government have made similar pronouncements, perhaps in reliance upon the Department of Defense’s public statements. For instance, on March 7, 2006 former Attorney General Alberto R. Gonzales stated that “Unfortunately, despite assurances from those released, the Department of Defense reports that at least 15 have returned to the fight and been captured or killed on the battlefield.” Members of both the House and Senate have made similarly incorrect claims—understandably, given the Department of Defense’s testimony to Senate and Congressional committees from 2004 throughout the first half of 2007.

III.

When Government Officials Describe the Number of Detainees that have Returned to the Battlefield, they Generally do so with Equivocating Terms.

More than forty (40) Government officials have characterized the number of detainees who have returned to the battlefield and thereafter been killed or captured. The cited numbers of recidivists ranges from one (1) to thirty (30), and are not always consistent with one another. More than forty (40) times, Government officials have stated that detainees have returned to the battlefield only to be killed or recaptured, but almost none of the Government officials have described the alleged recidivists.



Furthermore, the Government's statements as to the total of recidivist ex-detainees are almost always hedged with qualifications. For instance, on June 20, 2005, Scott McClellan—then the White House Press Secretary—stated the following:

*I think that our belief is that about a dozen or so detainees that have been released from Guantánamo Bay have actually returned to the battlefield, and we've either recaptured them or otherwise dealt with them, namely killing them on the battlefield when they were again attacking our forces.*⁵²

Former Secretary McClellan's short statement limited the number of "recidivists" by *four* qualifying terms. This was the predominate approach, as it turns out, for eighty-two percent

⁵² Emphasis added. See Appendix for complete timeline of quotes.

(82%) of the publicly made claims catalogued in Appendix I of this report contain qualifying language, including terms such as: “at least”,⁵³ “somewhere on the order of”,⁵⁴ “approximately”,⁵⁵ “around”,⁵⁶ “just short of”,⁵⁷ “we believe”,⁵⁸ “estimated”,⁵⁹ “roughly”,⁶⁰ “more than”,⁶¹ “a couple”,⁶² and “about.”⁶³ Seven (7) times, officials declined to identify the number of recidivist detainees, relying instead on such terms as “some,”⁶⁴ “a few”⁶⁵ or “several.”⁶⁶

Whether Government officials have given exact numbers, numerical ranges, or vague approximations, however, it is evident that the totals given—ranging from “one”⁶⁷ to “at least thirty (30)”⁶⁸—vary widely. Further, while it would be natural for the numbers to change over time, it is surprising that high level Government officials would not know the precise number of recidivists at a given time.

⁵³ H.R. Comm. on Armed Services, *Guantanamo Bay*, Statement of Patrick F. Philbin Associate Deputy Attorney U.S. Department of Justice, 110th Cong. (Mar. 29, 2007).

⁵⁴ H.R. Subcomm. on Def. of the Comm. On Appropriations, *Rep. John P. Murtha Holds a Hearing on the Military Detention Center at Guantanamo Bay, Cuba*, 110th Cong. (May, 9, 2007).

⁵⁵ *Id.*

⁵⁶ Sen. Comm. on Armed Services, *To Receive Testimony on Legislative Issues Regarding Individuals Detained by the Department of Defense as Unlawful Enemy Combatants*, 110th Cong. 108 (Apr.26, 2007).

⁵⁷ *Id.*

⁵⁸ Sen. Comm. on Armed Services, *U.S. Senator John W. Warner (R-VA) Holds a Hearing on Guantanamo Bay Detainee Treatment*, 110th Cong. (July 13, 2005).

⁵⁹ Sen. Comm. on the Judiciary, *U.S. Senator Arlen Specter (R-PA) Holds a Hearing on the Detainee Trials*, 110th Cong. (Aug. 2, 2006).

⁶⁰ Vince Crawley, *Releasing Guantanamo Detainees Would Endanger World, U.S. Says; State Department legal adviser discusses human-rights concerns in webchat*, <http://usinfo.state.gov/dhr/Archive/2006/May/26-543698.html> (May 25, 2006).

⁶¹ George W. Bush, *Remarks on the War on Terror*, Sept. 11, 2006 Pub. Papers.

⁶² John D. Banusiewicz, *Rice Responds to Call for Guantanamo Detention Facility's Closing*, <http://www.defenselink.mil/news/newsarticle.aspx?id=15706> (May, 21 2006).

⁶³ U.S. Dept. of Def., *Defense Department Special Briefing on Administrative Review Boards for Detainees at Guantanamo Bay, Cuba*, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3171> (July 8, 2005).

⁶⁴ Donna Miles, *Bush: Guantanamo Detainees Receiving Humane Treatment*, <http://www.defenselink.mil/news/newsarticle.aspx?id=16359> (June 20, 2005).

⁶⁵ U.S. Dept. of St., *Press Gaggle with Scott McClellan and Faryar Shirzad, Aboard Air Force One En Route Prestwick, Scotland*, <http://www.state.gov/p/eur/rls/rm/49002.htm> (July 6, 2005).

⁶⁶ U.S. Dept. of St., *Guantanamo Detainees*, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2004&m=March&x=20040316162613maduobba0.2819483> (Mar. 16, 2004).

⁶⁷ Donald H. Rumsfeld, then-Secretary of Defense, U.S. Dept. of Def., *Defense Department Operational Briefing*, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2366> (Mar. 25, 2004).

⁶⁸ “Former Guantanamo Detainees Who Have Returned to the Fight” Department of Defense News Release, July 12, 2007. Retrieved November 26, 2007 at <http://www.defenselink.mil/news/d20070712formergtmo.pdf>.

CONCLUSION

The Department of Defense has failed to provide information indicating that any more than five (5) former Guantánamo detainees have been re-captured or killed. Even among these five (5), two (2) of the individuals' names do not appear on the list of individuals who have at any time been detained at Guantánamo, and the remaining three (3) include one (1) individual who was killed in an apartment complex in Russia by local authorities and one (1) who is not listed among former Guantánamo detainees but who, after his death, has been alleged to have been detained under a different name.

Publicly cited numbers other than those listed above are highly suspect and inconsistent with the information provided by the Department of Defense.

APPENDIX 1

GUANTÁNAMO BAY DETAINEES ALLEGEDLY RELEASED AND SUBSEQUENTLY RE-CAPTURED OR KILLED IN COMBAT AGAINST THE UNITED STATES

TIME LINE OF NUMBERS CITED PUBLICLY BY GOVERNMENT OFFICIALS:

DATE:	NUMBER CITED:	GOV. OFFICIAL:	QUOTE:	*CITE
May 09, 2007	*Approx. 30	Joseph A. Benkert , Principal Deputy Assistant Secretary of Def. for Global Affairs	“Reporting to us has led the department to believe that somewhere on the order of 30 individuals whom we have released from Guantánamo have rejoined the fight against us”	1
May 09, 2007	*Approx. 30	Rear Admiral Harry B. Harris Jr. (USN), Commander, Joint Task Force Guantánamo	“Of those detainees transferred or released, we believe approximately 30 have returned to the fight.”	2
Apr. 26, 2007	*Approx. 30	Daniel J. Dell’Orto , Principal Deputy General Counsel Dept. of Def.	“The General number is around – just short of 30, I think ” “It’s a combination of 30 we believe have either been captured or killed on the battlefield, so some of them have actually died on the battlefield.”	3
Apr. 17, 2007	24	Michael F. Scheuer , Former Chief, Bin Laden Unit, C.I.A.	“But the rub comes with the release, and that is where we are going to eventually have to come down and sit down and do some hard talking, as the Europeans said, because we have had already two dozen of these people come back from Guantánamo Bay and either be killed in action against us or recaptured.”	4
Mar. 29, 2007	**At Least 29	Patrick F. Philbin , Associate Deputy Attorney, U.S. Dept. of Justice	“The danger that these detainees potentially pose is quite real, as has been demonstrated by the fact that to date at least 29 detainees released from Guantánamo re-engaged in terrorist	5

			activities, some by rejoining hostilities in Afghanistan where they were either killed or captured on the battlefield.”	
Mar. 08, 2007	12	Senator Lindsey Graham (SC)	“ Twelve of the people released have gone back to the fight, have gone back to trying to kill Americans and civilians.”	6
Mar. 06, 2007	**At Least 12-24	Sr. Defense Official	“I can tell you that we have confirmed 12 individuals have returned to the fight, and we have strong evidence that about another dozen have returned to the fight.”	7
Nov. 20, 2006	**At Least 12	Alberto R. Gonzales, U.S. Atty. Gen.	“As you may know, there have been over a dozen occasions where a detainee was released but then returned to fight against the United States and our allies again.”	8
Sept. 27, 2006	**At Least 10	Senator Jon Kyl (AZ)	“According to an October 22, 2004 story in the Washington Post, at least 10 detainees released from Guantánamo have been recaptured or killed fighting U.S. or coalition forces in Afghanistan or Pakistan.”	9
Sept. 06, 2006	**At Least 12	President George W. Bush	“Other countries have not provided adequate assurances that their nationals will not be mistreated or they will not return to the battlefield, as more than a dozen people released from Guantánamo already have.”	10
Aug. 02, 2006	*Approx. 25	Senator Arlen Specter (PA)	“as you know, we have several hundred detainees in Guantánamo. A number estimated as high as 25 have been released and returned to the battlefield, so that's not a desirable thing to happen.”	11
July 19, 2006	**At Least 10	Senator James M. Inhofe	“ At least 10 detainees we have documented that were released in Guantánamo, after U.S. officials concluded that they posed no real threat or no significant threat, have been recaptured or killed by the U.S. fighting and coalition forces, mostly in Afghanistan.”	12

June 20, 2006	15	Senator Jeff Sessions (AL)	“They have released several hundred already, and 15 of those have been rearrested on the battlefield where they are presumably attempting to fight the United States of America and our soldiers and our allies around the world.”	13
June 20, 2006	*Approx. 12	Senator Lindsey Graham (SC)	“ About a dozen of them have gone back to the fight, unfortunately. So there have been mistakes at Guantánamo Bay by putting people in prison that were not properly classified.”	14
May 25, 2006	*Approx. 10% of “hundreds”	John B. Bellinger III , Senior Legal Adviser to Sec. of St. Condoleezza Rice.	“ Roughly 10 percent of the hundreds of individuals who have been released from Guantánamo ‘have returned to fighting us in Afghanistan,’ Bellinger said.”	15
May 21, 2006	“ a couple ”	Condoleezza Rice , U.S. Sec. of St.	“because the day that we are facing them again on the battlefield -- and, by the way, that has happened in a couple of cases that people were released from Guantánamo.”	16
Mar. 28, 2006	*Approx. 12	U.S. Dept. of Def.	“ Approximately a dozen of the more than 230 detainees who have been released or transferred since detainee operations started at Guantánamo are known to have returned to the battlefield.”	17

Mar. 07, 2006	**At Least 15	Alberto R. Gonzales , U.S. Atty. Gen.	“Unfortunately, despite assurances from those released, the Department of Defense reports that at least 15 have returned to the fight and been recaptured or killed on the battlefield.”	18
Feb.14, 2006	*Approx. 15	U.S. Embassy in Tirana – Albania	“Unfortunately, of those already released from Guantánamo Bay, approximately fifteen have returned to acts of terror and been recaptured.”	19
Jan. 10, 2006	12	Donald H. Rumsfeld , Defense Secretary	Twelve detainees who'd been released from Guantánamo had returned to the battlefield and had been re-captured by U.S. forces	20

July 21, 2005	*Approx. 12	Matthew Waxman , Dep. Ass. Sec. of Def. for detainee affairs	About a dozen individuals who were released previously, he said, returned to the battlefield “and tried to harm us again.”	21
July 13, 2005	*Approx. 12	Gen. Bantz Craddock , Commander, U.S. Southern Command	“ We believe the number's 12 right now -- confirmed 12 either recaptured or killed on the battlefield.”	22
July 08, 2005	*Approx. 12	Rear Adm. James McGarrah	“ About a dozen of the 234 that have been released since detainee operations started in Gitmo we know have returned to the battlefield -- about a dozen. ”	23
July 06, 2005	“ a few ”	Scott McClellan , White House Press Sec.	“I mean, the President talked about how these are dangerous individuals; they are at Guantánamo Bay for a reason -- they were picked up on the battlefield. And we've returned a number of those, some 200-plus, we've returned a number of those enemy combatants to their country of origin. Some of -- a few of them have actually been picked up again fighting us on the battlefield in the war on terrorism.”	24
July 06, 2005	**At Least 5	Anonymous Defense Official	“‘ At least five detainees released from Guantánamo have returned to the (Afghan) battlefield,’ said the defense official, who requested anonymity.”	25
June 27, 2005	12	Senator Jim Bunning , (KY)	“I could describe many individuals held at Guantánamo and give reasons they need to remain in our custody, but I only will mention a few more _12, to be exact. That is the number of those we know who have been released from Guantánamo and returned to fight against the coalition troops.”	26
June 20, 2005	*Approx. 12	Scott McClellan , White House Press Sec.	“ I think that our belief is that about a dozen or so detainees that have been released from Guantánamo Bay have actually returned to the battlefield, and we've either recaptured them or otherwise dealt with them, namely killing them on the battlefield when they	27

			were again attacking our forces.”	
June 20, 2005	“some”	President George W. Bush	The president was quick to point out that many of the detainees being held "are dangerous people" who pose a threat to U.S. security. Some of those who have been released have already returned to the battlefield to fight U.S. and coalition troops, he said.	28
June 17, 2005	*Approx. 10	Vice President Dick Cheney	“ In some cases, about 10 cases , some of them have then gone back into the battle against our guys. We've had two or three that I know of specifically by name that ended up back on the battlefield in Afghanistan where they were killed by U.S. or Afghan forces.”	29
June 16, 2005	12	Congressman Bill Shuster (PA)	“In fact, about two-hundred of these detainees have been released and it's been proven that twelve have already returned to the fight.”	30
June 14, 2005	**At Least 10	Vice President Dick Cheney	He provided new details about what he said had been at least 10 released detainees who later turned up on battlefields to try to kill American troops.	31
June 13, 2005	**At Least 12	Scott McClellan, White House Press Sec.	“There have been -- and Secretary Rumsfeld talked about this recently -- at least a dozen or so individuals that were released from Guantánamo Bay, and they have since been caught and picked up on the battlefield seeking to kidnap or kill Americans.”	32
June 06, 2005	“some”	Air Force Gen. Richard B. Myers	“We've released 248 detainees, some of whom have come back to the battlefield, some of whom have killed Americans after they have been released.”	33
June 01, 2005	**At Least 12	Donald H. Rumsfeld, Defense Secretary	“ At least a dozen of the 200 already released from GITMO have already been caught back on the battlefield, involved in efforts to kidnap and kill Americans.”	34

Dec. 20, 2004	**At Least 12	Gordon England , Secretary of The Navy	“And as you are aware, there's been at least 12 of the more than 200 detainees that have been previously released or transferred from Guantánamo that have indeed returned to terrorism.”	35
Nov. 03, 2004	**At Least 10	Charles Douglas "Cully" Stimson , Dep. Ass. Sec. of Def. for Detainee Affairs	Of the roughly 200 detainees the United States has released from its Guantánamo Bay, Cuba, detention facility, intelligence claims that at least 10 returned to terrorist activity, the deputy assistant secretary of defense for detainee affairs said here Nov. 2.	36
Oct. 19, 2004	“ a couple ”	Vice President Dick Cheney	“And we have had a couple of instances where people that were released, that were believed not to be dangerous have, in fact, found their way back onto the battlefield in the Middle East.”	37
Oct. 17, 2004	**At Least 7	U.S. Military Officials	at least seven former prisoners of the United States at Guantánamo Bay, Cuba, have returned to terrorism, at times with deadly consequences.	38
Mar. 25, 2004	1	Donald H. Rumsfeld , Defense Secretary	“Now, have we made a mistake? Yeah. I've mentioned earlier that I do believe we made a mistake in one case and that one of the people that was released earlier may very well have gone back to being a terrorist.”	39
Mar. 16, 2004	“ several ”	Dept. of Def.	“Releases are not without risk. Even though the threat assessment process is careful and thorough, the U.S. now believes that several detainees released from Guantánamo have returned to the fight against U.S. and coalition forces.”	40

* “Approx.” indicates the specific language used was an approximation; the specific number cited was used contextually with qualifying language; *See* “QUOTE” column for actual qualifying language used within the immediate textual area of the number cited.

** “At Least” indicates that the phrase “at least” was used in connection with the number provided; the number provided is therefore a baseline, or the lowest number possible

APPENDIX 2

*CITATIONS:

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9	152 Cong. Rec. S 10270 (Sept. 27, 2006).
10	George W. Bush, <i>Remarks on the War on Terror</i> , Sept. 11, 2006 Pub. Papers.
11	Sen. Comm. On the Judiciary, <i>U.S. Senator Arlen Specter (R-PA) Holds a Hearing on the Detainee Trials</i> , 110 th Cong. (Aug. 2, 2006).
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13	U.S. Senator Jeff Sessions, <i>Senate Floor Statement of Senator Sessions: National Defense Authorization Act for Fiscal Year 2007</i> , http://sessions.senate.gov/pressapp/record.cfm?id=257513 (June 20, 2006).
14	152 Cong. Rec. S 6113 (June 20, 2006).
15	Vince Crawley, <i>Releasing Guantánamo Detainees Would Endanger World, U.S. Says State Department legal adviser discusses human-rights concerns in webchat</i> , http://usinfo.state.gov/dhr/Archive/2006/May/26-543698.html (May 25, 2006).

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17	U.S. Dept. of Def., <i>Defense Department Update, March 28, 2006 – GTMO Detainees: U.S. Navel Station Guantánamo Bay, Cuba</i> , http://www.defenselink.mil/home/dodupdate/For-the-record/documents/20060328a.html (Mar. 28, 2006).
18	U.S. Dept. of Just., <i>Prepared Remarks by Attorney General Alberto R. Gonzales at the International Institute for Strategic Studies</i> , http://www.usdoj.gov/ag/speeches/2006/ag_speech_060307.html (Mar. 7, 2006).
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21	U.S. Dept. of St., <i>United States Intent on Repatriating as Many Detainees As Possible, State Department's Prosper says release tied to risk-management issues</i> , http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2005&m=July&x=20050721153553sjhtrop0.8918726 (July 21, 2005).
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APPENDIX 3

Former Guantanamo Detainees who have returned to the fight:

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

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

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

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

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

Mohamed Yusif Yaqub AKA Mullah Shazada:

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

Abdullah Mehsud:

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

Maulavi Abdul Ghaffar:

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

Mohammed Ismail:

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

Abdul Rahman Noor:

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

Mohammed Nayim Farouq:

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

Ruslan Odizhev:

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

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

APPENDIX 4

Unclassified

Combatant Status Review Board

TO: Personal Representative

FROM: 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.

Unclassified

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Exhibit B-1

Justice Scalia, the Department of Defense, And the Perpetuation of an Urban Legend:

THE TRUTH ABOUT THE ALLEGED RECIDIVISM OF RELEASED GUANTÁNAMO DETAINEES

By

Mark Denbeaux

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Executive Summary

The defining characteristic of an “urban legend” is its ability to perpetuate itself not only without factual support but also in the face of overwhelming factual evidence to the contrary. While it is unsurprising to find urban legends kept alive in the unmoderated precincts of the internet, it is shocking to discover one depicted as truth in an opinion written by a United States Supreme Court Justice.

Just this month, however, Justice Antonin Scalia, in his dissent in *Boumediene v. Bush*, repeated the persistent yet false accusation that “[a]t least 30 of those prisoners hitherto released from Guantánamo Bay have returned to the battlefield.” His source for this misinformation was a year-old Senate Minority Report, which in turn was based on misinformation provided by the Department of Defense.

Justice Scalia’s reliance upon the these sources would be more justifiable had this urban legend not (one would have thought) been permanently interred by later developments, including a Department of Defense press release issued in 2007, as well as hearings held before the House Foreign Relations Committee less than two weeks before Justice Scalia’s dissent was released.

On December 10, 2007, the Seton Hall Center for Policy and Research issued a report entitled *The Meaning of “Battlefield”: An Analysis of the Government’s Representations of “Battlefield Capture” and “Recidivism” of the Guantánamo Detainees*, demonstrating that statements asserting that thirty former detainees had returned to the battlefield were inaccurate. Further developments, including recent hearings before Congress at which more information was provided by the Department of Defense, confirm that the claim there have been thirty recidivists is simply wrong and has no place in a reasoned public debate about Guantánamo.

This report, which relies exclusively upon the Government’s own data¹, concludes the following:

- At most twelve, not thirty, detainees can be alleged to have “returned to the fight.”
- It is by no means clear that even these twelve have been so engaged since their release.
- According to the Department of Defense’s published and unpublished data, not a single detainee was ever released by a court.
- Every released detainee was released by political appointees of the Department of Defense, sometimes over the objection of the military.
- According to the Department of Defense’s published and unpublished data and reports, not a single released Guantánamo detainee has ever attacked any Americans.
- The Department of Defense’s statements regarding recidivism are inconsistent with each other and often contradictory.

¹ The report relies upon all government data available as of June 12, 2008 which is the date *Boumediene v. Bush*, 2008 U.S. LEXIS 4887 (U.S. June 12, 2008) (Scalia, J., dissenting) was published.

- These inconsistencies may be due to the fact that, despite the importance of tracking detainee recidivism, the Department of Defense's sources of information are apparently media reports.
- Despite national security concerns, the Department of Defense does not have a system for tracking the conduct, or even the whereabouts, of released detainees.
- The only detainee who indisputably took up arms against the United States' allies was the detainee identified as ISN 220.
- ISN 220 was not released as a result of any legal process, whether a CSRT or a federal habeas proceeding. No detainee has been released as a result of either process.
- The decision to release ISN 220 was made by political officers in the Department of Defense and was contrary to the recommendations of military officers.
- The Department of Defense has never explained why ISN 220 was released, or who was responsible for that decision.
- It is at least plausible that a more transparent process would have resulted in ISN 220's continued detention.

Introduction

In the opening lines of his dissent in *Boumediene v. Bush*,² Associate Supreme Court Justice Antonin Scalia asserted that “[the Court’s decision] will almost certainly cause more Americans to be killed.”³ To buttress this argument, Justice Scalia stated: “In the short term, however, the decision is devastating. At least 30 of those prisoners hitherto released from Guantánamo Bay have returned to the battlefield.”⁴

Justice Scalia’s claim that there have been thirty recidivist detainees is belied by all reliable data. Such a statement simply repeats, without appropriate judicial analysis or skepticism towards the statements of parties before the Court, inaccurate data disseminated by the Department of Defense. Despite having been repeatedly debunked, this statement has been reflexively accepted as true by members of Congress and much of the American public. Justice Scalia is only the most recent disseminator of an urban legend that refuses to die.

Claims of Detainee Recidivism

As documented in the Center’s earlier report, *The Meaning of Battlefield*, there have been a wide variety of claims of detainee recidivism by high ranking executive branch officials, members of Congress, and members of the judiciary. However, the source of Justice Scalia’s cite to “30” recidivists is Senate Report No. 110-90, pt. 7, p. 13 (June 26, 2007), *Minority Views* of Senators Kyl, Sessions, Graham, Cornyn, and Coburn:

² *Boumediene v. Bush*, 2008 U.S. LEXIS 4887 (U.S. June 12, 2008) (Scalia, J., dissenting).

³ *Id.*

⁴ *Id.*

At least 30 detainees who have been released from the Guantanamo 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 Guantanamo detainee later attacked U.S. and allied soldiers in Afghanistan, killing three Afghan soldiers.

Another former detainee has killed an Afghan judge. One released detainee led a terrorist attack on a hotel in Pakistan, and also led a kidnapping raid that resulted in the death of a Chinese civilian. This former detainee recently told Pakistani journalists that he plans to "fight America and its allies until the very end."⁵

Minority Views cites for this information a CNN story from May 14, 2007 (Attachment A). CNN, in turn, sources the Department of Defense for its "30" statistic.

The most authoritative Department of Defense source for that number consists of testimony by Department of Defense Principal Deputy General Counsel Daniel J. Dell'Orto on April 26, 2007 before the Senate Armed Services Committee.

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.

In short, Justice Scalia's claim that there have been thirty recidivists ultimately relies upon statements made by the Department of Defense: the respondent in *Boumediene*, the case in which Scalia dissented. While it may be permissible to credit information from a litigant, especially when provided under oath as was Mr. Dell'Orto's testimony, it is certainly inappropriate to accept such statements at face value without probing further.

In fact, Mr. Dell'Orto's testimony and the *Minority Views* statement occurred almost a year before Scalia's opinion was written. During that year, two Department of Defense documents established that it was false. First, a Department of Defense press release from July 2007 belied both Mr. Dell'Orto's testimony and *Minority Views*' reliance upon it. Second, and even more definitively, a Department of Defense document produced at a House Foreign Relations Subcommittee Hearing on May 20, 2008 abandoned the claim that there have been thirty recidivists.

Department of Defense's Backpedaling: The July 2007 News Release

⁵ *Minority Views*, p. 13.

The July 2007 press release issued by the Department of Defense raised serious questions about the claims of recidivism made by the Department's own Principal Deputy General Counsel and *Minority Views*.⁶ Although it did repeat the number "30," the press release made clear that that number included not only those former detainees who could have in any sense been said to have engaged in combat against the United States or its allies but also those who returned "to militant activities, participat[ed] in anti-U.S. propaganda or other activities through intelligence gathering and media reports."⁷

In short, while both Principal Deputy General Counsel Dell'Orto and *Minority Views* publicly insisted that some thirty former Guantánamo detainees have "returned to waging war against the United States and its allies," the Department's July 2007 news release flatly contradicted this claim. Rather than naming thirty (30) supposed recidivists, the press release described at most fifteen (15) possible recidivists. Even more surprising, only seven (7) of these individuals were identified by name and were alleged to have returned to any battlefield or any combat. The other eight (8) of the fifteen (15) individuals alleged by the Government to have "returned to the fight" were accused of nothing more than speaking critically of the Government's detention policies.

As described in detail in *The Meaning of "Battlefield,"* these other "recidivists" included the Tipton Three (who recounted their Guantánamo experiences for Michael Winterbottom's commercial film, *The Road to Guantánamo*), whose speech was apparently viewed as problematic, and five (5) Uighurs who remained detained in a refugee camp in Albania but who had submitted to the New York Times an editorial that was critical of the Government's Guantánamo policies.

The July 2007 press release identified seven (7) individuals not by ISN number but by name.⁸ As *The Meaning of "Battlefield"* reported, three (3) of these seven could not be matched up with Department of Defense's lists of detainees.⁹ Subsequent information released by the

⁶ Although not widely commented upon, the release also raised serious questions about the Government's diligence in protecting national security. The release proclaimed that the Government's does "not generally track ex-GTMO detainees after repatriation or resettlement[.]"

⁷ The preamble of the release stated:

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. . . .

⁸ *The Meaning of "Battlefield"* at 3.

⁹ Abdul Rahman Noor, Abdullah Mehsud, and Maulavi Abdul Ghaffar do not appear on the Department of Defense Records on detainees. See *The Meaning of "Battlefield"* at 11-12.

Department of Defense confirmed that one of the seven had never been in Guantanamo.¹⁰ However, it provided the names and ISNs for the remaining six, who presumably had been in Guantánamo.

In any event, six recidivists comprise just a small fraction of the thirty that Justice Scalia reported almost a year later.

Justice Scalia may have been misled by *Minority Views*, which he cited as authority—despite that it did not purport to be based upon any intelligence, but merely upon press accounts—or he may have been misled by the Department of Defense’s July 2007 press release. Still, a careful reading of the latter would have made clear that it was inappropriate to cite “30” recidivists as having “returned to the battlefield.” The press release makes clear that this number can be defended, if at all, only by lumping together the handful of former detainees who actually engaged in some sort of “combat” with those who engaged in “militant activities,” “anti-U.S. propaganda,” and unspecified “other activities.”¹¹

Whether a Justice of the Supreme Court should have been so misled is another question, but developments that have occurred since the July 2007 press release render Justice Scalia’s unexamined repetition of the number “30” even less defensible.

The Department of Defense’s Position as of May 20, 2008

Whether or not it would have been appropriate for a Supreme Court justice to insist that there have been “30” recidivists after the July 2007 Department of Defense press release, it was clearly inappropriate in June 2008 for Justice Scalia to accept this claim at face value.

On May 20, 2008, the Subcommittee on International Organizations, Human Rights and Oversight of the House Foreign Affairs Committee held a hearing on this question, among others concerning Guantánamo. At that hearing, considerable skepticism was expressed about the reliability of the cited number of recidivists. The highpoint of the hearing, in this regard, was the production by the Department of Defense of a document (on plain paper, without letterhead), sent by facsimile to Congressman Dana Rohrabacher (R. Cal.). The document, which is attached as Appendix 4, references Professor Denbeaux and was provided to him after his testimony.

The May 20 document expressly distinguishes between the twelve names (together with eleven ISN numbers) it lists as having “returned to the fight” and former detainees who have merely “spoken critically of the Government’s detention policy” (quoting *The Meaning of “Battlefield”*). This constitutes an admission that the cited number “30” is incorrect.

¹⁰ The July 2007 press release included a detainee named “Abdul Rahman Noor.” *The Meaning of “Battlefield”* concluded that Mr. Noor was “never officially detained at Guantanamo.” The May 20, 2008 document apparently reached a similar conclusion, as Mr. Noor was not included in the current list of twelve (12) recidivists.

¹¹ See *The Meaning of “Battlefield”*

Six of the twelve names were listed in the July 2007 press release, and six are new. It is not clear whether the six new names represent individuals who had “returned to the fight” after July 2007, or were omitted from the July 2007 press release for some other reason.¹²

Of the twelve, five (5) are listed as “killed” (one of whom is ISN 220, a Kuwaiti national whose story is spelled out below), and one is listed as “at large.” There are five more listed as “arrested” and only one listed as “captured.” It is not clear what the distinction is, but it may indicate where the apprehension occurred—“on the battlefield” or elsewhere. The “arrested individuals” included two Moroccans, two Russians, and one Turkish national, all of whom were arrested in their home countries. There is neither information about the charges filed, nor any information that these individuals attacked or plan to attack America. Further, it is not clear that actions against Morocco, Russia, and Turkey can be fairly characterized as “return[ing] to the fight.”

In short, the May 20, 2008 Department of Defense document claimed twelve (12), not thirty (30), detainees had returned to the fight. While this represents a significant difference, it is not clear that twelve is the correct number either. As this report has developed, the information provided is too fragmentary to ensure that all twelve can fairly be described as having “returned to wage war.” Further, the history of the Department of Defense’s disclosures in this area provides no basis for confidence in its accuracy or completeness. The Center has documented at least three instances wherein the Department of Defense erred in its releases: the misidentification of one of the named individuals in the July 2007 press release (Noor); the mistake in the May 20 document as to ISN 587 (or perhaps 367); and the Department’s admission in the May 20 document that its earlier claim that there have been thirty recidivists counted individuals not fairly described as having “returned to the fight.”

¹² Although the May 20 document clarified mistakes in the July 2007 press release, the May 20 document is itself inaccurate in at least one respect. It lists the same ISN number for two different detainees. A Moroccan named “Ibrahim Bin Shakaran” is listed as ISN 587 is an Afghan named “Mohamed Yusif Yaaqoub aka Mullah Shanzada.” According to the May 20 document, the Moroccan remains alive and was arrested in Morocco; however, the May 20 document reports the individual as killed.

As *The Meaning of “Battlefield”* reports, Department of Defense records do not have record of any detainee named “Mullah Shazda,” though there is record of an ISN 367 with the name “Mohammed Yusif Yaqub.” *Id.* The May 2008 document indicates that this detainee (now numbered ISN 587) was transferred to Afghanistan in March 2003. Department of Defense records indicate, however, that ISN 367 was still in Guantánamo until at least April 17, 2003.

Accordingly, it appears that even considering the May 2008 document, the Department of Defense is unclear as to the identities of some of the twelve detainees that it claims are recidivists.

ISN	Name	On July 2007 Press Release	Disposition	Citizenship	Country of Act	Killed Americans
92	SHAH, SAID MOHAMMED ALIM	Yes	Killed	Afghanistan	Afghanistan	No
930	ISMAIL, MOHAMMED	Yes	Capture	Afghanistan	Afghanistan	No
363	GHAFOOR, SHAI JAHN	Yes	Killed	Afghanistan	Afghanistan	No
587	YAQUB, MOHAMMED YUSIF	Yes	Killed	Afghanistan	Afghanistan	No
633	FAROUQ, MOHAMMED NAYIM	Yes	At Large	Afghanistan	Afghanistan	No
211	ODIJEV, RUSLAN ANATOLIVICH	Yes	Killed	Russia	Russia	No
203	GUMAROV, RAVIL SHAFEYAVICH	No	Arrest	Russia	Russia	No
674	ISHMURAT, TIMUR RAVILICH	No	Arrest	Russia	Russia	No
297	SEN, IBRAHIM SHAFIR	No	Arrest	Turkey	Turkey	No
587	SHAKARAN, IBRAHIM BIN	No	Arrest	Morocco	Morocco	No
294	MIZOUZ, MOHAMMED	No	Arrest	Morocco	Morocco	No
220	AL AJMI, ABDALLAH SALEH AII	No	Killed	Kuwait	Iraq	No

The Political Release of ISN 220

While Justice Scalia is clearly wrong about the number of detainee recidivists, his larger point seems to be that the Government, not the courts, should be trusted with separating the sheep from the goats. However, one of the greatest ironies of the whole recidivism debate is that not a single detainee has been released as a result of habeas corpus. All of the alleged recidivists have been released by the Department of Defense, which has never explained why it released such individuals to “return to waging war.” Any assessment of the relative strengths of judicial and political processes should be made with full awareness of the story of ISN 220, who “returned to the fight” not as the result of any judicial ruling but rather because of a decision made by the political appointees at the Department of Defense who released him despite the objections of the military.

The May 20 list reports that ISN 220 was blown up in Iraq. According to press accounts, he was a suicide bomber who left a videotape describing his hostility to America and reporting on his Guantánamo experience.

Available records indicate that the U.S. military did not want ISN 220 released because it had determined that, if released, he would attempt to kill Americans.

ISN 220’s Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) records reflect that he specifically identified himself as a terrorist and even warned the Government that he would kill Americans as soon as he was released. As a result, the CSRT evaluated ISN 220 as a threat, and the ARB recommended that his detention continue. Following his ARB, however, the Department of Defense inexplicably released ISN 220.

The Combat Status Review Tribunal (CSRT) declared ISN 220 to be an enemy combatant (see Appendix 2). The Tribunal held that he was a “fighter for” the Taliban who engaged in “hostilities” against either the United States or its coalition partners. The Tribunal

based its first finding that ISN 220 was a Taliban fighter on two incidents. First, he went AWOL from the Kuwaiti military so that he could travel to Afghanistan to participate in the Jihad. Second, the Taliban issued ISN 220 an AK-47, ammunition, and hand grenades. With respect to the latter finding, the Tribunal considered allegations of five events to conclude that ISN 220 engaged in hostilities: he admitted that he fought with the Taliban in the Bagram area of Afghanistan; the Taliban placed him in a defensive position to block the Northern alliance; he spent eight months on the front line at the Aiubi Center in Afghanistan; he participated in two or three fire-fights against the Northern Alliance; and he retreated to the Tora Bora region where he was later captured while attempting to escape to Pakistan.

Less than a year after ISN 220's CSRT, the Administrative Review Board of the Department of Defense affirmed on May 11, 2005 the CSRT assessments and decided that ISN 220 should be further detained (see Appendix 3). Even with the extraordinary amount of redaction of the Review Board's report, ample evidence apparently existed for these assessments and the recommendation for continued detention.¹³ Specifically, a Government memorandum prepared for the ARB identified three factors that favored the continued detention of ISN 220: (1) he is a Taliban Fighter; (2) he participated in military operations against the coalition; and (3) he is committed to Jihad.¹⁴ Moreover, the ARB primarily relied upon two factual bases for its conclusion that ISN 220 was committed to Jihad:

1. [ISN 220] went AWOL [from the Kuwaiti military] because he wanted to participate in the jihad in Afghanistan but could not get leave from the military.¹⁵
2. In Aug 2004, [ISN 220] wanted to make sure that when the case goes before the Tribunal, they know that he is a Jihadist, an enemy combatant, *and that he will kill as many Americans as he possibly can.*

(Emphasis added).¹⁶ Furthermore, the ARB found ISN 220's behavior while he was detained to be "aggressive and non-compliant."¹⁷

While the documents that have been released strongly suggest that ISN 220 should still be detained, there are no available records indicating why he was released or who is responsible for the release. The only thing that can be said with assurance is that, Justice Scalia to the contrary notwithstanding, no federal judge is responsible. Perhaps if the process were more transparent, such a grave mistake would not have been made.

CONCLUSION

¹³ "The preponderance of the information presented to the ARB supports [REDACTED]" ISN 220.

¹⁴ Critics have challenged the government's use of the word Jihad in this context, noting that Jihad can mean many things, many of which are the opposite of criminal conduct. In this case, however, the government defines its use of Jihad.

¹⁵ ISN 220, CSRT 1452.

¹⁶ Jarrett Brachman, *et al.*, Combating Terrorism Ctr., *An Assessment of 516 Combatant Status Review Tribunal (CSRT) Unclassified Summaries* (2007).

¹⁷ ISN 220, Administrative Review Board 952.

Justice Scalia's recent perpetuation of the urban legend that there have been thirty detainee recidivists is both false and unfortunate. It neither contributes to a meaningful public debate nor reflects appropriate judicial skepticism about representations by parties before the Court. Further, as a party to *Boumediene*, the Department of Defense had a duty to the Court to correct any false impressions that its Principal Deputy Counsel had created by his testimony. The perpetuation of this particular urban legend concerning a matter of life and death does not reflect well on any of those involved.