

JANUARY 2012
HASC COMMITTEE PRINT 112-4

LEAVING GUANTANAMO

POLICIES, PRESSURES, AND DETAINEES RETURNING TO THE FIGHT



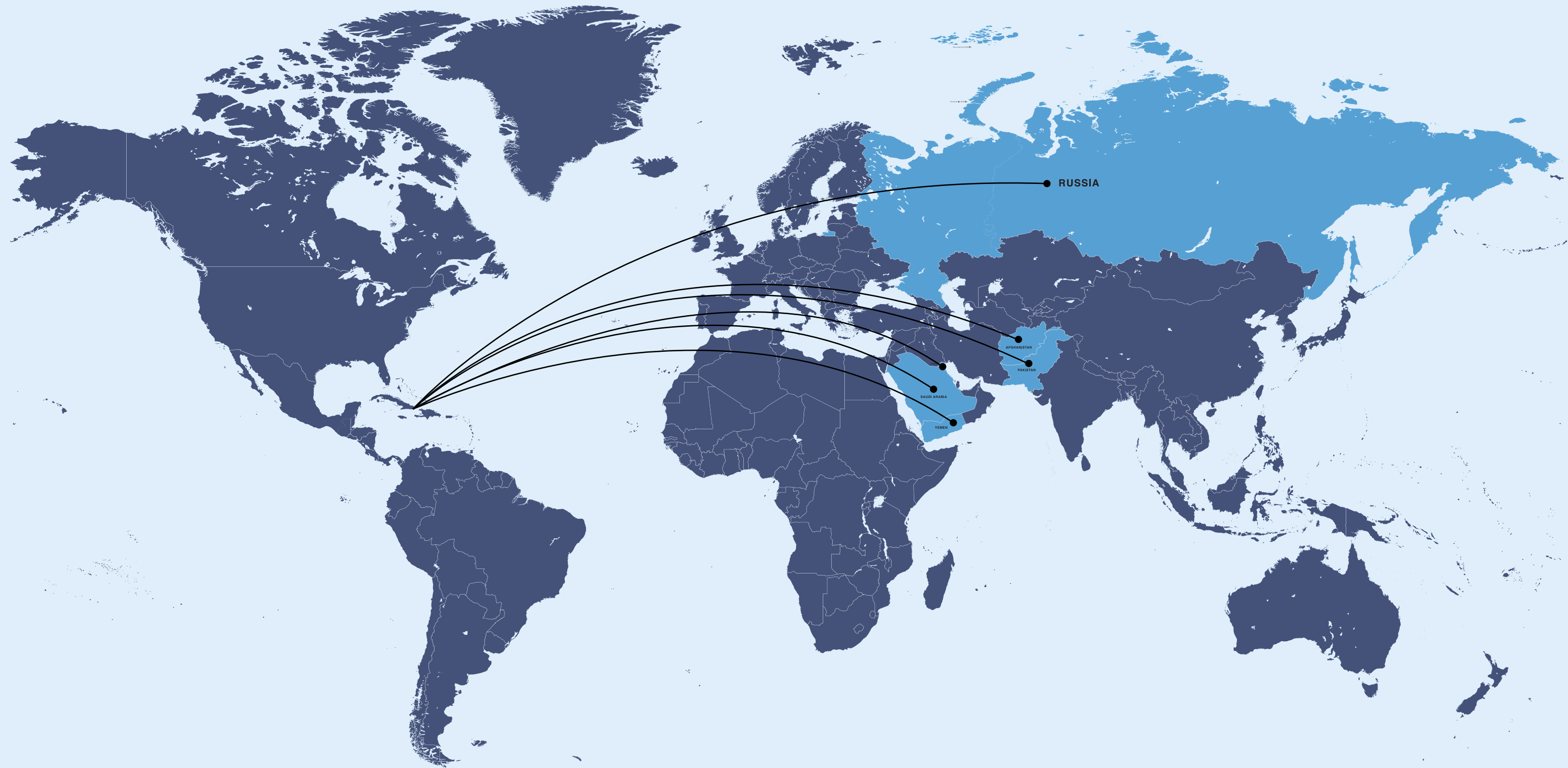


As of September 2011, the US government believed that 27 percent of former GTMO detainees were confirmed or suspected to have been engaged in terrorist or insurgent activities.

27%



SUSPECTED OR CONFIRMED

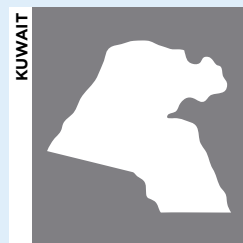


SNAPSHOTS OF REENGAGEMENT



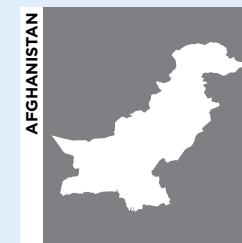
Abu Sufyan al-Azdi al-Shihri, 372

*Repatriated in 2007
*Leader in al-Qaida in Arabian Peninsula orchestrating terrorist targeting, recruiting, and attack training, planning, and preparation



Abdallah Saleh Ali al-Ajmi, ISN 220

*Repatriated in 2005
*Conducted a suicide bombing in Iraq in 2008

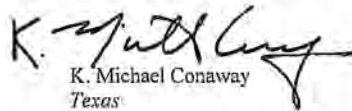


Abdullah Zakir, ISN 8

*Repatriated in 2007
*Top Taliban military commander in Helmand province

**SUBCOMMITTEE ON OVERSIGHT
AND INVESTIGATIONS**
of the
COMMITTEE ON ARMED SERVICES

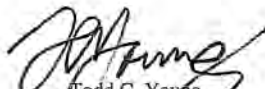
 VA-01
Robert J. Wittman, Chairman
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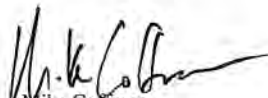
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New Jersey


Todd C. Young
Indiana IN-9

Mark S. Critz
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Thomas J. Rooney
Florida FL-16

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Hawaii


Mike Coffman
Colorado CO-6

“...we have been very selective in terms of returning people. One of the things we have discovered over time is that we are not particularly good at predicting which returnee will be a recidivist. Some of those that we have considered the most dangerous and who have been released or who we considered dangerous and potentially going back into the fight have not, and some that we evaluated as not being much of a danger or much of a risk we have discovered in the fight.”

**SECRETARY OF DEFENSE
ROBERT GATES**

FEBRUARY 17, 2011

Senate Armed Services Committee Hearing

“A Statement by the United States Government,” *New York Times*, April 24, 2011 (issued in connection with the decision by the newspaper and other organizations to publish documents obtained illegally by Wikileaks).

“Both the previous and the current Administrations have made every effort to act with the utmost care and diligence in transferring detainees from Guantanamo. . . . Both Administrations have made the protection of American citizens the top priority and . . . we will continue to work with allies and partners around the world to mitigate threats to the U.S. and other countries . . .”

GEOFF MORRELL
PENTAGON PRESS SECRETARY

AMBASSADOR DANIEL FRIED
SPECIAL ENVOY FOR CLOSURE OF THE
GUANTANAMO DETENTION FACILITY

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Executive Summary and Introduction

In March 2011, Chairman Howard P. “Buck” McKeon and Ranking Minority Member Adam Smith directed the Oversight and Investigations Subcommittee to undertake an in-depth, comprehensive bipartisan investigation of procedures to dispatch detainees from the Guantanamo Bay detention facility (GTMO) over the past decade. This necessarily included an examination of mechanisms intended to prevent former detainees from reengaging in terror-related activities.

In conducting this study, committee staff travelled to eleven countries, interviewed nearly every senior official directly involved in these matters in both the Bush and Obama administrations, received briefings from the Department of Defense and Department of State, consulted with eighteen subject matter experts, met with two former detainees, and reviewed thousands of pages of classified and unclassified documents. Subcommittee Members convened a hearing, three Member briefings (including one that was classified), and travelled to several relevant locations.

This report finds that the Bush and Obama administrations, in reaction to domestic political pressures, a desire to earn goodwill abroad, and in an attempt to advance strategic national security goals, sought to “release” or “transfer” GTMO detainees elsewhere. Those “released” were judged a sufficiently low threat that they were sent to countries with no expectation of follow up. “Transferred” detainees, because they were assessed as relatively more dangerous, were conveyed with the expectation that some process would be applied in the receiving nation to mitigate the threat they potentially posed.

Despite earnest and well-meaning efforts by officials in both administrations, properly evaluating detainees and ensuring that their cases were handled appropriately by receiving countries was, and remains, a challenge. This is demonstrated by the fact that the Office of the Director of National Intelligence (ODNI) estimated in September 2011 that 27% of the 600 former detainees who have left GTMO were confirmed or suspected to be presently or previously reengaged in terrorist or insurgent activities.

This total percentage has consistently increased. Furthermore, the Office of the Director of National Intelligence noted in 2010 that the Intelligence Community “assesses that if additional detainees are transferred from GTMO, some of them will reengage in terrorist or insurgent activities.” Five of 66 detainees who left GTMO in the 20 months between February 2009 and

October 2010 are confirmed (two) or suspected (three) by ODNI of involvement in terrorist or insurgent activities. Although two of the five were released pursuant to court orders, this nonetheless yields a seven and one half percent reengagement rate. Although it is difficult to compare two disparate groups of former detainees (a smaller pool which left GTMO relatively recently and a much larger pool which has been gone for a much longer period), the reengagement rate indicates that challenges remain.

This report posits four findings:

- Finding 1. Mechanisms to reduce the GTMO population were first contemplated when the facility was established in 2002. However, procedures to accomplish this took about eight months to finalize, and were spurred by persistent concerns that some detainees should not be held.
- Finding 2. After the first review process began, political and diplomatic pressures to reduce the GTMO population arose, resulting in releases and transfers.
- Finding 3. Pressures to reduce the GTMO population accelerated in the second Bush term, before reengagement dangers became fully apparent.
- Finding 4. While the GTMO transfer and release process instituted by the Obama administration differed in some important respects from what preceded it, there are sufficient continuities so that the threat of reengagement may not be lessened in the long term.

In addition to chapters discussing each finding in depth, this report includes several companion articles illustrating specific issues. A classified section sets forth material which cannot be reproduced here.

The following recommendations are offered:

- The Department of Defense, the Central Intelligence Agency, the Defense Intelligence Agency, and the Office of the Director of National Intelligence collaborate to produce a report (in classified and unclassified versions) to congressional committees of jurisdiction assessing factors causing or contributing to reengagement; including a discussion of trends, by country and region, where reengagement has occurred;
- The Department of Defense and Department of State produce a report (in classified and unclassified versions) to congressional committees of jurisdiction assessing the effectiveness of agreements in each country where transfers have occurred;
- Congress continue the certification requirements on GTMO transfers which are contained in the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. No. 112-81; 125 Stat. 1561 [2011]), at least until receiving and reviewing the specified reports; and
- Additional action as outlined in the classified annex.

Methodological and Stylistic Notes

This study is based primarily upon 19 interviews with current and past key policy makers and staffers from the White House, the Department of Defense, and the Department of State, as well as hundreds of pages of declassified documents, and some secondary sources. A large volume of classified information provided to the committee was also evaluated. That data forms, in part, the basis of a classified annex to this report.

In addition to visiting the detention facility at Guantanamo Bay, Cuba, committee staff traveled to eleven countries where detainees have been sent and met with U.S. and foreign government officials, representatives of non-governmental organizations, and two former detainees. Staff also received briefings from the Department of State, the Department of Defense (and several components including the Defense Intelligence Agency), as well as many groups and individuals knowledgeable about detainee disposition matters. The Oversight and Investigations Subcommittee convened one hearing and three briefings (including one classified briefing), and Members travelled to Afghanistan and Pakistan and GTMO for meetings and first-hand observations.

All interviews with former administration officials were unclassified. They were also professionally transcribed to aid in the compilation of material and to ease the task of writing the report. Quotations drawn from these transcripts have been edited only for typographical, spelling, and punctuation purposes. However, in a limited number of instances, some witnesses asked that specific material drawn from their transcripts be cited anonymously. The committee acceded to these requests in order to allow them to provide freely their frank views on the topics under investigation.

Consistent with practices of past administrations, the Obama administration would not permit interviews by HASC staff of current officials to be transcribed. It also mandated that individuals, including those at the rank of Deputy Secretary of Defense (or its equivalent) or higher, not be identified. The administration further required additional agency officials to be present for interviews. These strictures precluded direct quotations from these officials, complicated the gathering and interpretation of information from these witnesses, and may have unintentionally inhibited discussions.

In all instances where interviewees are not named, they are referenced with a randomly selected letter identifier.

As a courtesy, the administration was provided with a draft of both the classified and unclassified sections of this report. Comments the committee received from the administration have been considered in drafting the final report. In the case of the classified annex, the administration's comments have been appended in their entirety.

With the above caveats and three specific exceptions below, the committee was generally pleased with the cooperation from the administration, and past and current officials. The committee believes the Central Intelligence Agency may have been able to provide additional insight on reengagement issues and resolve factual discrepancies identified during meetings with U.S. officials abroad. Headquarters representatives from the CIA declined requests, made at the behest of the subcommittee chairman and ranking member, to meet with staff. This impaired the committee's efforts to evaluate fully this topic. The committee also regrets that Phillip Carter, former Deputy Assistant Secretary of Defense for Detainee Policy, declined a similar invitation to be interviewed by staff.

Finally, the Department of State, consistent with the practices of past administrations, including in connection with other Congressional requests, refused requests for copies of documents codifying certain arrangements with countries that received former detainees. The administration declined on the grounds that doing so would potentially have a "chilling effect" on negotiations with other countries.¹

The U.S. Navy abbreviation for Naval Station Guantanamo Bay is GTMO. The detention facility is a tenant unit there. For simplicity, GTMO is used to denote that facility in this report. This use, however, is explicitly not meant to conflate the detention facility with the entire installation.

The Department of Defense has not released a single dispositive list specifying which detainees have been released from GTMO and which have been transferred to other countries. Nonetheless, committee staff was able to assemble a list covering the first several years of GTMO's operation using a variety of declassified official documents and some secondary sources.² Cross referencing this list with other publicly available data leads us to believe it is substantially accurate. Consequently, the committee-derived list is cited in this report.

1. Department of Defense correspondence with committee staff, January 31, 2012 (in committee possession).

2. The material used to compile this list is: Department of State cable, "Release of [Excised] detainees from US control to foreign government control," October 10, 2002, Document no. 200585, "The Torture Archive," National Security Archive, The George Washington University (hereafter cited by document no. if available and "GWU."); "Transfer of Detainees completed," U.S. Department of Defense News Release, October 28, 2002; Andy Worthington, *The Guantanamo Files: The Stories of 774 Detainees in America's Illegal Prison* (London: Pluto Press, 2007), pp. 117, 178; David Rohde, "Low-risk prisoners freed from high-security hell," *Guardian*, October 30, 2002; document captioned "Guantanamo Detainees," February 4, 2004, p. 15, (in committee possession) (released by the Department of Defense pursuant to a FOIA request by Judicial Watch, March 2, 2011); "Briefing on Detainee Operations at Guantanamo Bay," U.S. Department of Defense News Transcript, February 13, 2004; "Guantanamo Detainees and Other War Crimes Issues," U.S. Department of State, Foreign Press Center Briefing, February 13, 2004; email from Ronald W. Miller to Elizabeth A. Ewing et. al., February 19, 2004, GWU; document captioned "Transfer of Russian Detainees from Guantanamo," February 27, 2004, GWU; "Gitmo Detainees Return To Terror," *Associated Press*, September 24, 2004; document captioned "Guantanamo Detainees," April 6, 2004 (available at www.defense.gov/news/Apr2004/d20040406gua.pdf); Declaration of Pierre-Richard Prosper, March 8, 2005; "Detainee Transfer Announced," U.S. Department of Defense News Release, April 26, 2005; Declaration of Matthew W. Waxman, June 2, 2005; "Detainee Transfer Announced," U.S. Department of Defense News Release, July 20, 2005; Department of State cable, "Speaking out on GITMO and detainees," July 27, 2005, (in committee possession) (available at <http://www.state.gov/documents/organization/125078.pdf>); "Detainee Transfer Announced," U.S. Department of Defense News Release, February 9, 2006; document captioned "country, number of detainees transferred," etc., c. September 2011 (in committee possession).



● RUSSIA

● AFGHANISTAN

● PAKISTAN

● SAUDI ARABIA

● YEMEN

SNAPSHOTS OF REENGAGEMENT

As of September 2011, the Defense Intelligence Agency assessed that 27 percent of former GTMO detainees were confirmed or suspected as previously or presently reengaged in terrorist or insurgent activities.¹ This number suggests it has been difficult to determine which detainees could be safely transferred or released. Three past cases illustrate the dangers. The following vignettes draw upon journalistic accounts, congressional testimony, and other open sources, as well as committee staff meetings with foreign government officials.

1. Testimony of General James Clapper, "The State of Intelligence Reform 10 Years After 9/11," Joint Hearing of the Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence, U.S. House of Representatives, September 13, 2011.



Abdallah Saleh Ali al-Ajmi (Internment Serial Number 220) was transferred to Kuwait in November 2005 after spending three years in detention.² He was tried but acquitted of terrorist-related charges by a Kuwaiti court, apparently because evidence from GTMO was deemed to be inadmissible.³

Records from his Combatant Status Review Tribunal showed al-Ajmi deserted from the Kuwaiti military to travel to Afghanistan for jihad. He admitted to spending eight months fighting on the front lines in Afghanistan and engaging in several firefights with the Northern Alliance. He was captured as he attempted to escape to Pakistan.⁴ Additional documentation in al-Ajmi's file noted "Al Ajmi is committed to jihad" and that "[he] wanted to make sure that when the case goes before the tribunal, they know that he now is a Jihadist, an enemy combatant, and that he will kill as many Americans as he possibly can."⁵

Describing his attitude at GTMO, al-Ajmi's paperwork indicated his "behavior has been aggressive and non-compliant." Indeed, he had been "in GTMO's disciplinary blocks throughout his detention."⁶ His Administrative Review Board concluded that, "based upon a review of recommendations from U.S. agencies and classified and unclassified documents, al-Ajmi is regarded as a continued threat to the United States and its Allies." The board recommended continued detention.⁷ His eventual departure from GTMO surprised even his own attorney.⁸

Senior U.S. officials were apparently surprised and disappointed that al-Ajmi was not ordered held longer by the Kuwaiti courts. "They had hoped that Kuwait, an American ally, would find a way to detain al-Ajmi for years," one

news story recounts.⁹ "At the very least, the officials figured, Kuwaiti authorities would keep a close watch on him." The government of Kuwait apparently "pledged to the State Department that he would be monitored if he was released from custody."¹⁰ Al-Ajmi was also allegedly subjected to travel restrictions. None of this appears to have taken place.

Following his return to Kuwait, al-Ajmi allegedly used an Internet chat room to recruit others for terror missions. "Whoever can go to the Islamic State of Iraq should go," the *New York Times* reported him writing.¹¹ He apparently followed his own guidance, finding his way to Syria and then Iraq.¹² In 2008, al-Ajmi staged a suicide strike in Iraq.¹³ *The Washington Post* gave an account of the attack:

Ajmi drove a pickup truck filled with 5,000 to 10,000 pounds of explosives, hidden in what appeared to be white flour sacks, onto an Iraqi army base outside Mosul. He barreled through the entrance checkpoint and past a fusillade of gunfire from the sentries, shielded by bulletproof glass and makeshift armor welded to the cab. The Easter Sunday blast killed 13 Iraqi soldiers, and wounded 42 others.¹⁴

A U.S. Army officer who witnessed the aftermath recounted a scene in which "Iraqi soldiers, some of them wailing, were pulling the dead from buildings" while "[b]loodied victims staggered about."¹⁵ Al-Ajmi detonated his explosives at a location in the outpost where they would have maximum impact. An Iraqi general at the scene of the bombing said he had scored "the perfect shot."¹⁶

2. Rajiv Chandrasekaran, "From Captive to Suicide Bomber," *The Washington Post*, February 22, 2009. For date of transfer, see public source detainee information (in committee possession).

3. Ewen MacAskill, "Ex-Guantanamo Prisoner Took Part in Iraq Bombing, Says US," *The Guardian*, May 8, 2008.

4. "Summary of Evidence for Combatant Status Review Tribunal - Al Ajmi, Abdallah Salih Ali" (in committee possession).

5. "Summary of Evidence for Combatant Status Review Tribunal."

6. "Unclassified Summary of Evidence for Administrative Review Board in the Case of al Ajmi, Abdallah Salih Ali" (in committee possession).

7. "Unclassified Summary of Evidence for Administrative Review Board in the Case of al Ajmi, Abdallah Salih Ali."

8. "From Captive to Suicide Bomber."

9. Rajiv Chandrasekaran, "A 'Ticking Time Bomb' Goes Off," *The Washington Post*, February 23, 2009.

10. "A 'Ticking Time Bomb' Goes Off."

11. Alissa J. Rubin, "Bomber's Final Messages Exhort Fighters Against U.S.," *New York Times*, May 9, 2008.

12. Alissa J. Rubin, "Former Guantanamo Detainee Tied to Attack," *New York Times*, May 8, 2008.

13. "Bomber's Final Messages Exhort Fighters Against U.S."

14. "From Captive to Suicide Bomber."

15. "A 'Ticking Time Bomb' Goes Off."

16. "A 'Ticking Time Bomb' Goes Off."



Said al-Shihri¹⁷ (ISN 372) was transferred in November 2007 to the Prince Mohammed bin Nayef Centre for Care and Counseling (also known as Care) in Saudi Arabia.¹⁸ This is an initiative, operated by the Saudi government, meant to rehabilitate those believed to be terrorists.¹⁹

However, after completing the portion of the program requiring him to reside at the Care facility, al-Shihri left Saudi Arabia for Yemen despite putatively being barred from foreign travel. In addition to raising questions about the Saudi government's ability to enforce travel restrictions on former detainees, al-Shihri's arrival in Yemen allowed him and another former GTMO detainee to assume leadership of the newly established al-Qa'ida in the Arabian Peninsula (AQAP).²⁰ They released a video announcing their roles.²¹

Katherine Zimmerman, lead Yemen analyst for the American Enterprise Institute's Critical Threats Project, reported to the committee that AQAP is a "significant" attraction "for former Guantanamo detainees seeking to re-join al-Qa'ida."²² One account says al-Shihri is one of at least a dozen former detainees who have returned to the fight in Yemen.²³ In another venue, foreign policy analyst David Kenner, commenting on al-Shihri's rise to power, has said, "[a]s the second in command, he is one of the most influential Saudi figures within AQAP -- and an embarrassment

to Saudi Arabia, which proudly touts its rehabilitation program's ability to 'cure' Islamist militants."²⁴

In December 2010, a senior Obama administration official described AQAP as "the most operationally active node of the al-Qaida network."²⁵ At least two scholars have echoed this sentiment. "AQAP has been al Qaeda's most-active affiliate," Rick "Ozzie" Nelson and Thomas M. Sanderson, have written. They have noted that the organization has attempted to bomb a U.S. airliner on Christmas Day 2009 and two cargo planes ten months later.²⁶ AQAP's leaders have also been credited with inspiring the Fort Hood shootings and the failed Times Square bombing.²⁷ In 2011 Congressional testimony, the National Counterterrorism Center director at the time referred to AQAP as "probably the most significant risk to the U.S. homeland."²⁸ Since the death of Osama bin Laden, some believe, "AQAP is poised to assume greater prominence."²⁹

In early 2010, the State Department named al-Shihri a "specially designated global terrorist" pursuant to Executive Order 13224, citing his involvement in targeting, recruiting, and attack training, planning, and preparation.³⁰ Al-Shihri was also added to Saudi Arabia's "Most Wanted" list in 2009, along with ten other former detainees.³¹ **(For details on the Saudi rehabilitation program, see companion article.)**

17. Al-Shihri's Combatant Status Review Tribunal (memo dated December 10, 2004) declared him an enemy combatant who was associated with the Taliban and participated in military operations against the U.S. and its coalition partners. He claimed to be providing humanitarian relief for Muslim refugees. See David Kenner, "Yemen's Most Wanted," *Foreign Policy*, January 8, 2010.

18. See public record of detainee's transfer (in committee possession). See also "Christmas Day's Recycled Terrorists," *The Washington Times*, December 30, 2009. Detainees are often greeted by members of the royal family upon arrival at the facility. Christopher Boucek, "The Saudi Process of Repatriating and Reintegrating Guantanamo Returnees," *CTC Sentinel*, Combating Terrorism Center, December 15, 2007.

19. For an expert assessment that the program was exceptional in its success, see Adam Lankford and Katherine Gillespie, "Rehabilitating Terrorists Through Counter-Indoctrination: Lessons Learned From The Saudi Arabian Program," *International Criminal Justice Review*, May 6, 2011.

20. "Defense Analysis Report—Terrorism," Defense Intelligence Agency, April 8, 2009.

21. Robert F. Worth, "Freed by the U.S., Saudi Becomes a Qaeda Chief," *New York Times*, January 23, 2009.

22. Testimony of Katherine Zimmerman, "AQAP Profiles in Terror: The Othman Ahmed al Ghamdi and Abu Sufyanal-Azdi al-Shihri Stories," House Armed Services Committee, Subcommittee on Oversight and Investigations, June 15, 2011.

23. Tom Coghlan, "Freed Guantanamo Inmates Are Heading for Yemen to Join Al Qaeda Fight," *Times Online*, January 5, 2010.

24. David Kenner, "Yemen's Most Wanted," *Foreign Policy*, January 8, 2010.

25. Christopher Boucek, "Evolution of al-Qaeda in the Arabian Peninsula," Carnegie Endowment for International Peace, November 1, 2011.

26. Rick "Ozzie" Nelson and Thomas M. Sanderson, "Al Qaeda in the Arabian Peninsula," AQAM Futures Project, *Center for Strategic and International Studies*, July 2011.

27. "Al Qaeda in the Arabian Peninsula."

28. Testimony of Michael Leiter, "Understanding the Homeland Threat Landscape," House Homeland Security Committee, February 9, 2011.

29. Nelson and Sanderson, "Al Qaeda in the Arabian Peninsula."

30. This designation prohibits provision of material support and arms to AQAP. See "Designations of Al-Qa'ida in the Arabian Peninsula (AQAP) and Senior Leaders," Office of the Coordinator for Counterterrorism, January 19, 2010. In June 2011, another former Guantanamo detainee, Othman al Ghamdi (ISN 184), was similarly designated for raising funds for AQAP's operations and activities in Yemen.

31. Peter Bergen and Katherine Tiedemann, "Inflating the Guantanamo Threat," *New America Foundation*, May 29, 2009. Al-Shihri's family ties to al-Qa'ida are strong. His brother-in-law was killed in a shootout with Saudi police in October 2009 while infiltrating the Saudi border. Al-Shihri's wife was previously married to an AQAP militant killed by Saudi security forces in 2005. See Jeremy Sharp, "Yemen: Background and US Relations," *Congressional Research Service*, March 3, 2011; Department of Defense correspondence with committee staff, January 31, 2012 (in committee possession).



ABDULLAH ZAKIR

REPATRIATED IN 2007

TOP MILITARY COMMANDER IN HELMAND PROVINCE

Abdullah Zakir, also known as Abdullah Gulam Rasoul (ISN 8), was captured in December 2001 and transferred to Afghanistan in December 2007 after it seems he was deemed to be “no longer a threat.”³² He claimed during his GTMO review: “I want to go back home and join my family and work in my land and help my family.”³³ Following his transfer, the Afghans apparently incarcerated Zakir in the maximum security wing of Pul-e-Charkhi prison, which had been designed to hold repatriated high threat Guantanamo detainees. However, he was released shortly thereafter.³⁴

The circumstances of this action remain cloudy. Afghanistan’s deputy attorney general has claimed that the former detainee “went before an Afghan court, which ruled he had served his time.”³⁵ Other Afghan officials have speculated in press accounts that pressure from tribal elders contributed to the decision to set him free.³⁶ Indeed, the Afghan review system was described by a U.S. lawyer who represented another former detainee, as “chaotic and opaque.” This attorney believed “tribal loyalties” seemed to “count for more than innocence or guilt.”³⁷

Not long after his release, Zakir began to play a critical role in the Afghan insurgency.³⁸ It is widely acknowledged that he became Mullah Omar’s top military commander and has masterminded lethal operations against coalition troops in Helmand province.³⁹ In early 2009, a U.S. intelligence official said that Zakir’s stated mission was to “counter the U.S. troop surge.”⁴⁰

One Afghan tribal elder has described Zakir’s ascension to the Taliban’s top day-to-day leadership position. “He has tremendous power now.” This includes the authority to develop “military strategy” as well as “appoint or fire Taliban shadow governors.”⁴¹ Zakir’s leadership in the Quetta Shura also affords him substantial influence in decision making across the region.⁴²

Counterinsurgency expert Seth Jones agrees that Zakir’s role is vitally important: “[He] is extremely influential . . . He is directly involved in Taliban strategic . . . and operational level efforts.”⁴³

32. Ben Farmer, “Taliban Commander Promoted After Release From Guantanamo Bay into Afghan Custody,” *The Telegraph*, March 24, 2010; Michael Evans, “Afghans Pressed to Explain Release of Abdullah Ghulam Rasoul,” *Times Online*, March 13, 2009. Since then, however, Taliban sources have told reporters that Zakir was “a senior commander at the time of his capture in 2001 and that the Afghan authorities should have known that.”

33. See unclassified document captioned “Summarized Administrative Review Board Detainee Statement,” for Abdullah Gulam Rasoul (aka Abdullah Zakir), ISN 8, (in committee possession).

34. “Afghans Pressed to Explain Release of Abdullah Ghulam Rasoul.”

35. Kathy Gannon, “Former Gitmo Detainee Said Running Afghan Battles,” *Yahoo News*, March 3, 2010.

36. Anand Gopal, “Qayyum Zakir: The Afghanistan Taliban’s Rising Mastermind,” *The Christian Science Monitor*, April 30, 2010.

37. “Afghans Pressed to Explain Release of Abdullah Ghulam Rasoul.”

38. “Former Gitmo Detainee Now a Taliban Boss,” *CBS News*, March 11, 2009. These accounts report that Pentagon and intelligence officials confirmed Zakir is in charge of operations against U.S. and Afghan forces in Southern Afghanistan.

39. Dexter Filkins and Pir Zubair Shah, “After Arrests, Taliban Promote a Fighter,” *New York Times*, March 24, 2010. See also “Afghans Pressed to Explain Release of Abdullah Ghulam Rasoul.” One press report identifies Zakir as being “responsible for increasingly sophisticated explosive attacks on British soldiers in Afghanistan.” See “Taliban Chief Released from Guantanamo to Target British Troops,” *Daily Times*, March 12, 2009.

40. “Former Gitmo Detainee Now a Taliban Boss.”

41. “Qayyum Zakir.”

42. Bill Roggio, “ISAF Targets Quetta Military Shura Leader in Southern Afghanistan,” *Long War Journal*, January 21, 2011.

43. Testimony of Seth Jones, “The Terrorist Threat: A Profile on Reengagement (The Abdullah Ghulam Rasoul Zakir Story),” House Armed Services Committee, Subcommittee on Oversight and Investigations, June 2, 2011.

Reengagement

THE BASICS

According to the Department of Defense, 779 individuals have been held at GTMO. As of January 1, 2012, 600 have left the facility, eight have died there, and 171 remain.¹

The Defense Intelligence Agency is charged with tracking former GTMO detainees who have returned to involvement “in terrorist or insurgent activities.” The agency labels this “reengagement,” a term specifically chosen instead of “recidivism” which it believes is a precise legal term denoting “a repeat offender” who has been “convicted of a crime after previously having been convicted.”²

Between 2004 and 2007, DIA produced ten reports to policy makers on reengagement.³ DIA reported to committee staff that it has refined its reporting methodology over time.⁴ Initially, detainees who had “taken part in anti-coalition militant . . . activities in the Afghanistan/Pakistan region” were deemed reengagers.⁵ Now the definition more broadly encompasses “involvement in terrorist or insurgent activities” targeting “Coalition or host-nation forces or civilians,” including outside the geographic area delineated earlier.⁶ Notably, reengagement activity does not necessarily have to be directed against the United States.

Until April 2009, DIA publicly identified some confirmed or suspected reengagers by name. The Agency no longer does so in an effort to protect intelligence sources and methods.⁷ While this makes sense, it has hindered the public’s understanding of the topic and made it difficult to confirm DIA assessments in some instances.

1. Department of Defense emails to committee staff, February 1, 2012 and February 6, 2012 (in committee possession).

2. Document captioned “(U) Reengagement Among Former Guantanamo Bay Detainees,” November 29, 2011, (Defense Intelligence Agency response to committee questions; in committee possession).

3. “(U) Reengagement Among Former Guantanamo Bay Detainees.”

4. For a critique of DIA’s methodology, including definitional concerns, and inconsistencies in reporting, see Mark Denbeaux, Joshua Denbeaux, and David Gratz, “Revisionist Recidivism: An Analysis of the Government’s Representations of Alleged ‘Recidivism’ of the Guantanamo Detainees,” Seton Hall Law Center for Policy and Research, June 2009.

5. “Information Paper,” Defense Intelligence Agency, October 19, 2004 (in committee possession).

6. “Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba,” Office of the Director of National Intelligence, December 2010.

7. Testimony of Ed Mornston, Defense Intelligence Agency, “Guantanamo Detainee Transfer Policy and Recidivism,” House of Representatives, Committee on Armed Services, April 13, 2011.

Furthermore, since November 2005, analysts have differentiated between *confirmed* and *suspected* reengagement, although they did not routinely detail these categories until 2007.⁸ It is important to note that DIA does not categorize activities such as “making anti-U.S. propaganda statements” as falling within the definition of terrorist activity.⁹ **(See definitions.)**

As of September 2011, the U.S. government believed that 27 percent of former GTMO detainees (161 individuals) were confirmed or suspected to have been engaged in terrorist or insurgent activities.¹⁰ This overall rate has been increasing. It was reported as 25 percent (150 detainees) as of October 2010. At that time, 81 (13.5 percent) were confirmed and 69 (11.5 percent) were suspected. Of these, 83 were at large, 54 in custody, and 13 dead.¹¹ Previously, the rate was reported to be 14 percent in April 2009 and seven percent nine months earlier.¹²

ODNI also indicated in October 2010 that, based upon February 2010 data, there was a window of “about 2.5 years” between the date a detainee left GTMO and the “first reporting of confirmed or suspected reengagement.”¹³ Previous public DIA publications also noted there was a lag time between suspected or confirmed behavior and when the Defense Intelligence Agency discerned it.¹⁴ The committee recognizes that a reporting lag complicates reengagement trend analysis.

It is also necessary to note that, regardless of the suspected and confirmed GTMO reengagement rate, there is, of course, a companion figure of those not confirmed or suspected of reengaging. Similarly, some believe a comparison with recidivism in U.S. prisons is informative. While there is a wide variation in offenses and original circumstances of criminal incarceration in the United States, a study of more than 250,000 prisoners released after 1994 from prisons in 15 states found 67.5 percent had been “rearrested for a new offense” within three years.¹⁵

Furthermore, there have been suggestions that some suspected or confirmed reengagers may not have been involved in terrorist or insurgent activities before being detained at GTMO. Rather, this view holds that it was the fact and condition of their detention that first caused them to act against the U.S. or its allies. According to this interpretation, these individuals should not be denoted reengagers because this incorrectly suggests they had “engaged” before being detained. This contention cannot be fully evaluated without undertaking an assessment of each case drawing upon the entire panoply of intelligence information on each former detainee. However, one study, based upon interviews with 62 former detainees, indicated “published interviews with a few former detainees have

8. “(U) Reengagement Among Former Guantanamo Bay Detainees.”

9. “Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba.”

10. Testimony of General James Clapper, “The State of Intelligence Reform 10 Years After 9/11,” Joint Hearing of the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence, September 13, 2011.

11. Director of National Intelligence Report, “Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba,” December 2010. Of those in detention in early 2010, some public sources claim “at least three” were held by the United States in a facility in Afghanistan. See Thomas Joscelyn, “What President Obama Doesn’t Know About Guantanamo,” *Encounter BroadSides*, no. 12, (2010), p. 14; Andy Worthington, “Dark Revelations in the Bagram Prisoner List,” on andyworthington.co.uk, January 20, 2010; “Guantanamo prisoner freed, arrested again,” *Associated Press*, February 7, 2009.

12. “Defense Analysis Report—Terrorism,” Defense Intelligence Agency, April 8, 2009; “Fact Sheet: Former Guantanamo Detainee Trends,” June 13, 2008, available at www.defense.gov/news/d20080613Returntothefightfactsheet.pdf.

13. “Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba.”

14. See e.g. Defense Analysis Report—Terrorism,” Defense Intelligence Agency, January 7, 2009; Defense Analysis Report—Terrorism,” Defense Intelligence Agency, December 4, 2007.

15. Patrick A. Langan and David J. Levin, “Recidivism of Prisoners Released in 1994,” *Bureau of Justice Statistics Special Report*, U.S. Department of Justice, June 2002.

suggested they became radicalized during their time at Guantanamo,” but noted “none of the respondents in our study expressed such opinions.”¹⁶ It did indicate that a “majority . . . harbored distinctly negative views of the United States.”¹⁷

The committee believes that the Central Intelligence Agency may have been able to provide additional insight on GTMO reengagement issues and resolve factual discrepancies identified during the staff’s meetings with embassies abroad. Although the administration later provided some clarifying information to the committee, staff’s inability to meet with CIA representatives is regrettable.

Committee staff has evaluated the Defense Intelligence Agency’s efforts in connection with reengagement. **The findings of this work and the administration’s response are set forth in a classified annex to this report.**

16. Laurel E. Fletcher and Eric Stover, *The Guantanamo Effect: Exposing the Consequences of U.S. Detention and Interrogation Practices*, (Los Angeles: University of California Press, 2009), p. 113.

17. Laurel E. Fletcher and Eric Stover, p. xii.

Definitions

“Confirmed” Reengagement

A preponderance of information identifying a specific former GTMO detainee as directly involved in terrorist or insurgent activities.

“Suspected” Reengagement

Plausible but unverified or single-source reporting indicating a specific former GTMO detainee is directly involved in terrorist or insurgent activities.

Terrorist or Insurgent Activity

Activities such as planning terrorist operations, conducting a terrorist or insurgent attack against Coalition or host-nation forces or civilians, conducting a suicide bombing, financing terrorist operations, etc. It does not include mere communications with individuals or organizations—including other former GTMO detainees—on issues not related to terrorist operations, such as reminiscing over shared experiences at GTMO, communicating with past terrorist associates about non-nefarious activities, writing anti-U.S. books or articles, or making anti-U.S. propaganda statements.

Above quoted from “Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba,” Office of the Director of National Intelligence, December 2010.

Terrorist Financing

Material support to terrorism or insurgency, including currency or monetary instruments, financial securities, or financial services.

Terrorist Recruitment

The act of enlisting, enrolling, hiring, engaging, or mobilizing others to provide material support to or conducting terrorist operations.

Planning Terrorist Operations

Participation in the formulation or program for a specific course of action . . . [which] is a terrorist attack.

DEFINITIONS

Plausible

Believable or credible information, based on an analysis of the reliability of a source and the credibility of the information provided.

Unverified

Information that has not been corroborated by another source or method.

Preponderance

The majority of the information is credible.¹

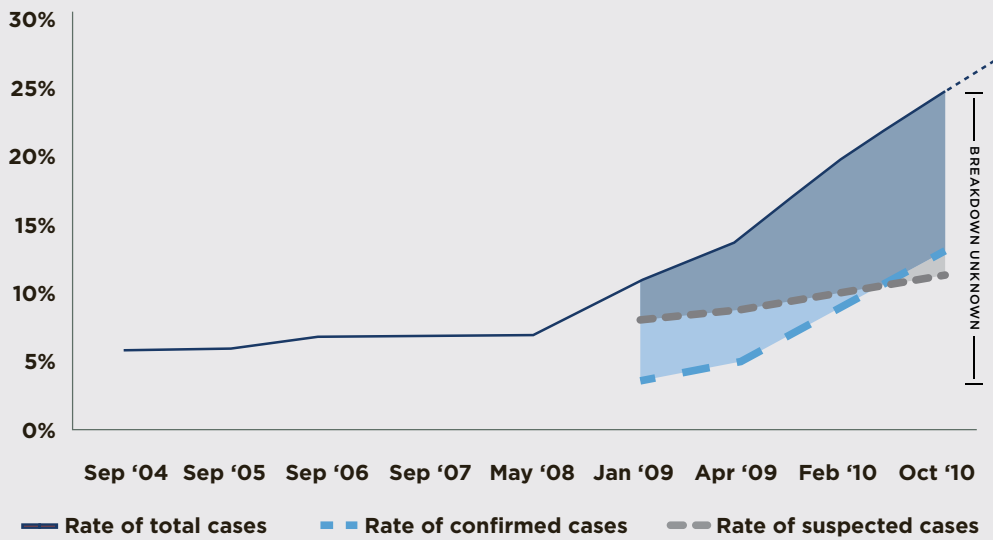
Directly Involved

An active participant in or provider of material support.

Above quoted from: Document captioned "(U) Reengagement Among Former Guantanamo Bay Detainees," November 29, 2011, (Defense Intelligence Agency response to House Armed Services Committee questions; in committee possession).

1. For example, "fingerprints, DNA, conclusive photographic match." See "Fact Sheet: Former Guantanamo Detainee Trends," April 7, 2009, available at www.defense.gov/news/Returntothefightfactsheet2.pdf.

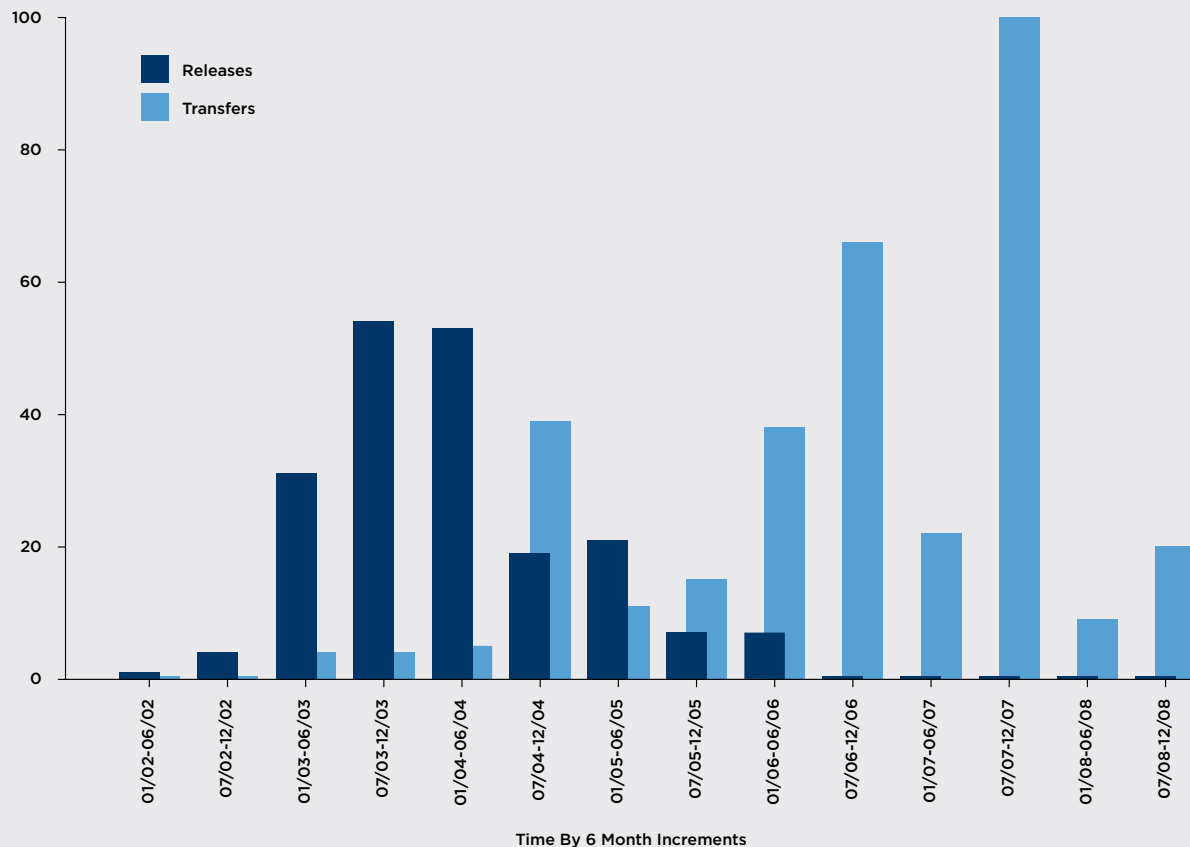
Former GTMO Detainee Terrorism Trends



Sources: “Defense Analysis Report—Terrorism,” Defense Intelligence Agency, May 12, 2008; “Defense Analysis Report—Terrorism,” Defense Intelligence Agency, January 7, 2009; “Defense Analysis Report—Terrorism,” Defense Intelligence Agency, April 8, 2009; and “Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba,” Office of the Director of National Intelligence, December 2010; all in committee possession.

In 2010, DIA noted “about 2.5 years between leaving GTMO and the first identified reengagement reports.”

Change in Number of Transfers/Releases Over Time



Sources: see explanation in Methodological and Stylistic Notes

Finding 1

Mechanisms to reduce the GTMO population were first contemplated when the facility was established in 2002. However, procedures to accomplish this took about eight months to finalize, and were spurred by persistent concerns that some detainees should not be held.

When the initial detainees arrived at the U.S. Naval Station at Guantanamo Bay, Cuba (GTMO), President George W. Bush's administration contemplated the fact that some might soon leave. As the first individuals were delivered to GTMO on January 11, 2002, the Department of State instructed U.S. ambassadors to inform their host governments that the United States was "evaluating the possibility of returning certain individuals to their home country of nationality for further legal action."¹ "We would hope that you would be able to prosecute vigorously all of your nationals who have aided al-Qaida terrorists," envoys were asked to declare.²

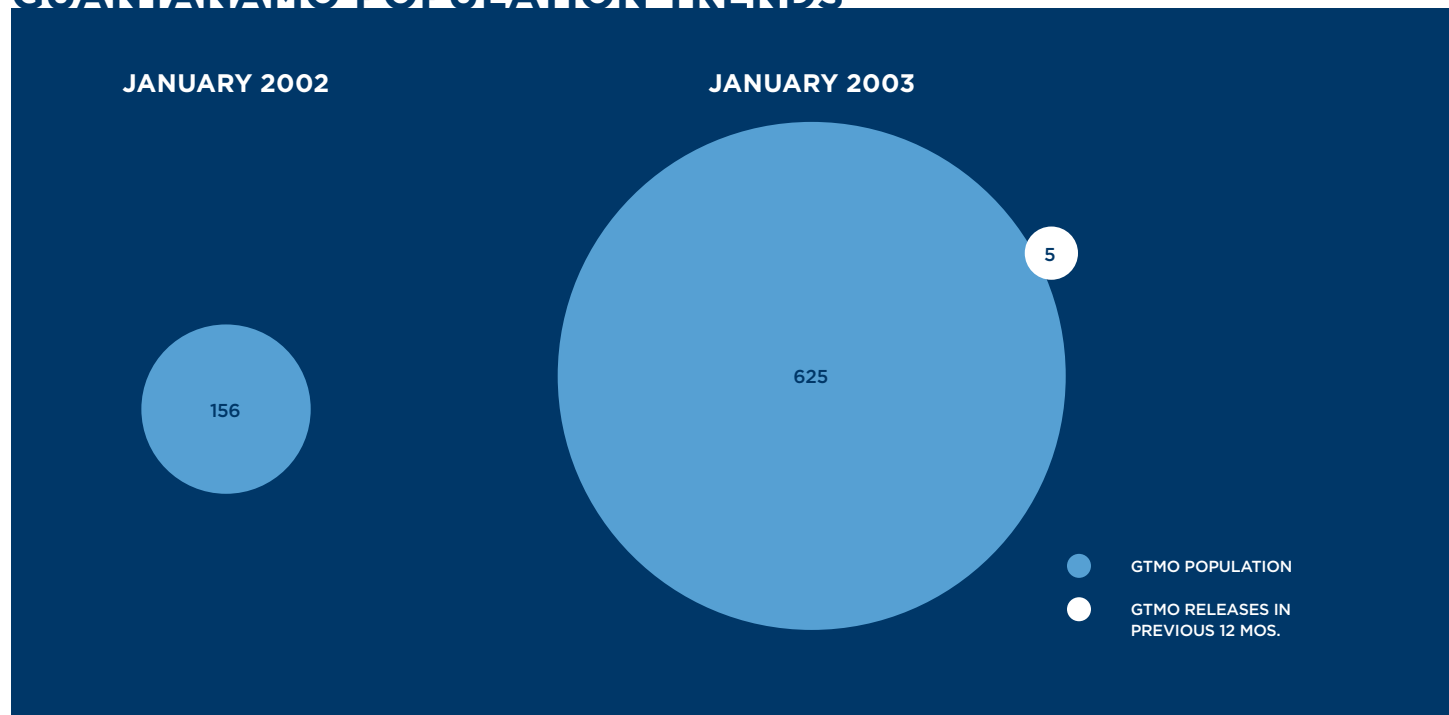
Detainees were held at GTMO premised on the belief that they were fighting against the U.S. and its interests. Holding them so they were kept from combat seemed commonsensical. It was also assumed that some could be prosecuted for their activities by the U.S. military or judicial systems in other countries. Still others may not require this treatment. Therefore, this necessitated categorizing the detainees in order to subject them to the appropriate action. As contemplated by the Department of Defense, GTMO detainees were to be evaluated for departure from GTMO in one of two ways. "Released" detainees would be those assessed as posing such a low security threat that no further safeguards were warranted and they could be freed to their home country. "Transferred" detainees, by contrast, would be those considered to have had more extensive involvement in threatening activities and were to be moved to the custody of another government for follow-up action.

A few weeks after GTMO became operational, Defense Secretary Donald Rumsfeld publicly explained this concept. Speaking of those detained at GTMO, Rumsfeld told the press, "the United States doesn't want to keep any of them any longer than we have to."

1. Department of State cable, "Transfer of Detainees [Excised]," January 12, 2002, Document no. 007208, "The Torture Archive," National Security Archive, The George Washington University (hereafter cited by document no. and "GWU."). The "Torture Archive" is a collection of documents donated by the American Civil Liberties Union to a research organization located at The George Washington University. Use of the collection for this purpose is not meant to imply that the committee concurs that documents contained within it provide evidence of "torture." See also transcript of committee staff interview of Pierre Prosper, May 10, 2011, pp. 13-14, 17-18 (in committee possession). For date of first detainee arrival, see Laurel E. Fletcher and Eric Stover, *The Guantanamo Effect: Exposing the Consequences of U.S. Detention and Interrogation Practices*, (Los Angeles: University of California Press, 2009), p. 41.

2. Document no. 007208, GWU. This document also indicates that ambassadors were tasked with determining the scope and nature of any such prosecutions and possible punishments that might apply in cases resulting in convictions. For discussion of such telexes, see Jonathan Mahler, "Getting Off the Island; Inside the long struggle to send Gitmo's detainees home," *Daily Beast*, May 28, 2009.

GUANTANAMO POPULATION TRENDS



“[S]ome may be transferred to other countries” and “some may be released,” he said.³ One former senior official summarized Rumsfeld’s perspective to committee staff:

He did not feel that the military should be, quote-unquote, the jailer, and therefore . . . at every step of the way there was a plan to get these people out of military facilities.⁴

By April 2002, “Guidelines for Transfer to Foreign Government Control” had been drafted.⁵ Former officials told committee staff that the transfer and release process was undertaken with two interrelated objectives in mind: to reduce the GTMO population in a way that protected against any future dangers posed by detainees.⁶

The first challenge, however, was gaining a better understanding of who was detained there. Rumsfeld intended the detention facility to hold “the most important and dangerous

3. “DoD News Briefing—Secretary Rumsfeld and Gen. Myers,” U.S. Department of Defense News Transcript, March 28, 2002, p. 2.

4. Transcript of committee staff interview of Marshall Billingslea, June 3, 2011, p. 15 (in committee possession). Similar sentiments expressed in Douglas J. Feith, *War and Decision: Inside the Pentagon at the Dawn of the War on Terrorism* (New York: Harper Collins, 2008), p. 160, and Bradley Graham, *By His Own Rules: The Ambitions, Successes, and Ultimate Failures of Donald Rumsfeld* (New York: Public Affairs, 2009), p. 316.

5. Memorandum from William J. Haynes, II to Secretary of Defense, April 9, 2002, Rumsfeld Archive. This is a collection of documents declassified at Donald Rumsfeld’s request and made available on Rumsfeld.com (hereafter “Rumsfeld Archive”) in connection with the preparation of Rumsfeld’s autobiography. See also transcript of committee staff interview of John B. Bellinger, III, May 19, 2011, p. 17 (in committee possession). The Haynes document also indicates that the Department’s General Counsel was considering the possibility of trying some detainees in federal courts or before Military Commissions.

6. Prosper, p. 20; Billingslea, pp. 38-40. Some contemporaneous explanations of the “release” process are complicated by a description of “transfer for release.” This appears to be a distinction without a practical difference. The United States intended released detainees to be freed immediately upon return to their home countries even if, as a practical matter, the release was effectuated by formally transferring the released detainees to the custody of their home governments for a temporally imperceptible yet legally required interregnum. (For the requirement that any treatment in the recipient country must be legally permissible according to the recipient country’s laws, see also transcript of committee staff interview of Paul Butler, July 8, 2011, pp. 23, 53 (in committee possession); and Prosper, pp. 45-46.)

detainees.⁷ Indeed, many were hardened terrorists and fighters who had been trained to mislead their captors, not only about specifics of their activities, but also with details such as their name and nationality.⁸ Others did not fit this category.

U.S. forces reportedly captured as many as 70,000 fighters in the opening weeks of the conflict. Screening such a huge number was a challenging task, especially for unseasoned evaluators. It seems some battlefield commanders may have believed that it was easiest to resolve confusing or complicated detainee cases by directing such detainees to GTMO where there would presumably be more time and resources to resolve problems.⁹ Thus, GTMO came to contain a complex admixture of individuals, which was not what had been intended. As Marshall Billingslea, then the Principal Deputy Assistant Secretary of Defense for Special Operations/Low Intensity Conflict (SO/LIC), reported to committee staff, “[y]ou had extremely vicious jihadist types . . . mixed in with Afghan foot soldiers.”¹⁰

“We weren’t sure in the beginning what we had,” Army General James T. Hill, the U. S. Southern Command (SOUTHCOM) leader declared to the *New York Times* years later.¹¹ Sorting out who was in detention was a critical first task. Arranging to let go individuals who pose the lowest threat was the next step. As Condoleezza Rice, then the National Security Advisor, recalls in her autobiography: “the challenge we . . . faced was how to identify those who had been unnecessarily detained and find a way to release them responsibly.”¹²

Specific detainee cases started to be considered for release or transfer in summer 2002.¹³ By this time, the White House had empanelled a GTMO “Policy Coordination Committee” (PCC). This was an interagency group led by the National Security Council to guide government activities related to detainees.¹⁴ The PCC included assistant secretary-level representatives from the Central Intelligence Agency, the Federal Bureau of Investigation, the Joint Chiefs of Staff, and the departments of Defense, State, and Justice.¹⁵

Indeed, one PCC member told committee staff that it had become apparent to him in mid-2002 that more than a handful of detainees were likely release candidates.¹⁶ This is consonant with the fact that in July the DOD General Counsel reported to Rumsfeld that “several” detainees were being assessed for dispatch from GTMO because they “no longer appear to

7. Donald Rumsfeld, *Known and Unknown: A Memoir* (New York: Sentinel, 2011), p. 568. Indeed, several accounts indicate that the secretary halted construction plans in early 2002 to accommodate 2,000 detainees at GTMO as a way to force battlefield leaders to consider more carefully who they selected to fill the limited number of detention slots there. (See Feith, p. 160, and Rumsfeld, p. 568.) Special Operations/Low Intensity Conflict leaders at the Department of Defense also mandated at the time that theater commanders better justify cases they were sending to GTMO. (See Billingslea, p. 23, and notes from Department of Defense briefing for committee staff, April 20, 2011, in committee possession.) Indeed, Billingslea recounted that he believed the Secretary delayed approving construction of permanent detention facilities at GTMO lest this authorization erroneously signal “a determination that DoD would remain responsible for this mission.” See Billingslea, p. 16. (For other confirmation that the Secretary of Defense thought GTMO was an undesirable drain on DOD resources better spent elsewhere, see Butler, pp. 82-83.)

8. Billingslea, p. 25; Prosper, pp. 39-40; Butler, p. 36. See also Jerrold M. Post, ed., *The Al-Qaeda Training Manual*, (Maxwell Air Force Base, Alabama: USAF Counterproliferation Center, August 2004). According to Douglas Feith, many detainees were also the source of crucial intelligence. See Feith, p. 159.

9. Gordon Cucullu, *Inside Gitmo: The True Story Behind the Myths of Guantanamo Bay* (New York: Collins, 2009), pp. 5-6; Andy Worthington, *The Guantanamo Files: The Stories of 774 Detainees in America's Illegal Prison* (London: Pluto Press, 2007), pp. 129-130; David Rose, *Guantanamo: The War on Human Rights* (New York: New Press, 2004), p. 9; Greg Miller, “Many Held at Guantanamo Not Likely Terrorists,” *Los Angeles Times*, December 22, 2002.

10. Billingslea, p. 24.

11. Tim Golden and Don Van Natta, Jr., “The Reach of War; U.S. Said to Overstate Value of Guantanamo Detainees,” *New York Times*, June 21, 2004.

12. Condoleezza Rice, *No Higher Honor: A Memoir of My Years in Washington* (New York: Crown, 2011), p. 275.

13. Prosper, p. 31.

14. Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008), p. 186; Karen Greenberg, *The Least Worst Place: How Guantanamo Became the World's Most Notorious Prison* (Oxford: Oxford University Press, 2009), p. 163.

15. Bellinger, p. 6; also transcript of committee staff interview of Matthew Waxman, August 25, 2011, pp. 21-22, 28 (in committee possession).

16. Prosper, pp. 31-32.

have any intelligence value and. . . may no longer pose a threat as enemy combatants.”¹⁷ A PCC participant later described to the *New York Times* the attitudes of the NSC staffers in the group: “[t]hey were very persistent.” “They kept pressing,” the anonymous source was reported as saying. They asked DOD “[d]id all the detainees really belong there?” and “what was the plan?” to move some out.¹⁸

Impressions about the size and nature of the pool of likely release candidates at GTMO may also have been influenced by a fifteen-page memorandum from the Central Intelligence Agency that apparently circulated through the National Security Council at this time. The CIA assessment was written by Emile Nakhleh, a CIA Middle East analyst, who spent eleven days at GTMO in late summer 2002 using his fluent native language skills to interview “numerous” detainees. Nakhleh determined that 200 of the approximately 600 detainees at GTMO were “neither terrorists nor jihadists” and consequently should be freed.¹⁹

SECTION 1 PROCESS

The memorandum apparently undergirded growing concerns among some that the GTMO population had been unintentionally inflated with individuals whose detention there was unwarranted. This probably sparked the development of the first formal DOD detainee evaluation mechanism, eventually dubbed the “Section 1” procedures.²⁰ These procedures established a process for Department of Defense officials to consider disposition recommendations for each detainee.

The Section 1 recommendations were proffered by the three military organizations involved with GTMO. Joint Task Force (JTF)-GTMO was the multi-service organization responsible for operating the facility and gathering and interpreting intelligence from the detainees in cooperation with other intelligence entities. SOUTHCOM was the regional military command to which JTF-GTMO reported. The Criminal Investigation Task Force (CITF) was comprised of military members and Department civilians with experience in law enforcement and criminal inquiries. One of its important tasks was to determine if any detainees appeared to be good candidates for prosecution by federal civilian courts or Military Commissions, or, if not, if detainees could somehow buttress legal action against others who were.²¹

17. Memorandum from William J. Haynes, II to Secretary of Defense, July 23, 2002, Rumsfeld Archive.

18. “Administration Officials Split Over Stalled Military Tribunals.”

19. Ken Silverstein, “Six Questions for Dr. Emile A. Nakhleh on the CIA and the Iraq War,” *Harper’s*, September 20, 2006 (quotations); “The Reach of War; U.S. Said to Overstate Value of Guantanamo Detainees;” Tom Lasseter, “America’s prison for terrorists often held the wrong men;” *McClatchy Newspapers*, June 15, 2008; “Administration Officials Split Over Stalled Military Tribunals;” Mayer, pp. 183-185.

20. Waxman, pp. 20, 74; transcript of committee interview of Former Official “Q,” pp. 61-62 (in committee possession). At the end of August 2002, DOD’s “Detainee Policy Group” prepared a document outlining possible detainee disposition procedures. See document captioned “Detainee Transfer Process,” c. August 28, 2002 (in committee possession) and document captioned “Implementing Guidance for Release or Transfer of Detainees under US Department of Defense Control to Foreign Government Control,” December 10, 2002. The latter document was released by the American Civil Liberties Union in June 2010 as the result of a Freedom of Information Act request the organization made available on its website in a collection captioned “Bagram FOIA: DOD and DOJ Documents Released on 6/9/2010.” The origin of the “Section 1” moniker appears to be derived from a memorandum that established the Administrative Review Boards, the evaluative mechanism that superseded it. This document described the existing process in a portion denoted by the numeral “1.” It subsequently refers to “procedures described in Section 1.” Apparently the name stuck. See document captioned “Order; Subject: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba,” May 11, 2004, available at www.defense.gov/news.

21. Butler, pp. 33-35; “Briefing on Detainee Operations at Guantanamo Bay,” U.S. Department of Defense News Transcript, February 13, 2004; notes from Department of Defense briefing for committee staff, April 20, 2011. It seems the USSOUTHCOM recommendation was actually developed by JTF-GTMO but formally transmitted as an action of the parent command. See Declaration of Harry B. Harris, Jr., August 18, 2006, and Declaration of Charles D. Stimson, August 22, 2006, both in case files of *Associated Press v. United States Department of Defense*, available at Justia.com. The activities of JTF-GTMO were originally divided between two distinct organizations. For one treatment of the factors that led to their merging, see Greenberg.

After the Section 1 process got underway, ten detainees weekly were evaluated for transfer, release, or continued detention by both JTF-GTMO and the CITF.²² These organizations assessed detainees as “high,” “medium,” or “low” threat, and forms indicating these conclusions were forwarded to Washington.²³ Officials from SO/LIC, the joint staff, and the Department of Defense’s Office of General Counsel then reviewed the packages, and SO/LIC forwarded the paperwork to an “interagency experts group” consisting of staffers from organizations represented on the PCC. That group, or the PCC, made recommendations that then went to Deputy Secretary of Defense Paul Wolfowitz for final decision.²⁴

If the Deputy Secretary approved transfer or release, the Department of State was then charged with working with potential recipient countries to bring the action about. This included ensuring that detainees would be subject to any conditions mandated by the PCC, and that they would be treated humanely, typically in accordance with the strictures outlined in an international treaty known as the Convention Against Torture.²⁵ If (and only if) the Department of State was successful in this effort was a detainee moved.²⁶

There are several important observations about how the Section 1 process was implemented. First, the JTF-GTMO and CITF recommendations periodically differed.²⁷ This may have been rooted in the nature of each organization’s work. Evaluations by JTF-GTMO were undertaken from an intelligence perspective. By contrast, military police and criminal investigators at CITF were trained and experienced in using a law enforcement framework when assessing prisoners.²⁸ When JTF-GTMO and CITF offered contrasting recommendations for a detainee, this placed an extra burden on the SO/LIC staffers responsible for evaluating the files. They sought to explain or reconcile the different views before forwarding the files to the experts group.²⁹ On the other hand, knowledgeable individuals reported to committee staff that the interagency group frequently acted perfunctorily on whatever recommendations came to it from SO/LIC. This may be because members of the experts group believed that DOD was best positioned to determine a detainee’s status. Regardless, SO/LIC endeavored to resolve any resulting disagreements that did come about.³⁰

DOD believed the task of evaluating detainees appropriately rested with them because they had a unique appreciation for how disposition decisions might endanger warfighters.³¹ By contrast, some thought the Department of State might downplay transfer or release risks because it was focused primarily on prospective foreign policy benefits of repatriating a GTMO detainee to his home. “I think the State Department probably had a very high threshold for accepting risk and the

22. Notes from Department of Defense briefing for committee staff, April 20, 2011.

23. “Briefing on Detainee Operations at Guantanamo Bay,” Prosper, p. 20; Butler, p. 32.

24. “Briefing on Detainee Operations at Guantanamo Bay,” Butler, pp. 43-47; Waxman, pp. 68-69; Declaration of Harry B. Harris, Jr.; Declaration of Charles D. Stimson; and Declaration of Karen L. Hecker in *Associated Press v. United States Department of Defense*, August 26, 2006, available at Justia.com. These declarations include redacted sample decision memoranda and back-up material provided to the Deputy Secretary of Defense in the Section 1 process.

25. Prosper, pp. 32-34; Bellinger, p. 23; and Document captioned “L. Press Guidance, United States Periodic Report on the Convention Against Torture,” May 6, 2005, available on the Department of State, Electronic Reading Room, Declassified/Released Document Collections, “Alleged CIA, ‘Ghost,’ or ‘Secret’ Detainees Collection,” tranche I. For a further discussion of the legal implications of transfers pursuant to the Convention Against Torture,” see Robert M. Chesney, “Leaving Guantanamo: The Law of International Detainee Transfers,” *University of Richmond Law Review* (2006).

26. Prosper, pp. 20, 47-48; Bellinger, pp. 13, 35; Butler, p. 81; Waxman, p. 52.

27. Butler, p. 39.

28. Billingslea, pp. 17-19, 28, 58, 70; Butler, pp. 35-40. One individual told committee staff that CITF’s painstaking efforts to build criminal cases against detainees delayed case processing. The mandate to consider ten cases weekly was intended to speed the task force’s work. See Billingslea, p. 28.

29. Butler, pp. 43-44.

30. Butler, pp. 45, 46, 48-49; Prosper, p. 21; Billingslea, p. 29.

31. Butler, p. 87.

Department of Defense had an extremely low threshold,” Billingslea summarized in an interview with committee staff.³²

In October 2002, Billingslea wrote to Rumsfeld to explain the current status of detainee review procedures. “SO/LIC has instituted a process to determine which detainees should be transferred or released to other nations,” he noted. The Section 1 process had been “put in place in September” and was “now yielding results,” Billingslea noted.³³ Referring to Wolfowitz, Billingslea explained,

[t]his week the Deputy approved release to Afghanistan of 3 detainees, and 1 to Pakistan. I have made it clear to our folks that those four need to be on a plane heading out of GTMO no later than the 26th.³⁴

He also declared “[t]here are three more detainees to be considered in the near term.”³⁵

As a Department of State official described to a foreign audience in March 2003:

The U.S. is in the process of dividing the detainees into three categories: 1.) those who should be prosecuted by the U.S.; 2.) those who the U.S. is comfortable with sending to their home country for prosecution/detention; and 3.) those who no longer pose a threat and can be released outright.³⁶

There may have been some emphasis placed on the second and third option at the time. This is because of persistent delays in the establishment of the Military Commission system, the venue in which detainees were to be tried by the United States.³⁷ Without this option readied, pressure built for alternative disposition.

Indeed, after the Section 1 process was operational, one senior administration official observed that “other parts of the U.S. Government” began “pushing the Defense Department to work a bit harder. . . [t]o identify more people” for potential transfer or release.³⁸ In fact, Billingslea reported to committee staff that he “was receiving an enormous amount of political pressure” in this period from the White House and Department of State officials “to move forward with releasing . . . individuals or providing them as transfers.”³⁹

In January 2003, Secretary Rumsfeld also again expressed his desire to reduce the numbers at GTMO. In a two-sentence memorandum (colloquially known as a “snowflake”) to the Undersecretary of Defense for Policy he declared, “[w]e need to get rid of more detainees.”

32. Billingslea, p. 40. Similar sentiment is expressed in Jonathan Mahler, “Getting Off the Island; Inside the long struggle to send Gitmo’s detainees home,” *Daily Beast*, May 28, 2009.

33. Memorandum from Marshall Billingslea to Secretary of Defense, October 11, 2002 (hereafter “Billingslea memo”). This document was among those requested to be declassified by Secretary Rumsfeld but it is posted on the website of the Department of Defense FOIA reading room in “Documents Released to Secretary Rumsfeld Under MDR,” rather than in the Rumsfeld Archive. For a journalistic account providing further background on this period see, “Administration Officials Split Over Stalled Military Tribunals.”

34. Billingslea memo.

35. Billingslea memo.

36. Department of State cable, “Subject: Guantanamo Detainees: Ambassador Prosper’s Stockholm Consultations,” March 13, 2003, Document no. 000654, GWU.

37. Prosper, p. 15; “Administration Officials Split Over Stalled Military Tribunals.”

38. Bellinger, p. 14.

39. Billingslea, pp. 25-26.

“How do we do it?” he asked.⁴⁰ He repeated his entreaty three months later. “I do want some people out of Guantanamo sent to their own countries. I really mean it. I want that done. I would like a report every two days on what is happening on this.”⁴¹

Such specific and emphatic instructions from the Secretary of Defense made his views unequivocally clear and had ramifications. As Billingslea recounted to committee staff, “the Secretary was frustrated with the speed by which this process was unfolding.”⁴² Probably in light of Rumsfeld’s concern, and because other Department leaders believed “the issues surrounding Guantanamo were significant and deserving of a high level of focus,” Department officials mandated that a minimum number of detainee cases be evaluated each month for prospective transfer or release.⁴³

But, some governments were reluctant to accept detainees. They “did not want to take suspected terrorists any more than we wanted to hold them,” Rumsfeld recounts in his memoirs.⁴⁴

“[B]efore 2003, we were putting pressure on countries to try to take their nationals back,” a Department of State official explained, “we were getting zero traction.”

“[B]efore 2003, we were putting pressure on countries to try to take their nationals back,” a Department of State official explained, “we were getting zero traction.”⁴⁵ A White House staffer recalled that many governments, “believed that the individuals in Guantanamo were troublesome insurgents . . . and that it was easier for the U.S. government to hold them than for them to take them back and have to do something with them.”⁴⁶

However, one former official told committee staff that in 2003 “there was general agreement” among the relevant cabinet secretaries that “we ought to be transferring or releasing more detainees from Guantanamo.”⁴⁷ What was uncertain to them, he recounted, was why this was not taking place. “The debate among them was who was holding up the show.”⁴⁸ Among other reasons, the official suggested was some combination of complex and cumbersome procedures that required significant interagency coordination.⁴⁹

Efforts were made to address these issues.

40. Memorandum from Donald Rumsfeld to Doug Feith, January 8, 2003, Rumsfeld Archive.

41. Memorandum from Donald Rumsfeld to Jim Haynes, Doug Feith, April 11, 2003, Rumsfeld Archive. While Rumsfeld was consistently interested in reducing the GTMO population, there is some evidence he was inattentive to the precise mechanism in which this came about. Condoleezza Rice recounted convening a Principals Committee meeting on detainee issues in which Rumsfeld did not participate. “I don’t do detainees,” he reportedly explained to her. See Rice, p. 275. Similarly, in a March 2004 press conference, Rumsfeld evinced only a general understanding of transfer issues. “I don’t get involved in this process,” he said. “I’m not a lawyer,” he continued. About detainee transfers pursuant to the Section 1 process he surmised, “I would guess there are very . . . few people . . . where there’s unanimity that they definitely shouldn’t go or definitely should . . . be transferred.” See “Defense Department Operational Briefing,” U.S. Department of Defense News Transcript, March 25, 2004.

42. Billingslea, p. 58.

43. Billingslea, p. 4 (quotation). See also Billingslea, pp. 5-7, 28-29; Butler, pp. 4-7; and Waxman, p. 44.

44. Rumsfeld, p. 569.

45. Prosper, p. 29.

46. Bellinger, p. 21.

47. Waxman, pp. 124-125.

48. Waxman, p. 125.

49. Waxman, pp. 125-6.

Finding 2

After the first review process began, political and diplomatic pressures to reduce the GTMO population arose, resulting in releases and transfers.

In May 2003, at the highpoint of GTMO's population, 680 detainees were at the facility. By January 2005, 146 had been released.¹ This was the result of the persistent effort to identify those individuals who were judged to pose a sufficiently low threat that they could be freed.

To some, this number validated the 2002 CIA assessment that had estimated 200 detainees were appropriate release candidates. Critics have also suggested that the delay acting on these cases indicated that there was a reluctance to make controversial release decisions. In 2005, the GTMO commander complained to the *Wall Street Journal*, “[n]obody wants to be the one to sign the release papers There’s no muscle in the system.”² Others believed the fact that the releases were spread over many months suggested that officials sought to deflect attention from the topic. “[H]onchos in Washington wanted to let the detainees ‘trickle out’ to minimize bad press,” one soldier assigned to GTMO said he was told by colleagues in 2003. “Would releasing too many make the Gitmo operation look bad?” he wondered retrospectively in a published account.³

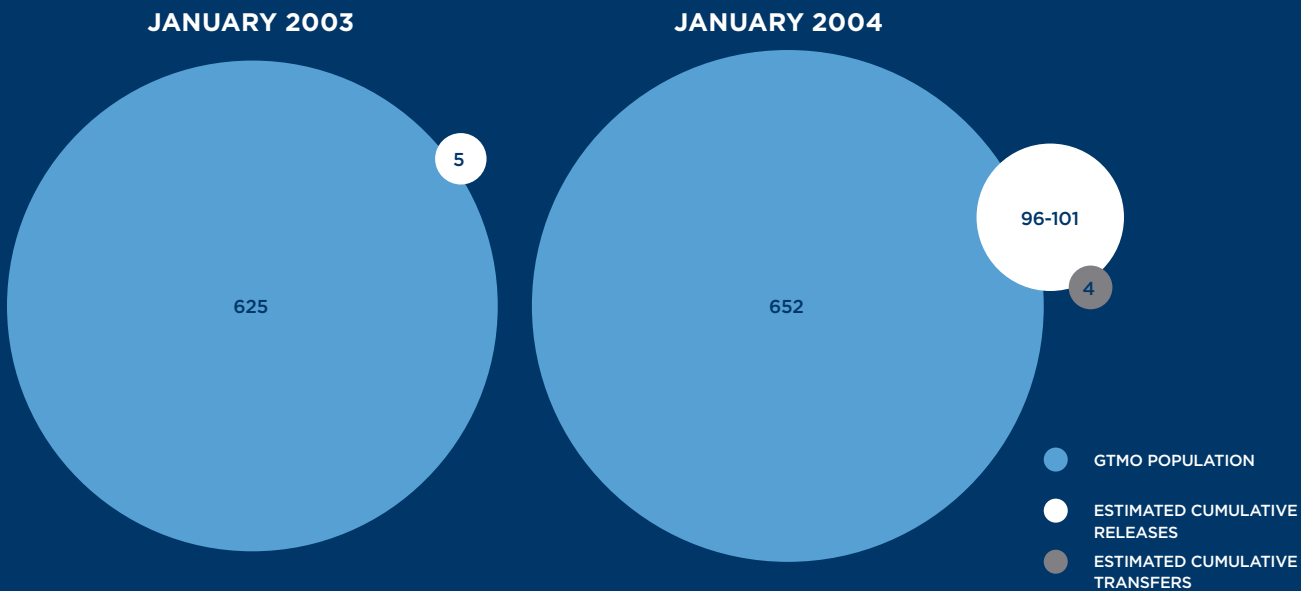
Committee staff, however, found no evidence that the U.S. intentionally delayed releases. Rather, there is substantial evidence of just the opposite: the Department of Defense responded to persistent pressures to reduce the GTMO population as fast as it believed could be done safely. Former senior officials interviewed by committee staff said releases occurred at a measured pace which was necessitated by the requirement to become more knowledgeable about the detainees amidst the deceit and confusion discussed previously. As Billingslea reported to Rumsfeld in his October 2002 memorandum, “[c]ontrary to rumors circulating among NSC

1. For details on determining transfer and release numbers and locations, see methodological section of this report. The only other detainee to depart GTMO before those discussed in the Billingslea memo is Abdul Razaq (ISN 356) who was determined to be mentally ill. See Andy Worthington, *The Guantanamo Files: The Stories of 774 Detainees in America's Illegal Prison* (London: Pluto Press, 2007), pp. 87, 101, 172; and Sami Yousafzai, “The One that Got Away,” *Newsweek*, May 17, 2002. Although Razaq was putatively interviewed for the *Newsweek* story, DOD records (see, for example, document captioned “country, number of detainees transferred,” etc., c. September 2011, in committee possession) show he did not leave GTMO until September. This discrepancy cannot be explained.

2. Christopher Cooper, “Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape,” *Wall Street Journal*, January 26, 2005.

3. Erik Saar and Viveca Novak, *Inside the Wire: A Military Intelligence Soldier's Eyewitness Account of Life at Guantanamo* (New York: Penguin Press, 2005), p. 208.

GUANTANAMO POPULATION TRENDS



Staff, I do not think there are ‘200’ detainees that can be immediately released.”⁴ “We did the easy cases first. Most of the rest of the detainees are anti-American and violent,” he declared.⁵

“[W]e were working hard to make decisions,” another former official told committee staff.⁶ He rejected “the notion” that inattention had resulted in “200 easy people sitting in Guantanamo.” This “was just not consistent with what we were doing on a day-to-day basis,” he said.⁷ Instead, the Department of Defense was engaged in

a process that minimized the risk of making a disastrous mistake by letting someone go from Guantanamo who first and foremost had the potential for killing Americans . . . or who had significant intelligence value yet to be exploited

explained Billingslea.⁸

Release decisions, according to an internal document, also did not obviate the determination that detainees had been “properly determined to be enemy combatants under the

4. Memorandum from Marshall Billingslea to Secretary of Defense, October 11, 2002 (hereafter “Billingslea memo”). This document was among those requested to be declassified by Secretary Rumsfeld but it is posted on the website of the Department of Defense FOIA reading room in “Documents Released to Secretary Rumsfeld Under MDR,” rather than in the Rumsfeld Archive (hereafter “DOD FOIA reading room”). While the fact that 187 detainees (a number strikingly similar to that proffered by Nakhleh) were released by February 2006 might suggest some support for his position, according to the Defense Intelligence Agency, at least eight of the released detainees were confirmed (five) or suspected (three) of reengaging in terrorist activities. (See “Defense Analysis Report—Terrorism,” Defense Intelligence Agency, April 8, 2009 and committee staff’s transfer and release determinations as referenced in methodological note.) For additional information on Nakhleh’s perspective, see Ken Silverstein, “Six Questions for Dr. Emile A. Nakhleh on the CIA and the Iraq War,” *Harper’s*, September 20, 2006; and Ken Silverstein, “Former CIA Official on Gitmo, Iraqi Elections and Iran Policy,” *Harper’s*, February 10, 2009.

5. Billingslea memo.

6. Transcript of committee staff interview of Paul Butler, July 8, 2011, p. 84 (in committee possession).

7. Butler, p. 85.

8. Transcript of committee staff interview of Marshall Billingslea, June 3, 2011, p. 35 (in committee possession). For more on the intelligence value of detainees, see Douglas J. Feith, *War and Decision: Inside the Pentagon at the Dawn of the War on Terrorism* (New York: Harper Collins, 2008), p. 159.

law of armed conflict.”⁹ However, while most released detainees were low-level fighters, one former official acknowledged there were some cases in which “we just got it wrong,” and detention was “a mistake.”¹⁰ There were also at least some “efforts to ensure that detainees who are released are prepared to be reintegrated into their societies” and “not harbor ill-will towards the United States.”¹¹ Furthermore, released detainees were asked to sign a pledge not to associate with al-Qa’ida or the Taliban or “engage in, assist, or conspire” with terrorists or terrorism or combat U.S. or allied forces.¹²

The difficulties of properly identifying detainees for release, notwithstanding a putatively rigorous evaluation and a signed agreement, are apparent. Eight of the GTMO detainees who were released between October 2002 and January 2005 were publicly (five) confirmed or suspected (three) by DIA in 2009 as “reengaging in terrorist activities.”¹³ Mullah Shazada (Internment Serial Number 367), for example, provided a false name while in detention and claimed to be a merchant. After his May 2003 release, he became the Taliban commander in southern Afghanistan. He was killed a year later in a firefight with U.S. forces.¹⁴

Witnesses told committee staff that the Department of Defense was acutely aware of the possibility that some who might be dispatched from GTMO would return to the fight. “There was no one in the Pentagon,” including “senior decision makers” who “didn’t understand the risks involved” in “transfer or outright release from Guantanamo,” Billingslea recounted.¹⁵ John B. Bellinger, III, who was involved with the PCC at the time as legal advisor to the National Security Council, said the principals and the departmental deputies they represented had the same concerns. “[W]e would have lengthy discussions in the situation room about the risks,” he recalled. Conversation centered on “what level of risk we ought to accept, and what would happen if an individual did go back to the fight,” he said. All involved knew “there were security risks of transfers or releases.”¹⁶

“There was no one in the Pentagon,” including “senior decision makers” who “didn’t understand the risks involved” in “transfer or outright release from Guantanamo,” one former official recounted.

9. Document captioned “Guantanamo Detainees,” February 4, 2004, (in committee possession) (released by the Department of Defense pursuant to a FOIA request by Judicial Watch, March 2, 2011). There is at least one report of a released detainee being incarcerated upon his return. See Mahvish Rukhsana Khan, *My Guantanamo Diary: The Detainees and the Stories They Told Me* (New York: Public Affairs, 2008), pp. 259-262.

10. Butler, p. 20.

11. Quoted from Document captioned “Summary of Conclusions for Meeting of the NSC Principals Committee,” June 19, 2003, (in committee possession) (released by the Department of Defense pursuant to a FOIA request by Judicial Watch, March 2, 2011). Billingslea briefed Rice, Rumsfeld, and others on this topic at a National Security Council meeting in June 2003.

12. The agreement is reproduced in Laurel E. Fletcher and Eric Stover, *The Guantanamo Effect: Exposing the Consequences of U.S. Detention and Interrogation Practices* (Berkeley: University of California Press, 2009), p. 89. It is referenced in “Information Paper,” Defense Intelligence Agency, October 19, 2004, (in committee possession). From the Department of State’s perspective, releases were relatively easy to arrange. The U.S. did have some humane treatment concerns with some countries, according to a former State official who was involved with the process. In other situations, home nations were reluctant to receive their nationals, even with the understanding that the U.S. had determined that they fit the release category. In a few situations, he also related, released detainees were detained by the recipient government, notwithstanding U.S. intentions to the contrary. See transcript of committee staff interview of Pierre Prosper, May 10, 2011, pp. pp. 32-38, 48 (in committee possession).

13. “Defense Analysis Report,” April 8, 2009.

14. “Defense Analysis Report”; Andy Worthington, *The Guantanamo Files: The Stories of 774 Detainees in America’s Illegal Prison* (London: Pluto Press, 2007), p. 103. Some have suggested Shazada’s trickery could have been detected. *TIME* magazine reported that Afghan government officials were not provided access to Afghan detainees despite repeated requests to vet them. Had these officials been able to visit, at least one government minister believes Shazada would have been identified as a Taliban. See Tim McGirk and Rahimullah Yusufzai, “After Gitmo, A Talib Takes Revenge,” *TIME*, June 7, 2004.

15. Billingslea, p. 69.

16. Transcript of committee staff interview of John B. Bellinger, III, May 19, 2011, pp. 24-25 (in committee possession).

TRANSFERS IN THE FIRST BUSH TERM

Processing cases for transfer posed special challenges. Between October 2002 and January 2004, while “more than 80” detainees were released, only four were transferred.¹⁷ However, in the final twelve months of President Bush’s first term, there were 59 transfers (and 66 releases).¹⁸ These numbers, their pace, and the dramatic increase in transfers demonstrate the dynamics that affected the process during this period, as well as the changing composition of the GTMO population as the pool of those considered the lowest threat was exhausted.

Until 2003, some interagency confusion existed about the mechanics of transfer negotiations. It seems the Department of Defense initially expected the Department of State to determine if a country was willing to agree conceptually to a transfer, without reference to specific detainees. If the Department of State was successful, DOD intended then to consider if it recommended transferring detainees to that country. The Department of State found this to be difficult because potential recipient countries typically required details about possible transferees before committing to receive them. Furthermore, if the country agreed but DOD then objected and assessed the relevant detainees as inappropriate for transfer, the diplomatic effort expended to secure the agreement was wasted.¹⁹

Eventually this difference was resolved. State began to approach countries only after a case was conveyed to the PCC by DOD. This precluded misspent diplomatic effort. It also meant that the Department of State’s transfer activities were limited to the pace and places determined by the Department of Defense.²⁰

Secretary Rumsfeld apparently did not understand this dynamic. He blamed early failures to secure transfers on an inadequate Department of State effort. In an April 2003 memorandum to Secretary of State Colin Powell, he complained,

[w]e need to make a real push to secure agreements with key foreign governments so that we can transfer enemy combatants out of Guantanamo Bay back to them for further detention and/or prosecution. . . . After more than a year, we do not yet have a single agreement signed.²¹

Billingslea expressed to committee staff his dismay with the Department of State. The Department “routinely appeared to be better at communicating the interests of foreign nations to us as opposed to communicating our equities to them,” he said.²² State career staff were “very

17. “Guantanamo Detainees,” February 4, 2004. Most accounts of dispatches from GTMO include references to Yaser Esam Hamdi (ISN 9) who left in April 2002. However, Hamdi was conveyed to the custody of the U.S. Naval Brig in Charleston, South Carolina because he was determined to be a U.S. citizen and thus not appropriately detained at GTMO. Given the peculiar circumstances of this case, except as noted, it is not included among the statistics or discussion of GTMO “transfers.”

18. Declaration of Matthew W. Waxman, June 2, 2005; and committee transfer and release list cited in methodological note.

19. Prosper, pp. 75-77; Jonathan Mahler, “Getting Off the Island: Inside the long struggle to send Gitmo’s detainees home,” *Daily Beast*, May 28, 2009.

20. Prosper, pp. 62, 74.

21. Memorandum from Donald Rumsfeld to Colin Powell, April 21, 2003, Rumsfeld Archive. This is a collection of documents declassified at Donald Rumsfeld’s request and made available on Rumsfeld.com (hereafter “Rumsfeld Archive”) in connection with the preparation of Rumsfeld’s autobiography.

22. Billingslea, p. 59. Billingslea emphasized to committee staff that Pierre Prosper, the Special Representative for War Crimes Issues and the individual leading the negotiations was “an excellent interlocutor on behalf of the Department of State” but he believed difficulties could be traced to career staff there. (See Billingslea, p. 59).

RUSSIA

The United States transferred seven Russian citizens from GTMO to Russian custody in February 2004. By 2009, five were included on the Defense Intelligence Agency's reengagement list. Two are confirmed and three are suspected of involvement in terrorism.¹ Many questions remain about what happened to the detainees once they were repatriated to Russia. Their cases raise important issues about early efforts to reduce the GTMO population. The U.S. has made no transfers to Russia since. One Russian national was transferred to Albania in 2006 and one remains in GTMO.²

BACKGROUND

According to press accounts, the seven transferred in 2004 had traveled to Afghanistan from Muslim areas of southern Russia before September 2001. Terrorism expert Andrew McGregor notes that they may "have been members of the Islamic Movement of Uzbekistan (IMU), an Islamist guerrilla force that fought in Afghanistan alongside al-Qaeda and the Taliban."³ Russian authorities apparently believed that several were involved in terrorist activities in the 1990s.⁴

After the detainees were captured and sent to GTMO, at least one Russian delegation visited them.⁵ Such missions commonly took place in advance of a transfer or release to allow officials of the prospective countries to gain first-hand knowledge of the detainees before initiating repatriation negotiations.⁶ Marshall Billingslea, then Acting Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, noted to committee staff that Russian officials showed significant interest in having the detainees returned.⁷

However, a year passed before Pierre Prosper, then the senior Department of State official responsible for leading the negotiations, authorized staff at the U.S. embassy in Moscow to begin discussions.⁸ Once underway, these talks took nearly twelve months. Such an extended period suggests some complications in securing satisfactory transfer arrangements. The negotiations were apparently protracted

because "the intelligence agencies, the law enforcement agencies . . . the State Department and the Defense Department" were all "invited to weigh in" with respect to both security and humane treatment arrangements, recalls John Bellinger, then senior associate counsel to the President and legal advisor to the National Security Council.⁹

Arrangements to ensure that detainees posed no future threat to the United States and its allies were important to the U.S. government. But, the U.S. also demanded "extremely high levels of assurance on treatment," on humanitarian grounds, Bellinger told committee staff.¹⁰ He and others "had a lot of concern regarding transferring the Russians."¹¹ "[W]e were . . . worried [about] . . . what was going to happen when they go [t]o Russia," recalled another.¹²

At the time of the transfer, mistreatment of prisoners in Russia was well known. According to the 2002 State Department report on human rights, prison conditions in Russia were "extremely harsh and frequently life threatening."¹³ The assessment also declared that "prisoners' rights groups, as well as other human rights groups, documented numerous cases in which law enforcement and correctional officials beat and otherwise abused detainees and suspects."¹⁴

Nonetheless, the transfer was made. Based upon public sources, it is difficult to determine precisely the terms. However, a Department of State document described the action at the time. It specified that the transfer included

assurances that the individuals will be detained, investigated and prosecuted, as appropriate, under Russian law, and will be treated humanely in accordance with Russian law and obligation.¹⁵

Still, there was apparently some "concern" elsewhere in the Department of Defense about the sufficiency of the security arrangements.¹⁶

A Russian media account reported that the finalized transfer agreement included three principal clauses: the

1. "Defense Analysis Report—Terrorism," Defense Intelligence Agency, April 8, 2009.

2. For exact date of Zakirjan Asam's (ISN 672) transfer to Albania and the fact that Ravil Mingazov (ISN 702) remains detained at GTMO see unclassified public documents (in committee possession).

3. Andrew McGregor, "A Sour Freedom: The Return of Russia's Guantanamo Bay Prisoners," *Chechnya Weekly*, 7, no. 22, June 1, 2006.

4. Fatima Tilsova, "The Fate of Russian Prisoners in U.S. Prisons," *Voice of America*, April 26, 2011. See also Nabi Abdullaev, "From Russia to Guantanamo, via Afghanistan," *The St. Petersburg Times*, December 24, 2002.

5. Abdullaev, "From Russia to Guantanamo."

6. Notes from committee staff travel to various locations (in committee possession).

7. Transcript of committee staff interview of Marshall Billingslea, June 3, 2011, pp. 62-63 (in committee possession); also see Abdullaev, "From Russia to Guantanamo."

8. Department of State cable, "Transfer of [Excised] Guantanamo detainees," March 25, 2003, Document no. 076578, "The Torture Archive," National Security Archive, The George Washington University (hereafter cited by document no. if available and "GWU").

9. Transcript of committee staff interview of John Bellinger, III, May 10, 2011, pp. 42 (in committee possession).

10. Bellinger, pp. 40-41.

11. Transcript of committee staff interview of Pierre Prosper, May 10, 2011, p. 50 (in committee possession).

12. Prosper, p. 50.

13. "Russia" in *Country Reports on Human Rights Practices*, U.S. Department of State, March 31, 2003.

14. "Russia" in *Country Reports on Human Rights Practices*.

15. "Department of State press guidance, Transfer of Russian Detainees from Guantanamo," February 27, 2004, GWU.

16. Billingslea, pp. 62-63.

RUSSIA (CONT)

detainees would be prosecuted in Russian courts; they would remain incarcerated until the end of America's involvement in Afghanistan; and that American officials could have access to them at any time.¹⁷ However, Bellinger reported to committee staff his recollection that the transfer agreement apparently prioritized prosecution, not merely legal detention.¹⁸

It is possible that some U.S. leaders may have been eager to effectuate the transfer because they believed it could benefit the nation's relationship with Russia. Billingslea recalled that at the time, the U.S. was "becoming aware of the relationship between the Chechen groups and al-Qa'ida."¹⁹ Speaking about an al-Qa'ida leader, he said that the government was interested in "the role that Zarqawi in particular was playing" in Eurasia.²⁰ Accordingly, U.S. officials may have thought the transfers could help to secure Russian support for the War on Terror.

TRANSFER TO RUSSIA

After the transfer, the Russian government held the seven detainees for four months. According to Russian news accounts, prosecutors considered charging the detainees with participating in criminal organizations, serving as mercenaries, and illegally crossing borders.²¹ According to material reviewed by committee staff, it seems the charges were dropped and the former detainees sent home after the prosecutors claimed to lack sufficient evidence for prosecution.²² The Russian press reported that the U.S. failure to provide useful evidence complicated any prospective prosecution.²³ However, one analyst has argued that the Russian decision to release the detainees may have been meant as an act of "magnanimity" intended to influence the release of two Russian agents held in Qatar.²⁴

Because the Russian government informed Prosper that "the men would be held and prosecuted" he "was surprised" by their release, according to one news story.²⁵

The U.S. embassy in Moscow also did not expect this outcome. A declassified diplomatic cable reveals that U.S. Embassy staffers in Moscow learned that the detainees had been freed from custody from Russian newspapers, and subsequently reported this fact to Washington.²⁶ Russian journalistic accounts also indicate that shortly after the detainees were released by the Russians, the Deputy Minister of Foreign Affairs made a statement which cast doubt on whether the Russians ever accepted the terms of the transfer agreement.²⁷

Less than a year after their release by Russian authorities, two former detainees (Timur Ravilich Ishmurat [ISN 674] and Ravil Shafeyavich Gumarov [ISN 203]) were arrested for alleged involvement in a gas pipeline bombing. They were acquitted by a jury in September 2005. However, the acquittal was appealed, and in May 2006 they were found guilty and sentenced to 11 and 13 years in prison, respectively.²⁸

In June 2007, according to Russian authorities, Ruslan Odizhev (Odishev or Odijev) (ISN 211), was killed in a gunfight with police after attempting to seize a Russian government facility.²⁹ Rasul Kudaev (alias: Abdullah Kafkas) (ISN 82) was arrested in early 2005 on suspicion of being connected to an attack on government buildings. Reports suggest he has been held in prison without trial since then.³⁰ Almasm Rabilavich Sharipov (ISN 209) (aka Shamil Khazhiev) was suspected by Russian authorities of associating with the terrorist group Hezb-e Tahir.³¹

Although the transfer agreement apparently was structured to permit U.S. diplomats to monitor the conditions in which the detainees were held, the U.S. embassy has apparently failed to take action on these provisions. Committee staff visited Russia in connection with this investigation. Russian officials refused to grant interviews and ignored requests for further information about the former detainees, making the collection of further details impossible.³²

17. "Russian Taliban," *Novaya Gazeta*, July 12, 2004 (translated by committee staff), available at www.archipelag.ru/geopolitics/piryadok/ethics/rus-naliban/.

18. Bellinger, pp. 41-42.

19. Billingslea, p. 63.

20. Billingslea, p. 63.

21. Oksana Yablokova, "Guantanamo Detainees Walk Free," *The Moscow Times*, June 28, 2004.

22. Eduard Lomovtsev, "Mysteries of the Russian Talibs" *Vremya Novostei*, August 29, 2005, available at <http://dlib.eastview.com/browse/doc/8172797>.

23. Lomovtsev, "Mysteries."

24. McGregor, "A Sour Freedom."

25. Jonathan Mahler, "Getting Off the Island," *The Daily Beast*, May 28, 2009.

26. Department of State cable, "Transfer of [Excised] Guantanamo detainees," March 25, 2003, Document no. 076578, GWU.

27. "Russian Taliban," *Novaya Gazeta*, July 12, 2004 (translated by committee staff).

28. Peter Finn, "Russian Homeland No Haven For Ex-Detainees, Activists Say; Men Freed From Guantanamo Allegedly Face Campaign of Abuse," *Washington Post*, September 3, 2006. Apparently, shortly after the retrial, their sentences were commuted to 10 and 11 years, respectively.

29. C.J. Chivers, "Russian Freed from Guantanamo is Killed by Police Near Chechnya," *New York Times*, June 28, 2007.

30. Tilsova, "The Fate of Russian Prisoners."

31. He is now apparently in the Netherlands. See Russian language newspaper *Kommersant*, June 28, 2007. The other two detainees in the transfer tranche of seven, Airat Vakhitov (ISN 492) and Rustam Akhmyarov (ISN 573), have also apparently left Russia to live in the Middle East after reporting being abused by Russian security services. See Tilsova, "Fate of Russian Prisoners."

32. Notes from briefing by U.S. Embassy, Moscow, Russia to committee staff, August 8-17, 2011 (in committee possession).

effective at raising concerns, [and] at expressing frustration,” but “did not distinguish itself in providing alternatives or solutions.”²³

2003 TRANSFERS TO SAUDI ARABIA

The month after Rumsfeld’s memorandum, four detainees were transferred to Saudi Arabia.²⁴ Billingslea described this May 2003 action as exceptional because the transfer was “top down directed.”²⁵ A former State Department official recounted

[w]e were getting hit up . . . by the Saudis for this. . . . I heard from the Saudis. The White House heard from the Saudis. . . . The President heard from the Saudis.²⁶

Consequently, “we tried to figure something out,” he said.²⁷ The Saudi transfers were “ad hoc” and not the result of a “formal process,” he recalled.²⁸ “We were just told to do it,” the *New York Times* quoted an official in 2004 describing the transfer.²⁹ “It happened to serve a beneficial diplomatic purpose,” a source told the newspaper.³⁰ The article also asserts the action was taken because the Saudis had allowed the United States to utilize some of the Kingdom’s bases during the invasion of Iraq.³¹

There was a process to accomplish transfers, unencumbered by bureaucratic procedures. An official description compiled in 2010 lists “Section 1” and “with Deputy Secretary of Defense approval” as two distinct mechanisms under which detainees could depart GTMO in this period.³² This indicates that the Deputy Secretary could mandate a transfer outside the Section 1 process, pursuant to authority other than what it provided. No former official interviewed by committee staff explicitly confirmed that this was the case in the 2003 transfers to Saudi Arabia, but it seems likely.

The *New York Times* reported in 2004 that “[o]fficials involved in the deliberations said the transfer of the Saudis from Guantanamo initially met with objections from officials at the Pentagon, the Central Intelligence Agency, and the Justice Department.”³³ “[N]o Saudis had even been under consideration” for dispatch from GTMO “prior to the arrangement’s

23. Billingslea, p. 60. He also conveyed his belief that he thought Rumsfeld’s frustration about transfers was rooted in the fact that, while the Department of Defense held the detainees, another agency (the Department of State) was ultimately responsible for relocating them. In other words, Rumsfeld was frustrated because DOD owned the “problem but not the solution.” See Billingslea p. 60.

24. Five individuals were sent on this date to Saudi Arabia. It appears four were transferred and one released. See transcript of committee interview of Former Official “Q,” p. 36 (in committee possession); Don Van Natta, Jr. and Tim Golden, “The Reach of War: Officials Detail a Detainee Deal by 3 Countries,” *New York Times*, July 4, 2004; Department of State cable, “Proposed Transfer of [Excised] Detainees for Continued Detention or Prosecution by [Excised],” March 22, 2003, 2002, Document no. 075431, “The Torture Archive,” National Security Archive, The George Washington University (hereafter cited by document no. and “GWU.”); see unclassified public source information regarding dates of the transfer (in committee possession); for the fact that the four detainees were transferred, see “Briefing on Detainee Operations at Guantanamo Bay,” U.S. Department of Defense News Transcript, February 13, 2004; “Detainee Transfer Announced,” U.S. Department of Defense News Release, April 26, 2005; and “Detainee Transfer Announced,” U.S. Department of Defense News Release, July 20, 2005.

25. Billingslea, pp. 30-32, 42.

26. Former Official “Q,” p. 59.

27. Former Official “Q,” p. 59.

28. Former Official “Q,” pp. 56, 59.

29. Don Van Natta, Jr. and Tim Golden, “The Reach of War.” This article asserts the transfer was part of a “secret three-way deal” involving Saudi Arabia, the United Kingdom, and the U.S.

30. Don Van Natta, Jr. and Tim Golden, “The Reach of War.”

31. Don Van Natta, Jr. and Tim Golden, “The Reach of War.”

32. Document captioned “(U) Screening Process Prior to Executive Order 13492,” p. 9 (in committee possession).

33. Don Van Natta, Jr. and Tim Golden, “The Reach of War.”

“[E]xternal pressure, including from foreign nations, continued to mount for transfers and releases,” one former Defense official recalled, as did “the requirement to continue to review detainees.” “There was this notion,” said another, that by reducing the GTMO population, “you could somehow address some of [the] criticisms” lodged against the facility’s existence.

being struck,” the paper said, citing anonymous Defense Department sources.³⁴ According to a declassified Department of State cable, the U.S. Embassy in Riyadh was directed in late March 2003 to deliver correspondence to the Saudi government specifying the conditions under which the Saudis might be transferred for “continued detention and/or prosecution.”³⁵ The “terms and conditions set forth in the letter are non-negotiable” the cable instructed, and noted that the initial transfers might represent the first of several tranches to be returned.³⁶

Bellinger recounted to committee staff that the Saudi transfers took place only after “protracted negotiations” to ensure humane treatment.³⁷ Another said the detainees “moved through the system fairly quickly.”³⁸ This seems to be the case since the detainees left about seven weeks after the cable to Riyadh.³⁹ Apparently after being held for two years by Saudi authorities, they were convicted in May 2005 after a four-day trial for “leaving the country without permission.” They received six month prison sentences, but were released based on time already served.⁴⁰

After the May 2003 transfers, another did not occur for nine months. Ambassador Pierre Prosper, the lead negotiator for the Department of State, said of the period: “we spent . . . that time . . . trying to figure out what we can get from countries” in addition to determining what was possible as a result of “our own internal decision making.”⁴¹ Department of Defense officials struggled to keep up. “[E]xternal pressure, including from foreign nations, continued to mount for transfers and releases,” Billingslea recalled, as did “the requirement to continue to review detainees.”⁴² “There was this notion,” said Paul Butler, who had become SO/LIC’s Principal Deputy Assistant Secretary of Defense in this time, that by reducing the GTMO population, “you could somehow address some of [the] criticisms” lodged against the facility’s existence.⁴³

On February 13, 2004, the second transfer took place when one detainee was sent to Spain. Nine days later a detainee left for Denmark. On February 27, seven were transferred to Russia and five to the United Kingdom on March 9. This was a sudden flurry of activity in a short period of time. It seems these actions represent a confluence of events which occurred just as the transfer process was becoming more flexible. Each transfer group is noteworthy for a different reason.

34. Don Van Natta, Jr, and Tim Golden, “The Reach of War.”

35. Department of State cable, “Proposed Transfer of [Excised] Detainees for Continued Detention or Prosecution by [Excised].”

36. Department of State cable, “Proposed Transfer of [Excised] Detainees for Continued Detention or Prosecution by [Excised].”

37. Bellinger, p. 41.

38. Prosper, p. 59.

39. For date of transfer, see unclassified public documents (in committee possession).

40. “Saudi Arabia: Guantanamo Detainees Return to Legal Limbo,” Human Rights Watch, May 26, 2006.

41. Prosper, p. 58.

42. Billingslea, p. 57.

43. Butler, p. 66.

FOREIGN PROSECUTION

When GTMO was established, policy makers believed that the facility's population might easily be reduced by sending detainees to other nations for "law of war detention" or criminal prosecution.¹ There is considerable evidence suggesting that many foreign governments did not have the capacity or willingness to do either.²

From interviews with former officials and select country visits, committee staff determined that most foreign governments were unable or unwilling to hold a detainee once he arrived from GTMO. A former Department of State official also told committee staff that it became apparent that few countries had viable mechanisms to detain individuals in the absence of criminal charges. "We would go to talk to these foreign governments, and they would say, 'we can't,' 'it is just legally impossible for us,'" to detain individuals for the duration of hostilities, Pierre Prosper said.³

By mid-2006 at the latest, it seems Bush administration officials had come to understand the limitations of foreign prosecution. One of Prosper's successors as the principal detainee transfer negotiator, said he did not recall "a single instance" in the last years of the Bush administration of attempting to get "commitments from governments to prosecute individuals for terrorism."⁴ As the Obama administration summarized in correspondence with the committee "[m]any former detainees could . . . not be prosecuted in other countries because of limitations of their laws."⁵

In some cases, prosecution was impossible because the alleged actions of the detainees were not illegal in the home country.⁶ In others, prosecution was not possible because foreign courts could not or would not putatively use evidence gathered in connection with detention at GTMO.⁷

Regardless of the reason, the outcome remained the same. As one official observed in a 2009 article, "[v]irtually no country has been able to detain or prosecute the people we've returned to them."⁸

Committee staff obtained definitive post-transfer disposition information on all detainees transferred to Morocco, Algeria and Turkey during staff visits.⁹ U.S. officials apparently believe that these three countries have high post-transfer prosecution success rates.¹⁰ Of these three locations, committee research shows that approximately eighty percent of the detainees were prosecuted and twenty percent were released without prosecution. Of the eighty percent who were prosecuted, almost half were acquitted at trial or later on appeal. Of the remaining half, one quarter were convicted initially but filed for appeal, while the other quarter are currently involved in active court proceedings. As of October 2010, at most, about 25 percent have been convicted.¹¹

In 2009, the Obama administration transferred two Tunisian detainees to Italy after arrest warrants were issued for them for allegedly recruiting fighters in Afghanistan.¹² According to press reports, the results seem inadequate. One received a six year sentence. The other received a two-year suspended sentence.¹³

The Obama administration has noted that, "[i]t may not be appropriate to view as failures every transfer that resulted in the detainee's eventual release, particularly in cases where the recipient country pursued legal action against the detainee." "The independent conclusion of a sovereign nation's legal system is not something that can be dictated by the United States in a transfer negotiation," it declared.¹⁴

1. See Department of State cable, "Transfer of Detainees [Excised]," January 12, 2002, Document no. 007208, "The Torture Archive," National Security Archive, The George Washington University; and memorandum from Donald Rumsfeld to Doug Feith and Jim Haynes, May 20, 2002. This document was among those declassified at Secretary Rumsfeld's request and posted on the website of the Department of Defense FOIA reading room in "Documents Released to Secretary Rumsfeld Under MDR." The Obama administration defines law of war detention as "detention authorized by the Congress under the AUMF, as informed by the laws of war." See Executive Order 13567, "Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force," March 7, 2011.

2. Committee staff did not conduct a comprehensive review of all foreign attempts at prosecution or detention. Staff did, however, analyze selective data in the eleven countries visited in connection with this investigation.

3. Transcript of committee staff interview of Pierre Prosper, May 10, 2011, p. 42 (in committee possession).

4. Transcript of committee staff interview of Former Official "J," July 5, 2011, p. 33 (in committee possession).

5. Department of Defense correspondence with committee staff, January 31, 2012 (in committee possession).

6. Notes from committee staff travel to Morocco and Algeria, June 25-July 2, 2010; Tajikistan and Turkey, August 14-20, 2010 (in committee possession). Prosecution was also sometimes not available in U.S. courts. See Department of Defense Correspondence, January 31, 2012.

7. Notes from committee staff travel to Morocco and Algeria, June 25-July 2, 2010; Tajikistan and Turkey, August 14-20, 2010 (in committee possession).

8. Kenneth Jost, "Closing Guantanamo," *CQ Researcher* 19, no. 8 (February 27, 2009): 182.

9. Notes from committee staff travel to Morocco and Algeria, June 25-July 2, 2010, and Turkey, August 14-20, 2010 (in committee possession).

10. Department of Defense briefing for committee staff; post-trip analysis and notes.

11. Notes from committee staff travel to Morocco and Algeria, June 25-July 2, 2010.

12. "Two Guantanamo detainees arrive in Italy," *The Guardian*, November 30, 2009.

13. Matt Glenn, "Italy court orders release of former Guantanamo detainee," *Jurist*, February 8, 2011.

14. Department of Defense Correspondence, January 31, 2012.

2004 TRANSFER TO SPAIN

The transfer to Spain of Ahmad Abd al Rahman Ahmad (aka Hamed Abderrahman Ahmad) (ISN 267) seems to exemplify the sort of arrangement the Department of Defense had been seeking without previous success.⁴⁴ On the day Abderrahman was transferred, there was a concerted effort to describe the GTMO disposition process to the public. Rumsfeld spoke to the Miami Chamber of Commerce on the topic.⁴⁵ Butler and Prosper held separate press conferences to describe each department's role.⁴⁶ That evening, Butler also appeared on PBS' *NewsHour*, where he debated a lawyer for detainees.⁴⁷

"[T]here's been a lot of interest in what we're doing at Guantanamo, and there have been some events . . . including the transfer of one detainee to Spain," Butler told the media, "so we thought it was an appropriate time to share some information about the vigorous procedures . . . that we're using."⁴⁸ Butler explained

there is a very detailed and elaborate process for gauging the threat posed by each detainee to determine whether, notwithstanding his status as an enemy combatant, he can be released or transferred to the custody of a foreign government consistent with our security interests.⁴⁹

"Various factors must be considered before any decision is reached," he continued.⁵⁰ This includes

the threat posed by the detainee . . . and whether we can reach appropriate transfer agreements with the foreign government. This is a complex process, and we're actively involved in negotiations with many different countries about transferring their detainees to their custody. But . . . we're asking foreign governments to take responsibility for these detainees and to provide . . . assurances that we think will address the risks that these detainees pose once they're transferred to the custody of the foreign government.⁵¹

Butler told committee staff that this was the first time that information about transfers or releases from GTMO was conveyed to the public "in any kind of a coordinated and methodical way."⁵² The presentations were intended to counter the "severe misinformation" which was circulating.⁵³ However, he reported, "by that time, we had lost a lot of ground in the public diplomacy debate."⁵⁴ He lamented the fact that those decrying GTMO's existence and/or operation had "too much momentum before we stepped out and started answering some questions."⁵⁵

44. "Detainee Transfer Announced," April 26, 2005 (noting one prior transfer to Spain); for exact date of transfer, see unclassified public record documents (in committee possession).

45. "Secretary Rumsfeld Remarks to Greater Miami Chamber of Commerce," U.S. Department of Defense News Transcript, February 13, 2004.

46. "Briefing on Detainee Operations at Guantanamo Bay," February 13, 2004; "Guantanamo Detainees and Other War Crimes Issues," U.S. Department of State, Foreign Press Center Briefing, February 13, 2004.

47. Transcript, *NewsHour with Jim Lehrer*, February 13, 2004.

48. "Briefing on Detainee Operations at Guantanamo Bay," February 13, 2004.

49. "Briefing on Detainee Operations at Guantanamo Bay," February 13, 2004.

50. "Briefing on Detainee Operations at Guantanamo Bay," February 13, 2004.

51. "Briefing on Detainee Operations at Guantanamo Bay," February 13, 2004.

52. Butler, p. 61.

53. Butler, p. 30.

54. Butler, p. 61.

55. Butler, p. 62.

PAKISTAN

Between 2002 and 2008, Pakistan received the third highest number of GTMO repatriations (63), behind only Afghanistan and Saudi Arabia.¹ Despite the high number of transfers, the committee believes, based upon information gathered by staff, that the U.S. continues to have limited visibility into Pakistan's internal policies concerning repatriated detainees.

From committee staff meetings with Pakistani officials, it became apparent that Pakistan had developed a very specific approach to the issue.² The officials told staff that, given limited resources and the large number of returned detainees, Pakistan elected to focus reintegration resources on those who the government believed it could most effectively dissuade from future militant activities. Officials acknowledged they believed some were so committed to the fight that no amount of time or attention would prevent them from reengaging.³

After being repatriated, former detainees who were believed to pose a relatively greater threat were held by the Pakistani government pending review.⁴ If a detainee was then released, he was subjected to monitoring and/or

parole-like circumstances. Family members also accepted formal responsibility for ensuring that former detainees did not reengage; they pledged to ensure that released detainees would not participate in anti-state activities.⁵ These factors were all intended to encourage former detainees to renounce violence and return to peaceful lives with their families.

According to Pakistani officials, such policies have prevented most former GTMO detainees from reengaging in terrorist activities. (At least two detainees released to Pakistan have been included on the Defense Intelligence Agency's reengagement list. One is suspected. The other was killed fighting U.S. forces.⁶)

The Pakistani policy is aimed at mitigating most threats, but it is premised on the belief that it cannot eliminate them all. It is not clear from the committee's inquiry if U.S. policy makers understood the Pakistani perspective before arranging for transfers and releases to that country.

The Obama administration has not sent any detainees to Pakistan. The last transfer occurred in August 2008.

1. For number of transfers to Pakistan see unclassified data (in committee possession).

2. Notes from Ministry of Interior and Ministry of Foreign Affairs briefings to committee staff, Islamabad, Pakistan, September 16, 2011 (in committee possession).

3. Notes from Ministry of Interior and Ministry of Foreign Affairs briefings.

4. According to press reports, detention is authorized for up to three months for intelligence and national security purposes, but has been known to extend to nine. See Nirupama Subramanian, "Pakistan Pushed For Release of Alleged Bin Laden Associate from Guantanamo," *The Hindu*, May 5, 2011; and Anjum Herald Gill, "17 Ex-Guantanamo Prisoners Released," *Punjab Daily Times*, June 28, 2005. Although there are few Western media accounts of Pakistani detainee policies or other ways to verify what committee staff was told, these articles confirm committee staff impressions.

5. Gill, "17 Ex-Guantanamo Prisoners Released."

6. "Defense Analysis Report—Terrorism," Defense Intelligence Agency, April 8, 2009.

DIPLOMATIC PRESSURES

Referring to the period after 2003, one journalistic account also said, "a number of foreign governments took their case directly to the Pentagon and the White House."⁵⁶ One witness told committee staff that the leader of one nation discussed the prospect of returning that country's detainees directly with President Bush. Subsequently, "we just . . . made the decision to move them all out" despite the fact that "we . . . all believed that they posed a threat," he said.⁵⁷ Prosper told committee staff that he "was getting pressure from foreign governments."⁵⁸ He also reported that Secretary of State Colin Powell was being contacted directly by foreign governments seeking the return of their detainees.⁵⁹

56. Jonathan Mahler, "Getting Off the Island." The supposition that most of the transfers between May 2003 and December 2004 were conducted outside Section 1 is buttressed by a document produced by the Obama administration to explain its procedures. The document notes that between 2002 and late 2004, "a total of 152 detainees departed GTMO under [the] 'Section 1' Process." Assuming public sources on the number that left in this period are accurate, that leaves 51 who were dispatched pursuant to the alternative mechanism. See document captioned "(U) Screening Process Prior to Executive Order 13492," (in committee possession).

57. Former Official "Q," p. 26.

58. Prosper, p. 38.

59. Prosper, pp. 24, 79.

SAUDI REHABILITATION PROGRAM

Saudi Arabia's counseling program was designed to rehabilitate and reintegrate GTMO detainees, among others, by providing them with what DOD now describes as "a controlled and structured post-detention environment."¹ All detainees who have returned to Saudi Arabia since 2005 have gone through the program, which starts in prison and eventually results in the movement to a halfway-house called the Mohammed bin Nayef Centre for Care and Counseling (also known as "Care").²

The program offers an extensive curriculum of religious lectures, social services, art therapy, sports, education, and vocational training meant to moderate the behavior of violent extremists.³ Hamed El-Said, a scholar who has conducted extensive research on global deradicalization efforts, characterizes the Saudi program as a way of "correcting deviant ideas," and notes "at the core of the programme is the treatment of the detainees who are seen as 'misled'

and in need of good advice, rather than criminals requiring punishment."⁴ Rehabilitation program participants, known as "beneficiaries," also receive generous financial support.⁵

In 2005, U.S. officials sought to negotiate the return of a second batch of detainees to Saudi Arabia.⁶ "[T]he Saudi government was already dealing with a rising tide of fundamentalism that posed a very real threat to the kingdom," one press account said of the time. Therefore the Saudis "would need to treat returning prisoners—many of whom had no doubt been further radicalized over the course of their time at Guantánamo—carefully."⁷

It appeared that a residential counter-radicalization program to mitigate risk of returning detainees had potential.⁸ Former Deputy Secretary of Defense Gordon England told committee staff that when he considered the program, it appeared to offer very impressive results.⁹ Consequently, fifteen detainees who were assessed as posing the least

1. The center also serves local extremists and fighters returning from Iraq, Afghanistan, and Yemen. According to officials at the center, 700 participants have graduated from the program. See notes from committee staff travel to Saudi Arabia, September 18, 2011 (in committee possession). The deradicalization program for domestic extremists has existed since 2003. Guantanamo detainees were accepted for a special program beginning in 2005. The Care facility formally opened in 2007. See also Department of Defense correspondence with committee staff, January 25, 2012 (in committee possession); and Marisa Porges, "The Saudi Deradicalization Experiment," *Expert Brief*, Council on Foreign Relations, January 22, 2010.

2. Notes from committee staff travel to Saudi Arabia, September 18, 2011; Hamed El-Said, "Deradicalising Islamists: Programmes and their Impact in Muslim Majority States," International Center for the Study of Radicalisation and Political Violence, January 2012.

3. Saudi officials briefed committee staff on the rehabilitation center in Riyadh on September 18, 2011. Other scholars, notably Christopher Boucek, have described the program in detail. In summary, the program's purpose is to discredit al-Qa'ida ideology through careful examination of Islamic teachings. Families are held accountable for ensuring that beneficiaries do not return to extremist activities. See Christopher Boucek, "Saudi Arabia's 'Soft' Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare," *Carnegie Papers*, 97 (September 2008).

4. El-Said, "Deradicalising Islamists."

5. Notes from committee staff travel to Saudi Arabia, September 18, 2011.

6. Transcript of committee staff interview of Matt Waxman, p. 57, August 25, 2011 (in committee possession). The first group was repatriated to Saudi Arabia in May 2003. For exact date of the first repatriation, see unclassified public information (in committee possession).

7. Jonathan Mahler, "Getting Off the Island," *The Daily Beast*, May 28, 2009. Saudi Arabia is especially interested in eliminating al-Qa'ida within its borders, particularly because of the threat the organization poses to the royal family. See "Al-Qaida chief tells Saudi Prince to Expel Non-Muslims," *Beirut NOW Lebanon* (English version), August 29, 2011. The government cracked down on violent extremism in the Kingdom following a series of al-Qa'ida attacks between 2003 and 2006, targeting the regime. The government's response demonstrates the tremendous capacity and capability of Saudi security forces. During this period, human rights groups claim 12,000 to 30,000 people were imprisoned. See Asma Alsharif, "Saudi Court Puts 85 Militants on Trial," *Reuters*, October 10, 2011.

8. Mahler, "Getting Off the Island;" Waxman, p. 156; transcript of committee staff interview of Sam Witten, pp. 38-39, June 21, 2011 (in committee possession).

9. Transcript of committee staff interview of Gordon England, pp. 60-61, October 6, 2011 (in committee possession).

There is considerable evidence that, as in the 2003 Saudi Arabia case, the Russian and U.K. transfers occurred because they were mandated by the president or senior policy makers, at least partly in response to requests from the recipient nations. Although no witnesses confirmed that "Deputy Secretary approval" was invoked instead of Section 1, individuals interviewed by committee staff provided some details, which coupled with other data, suggest that this might have been the case. It is possible that senior officials orchestrated the Russian and U.K. arrangements because they were skeptical that the Section 1 process could yield transfers in a timely manner.

Those involved in Section 1 may have understood this frustration. Butler recounted that he was told at the time that the Department's senior officials "want us to speed up the process."⁶⁰ Indeed, the February 13 press activities could have been part of an effort to communicate the Department's earnest efforts to audiences within the administration in addition to the foreign and domestic public.

60. Butler, p. 72.

threat were selected for it.¹⁰ DOD subsequently explained, “[p]articipation in rehab was one aspect of [a] larger assurance package with Saudi Arabia.”¹¹

Eventually, however, the Saudi initiative lost its credibility. In 2010 testimony before the Senate Judiciary Committee, national security specialist Suzanne Spaulding noted “11 graduates of the program” had “reportedly joined or rejoined the fight.”¹² Saudi officials claim a success rate of 80-90% for the initiative, though it seems no documented evidence or quantitative data is associated with this statistic.¹³ Earlier claims of success may have given decision makers who considered transfers a false sense of security. One expert believes these early successes may have been the consequence of the fact the first participants were not hard-core extremists, thus giving an exaggerated sense of Care’s capabilities.¹⁴

The Saudis acknowledged to committee staff “a big mistake” in the program allowed eleven detainees who completed it together to flee to Yemen.¹⁵ They described the exodus of detainees in 2008 and 2009 as an isolated incident that “hasn’t been a recurring problem.”¹⁶ It was the Saudi government’s belief that

the group of detainees “banded together at GTMO to come up with a plan to deceive rehabilitation personnel and flee after their return.”¹⁷ Moreover, the Saudis claimed that “they received incomplete background on the GTMO returnees that they accepted into the program, which hamstrung them” and contributed to subsequent events.¹⁸

The Department of Defense reported to the committee that “the Saudi program is among the best available.” DOD also provided the committee with information indicating that the program has evolved over time.¹⁹ A DOD representative also reported to committee staff in January 2012 that Saudi Arabia has “consistently made changes to counter what they perceived as AQ attacks in the program’s successes.”²⁰ Others argue that the Saudi initiative, while still being perfected, includes “well-designed strategies” potentially applicable to efforts “to rehabilitate Islamic terrorists around the world.”²¹ Similarly, Mark Fallon, a civilian Defense Department employee involved in evaluating GTMO detainees, told CNN in 2010, “I think there is some merit in the Saudi program.” He acknowledged, however, “that there’s no 100 percent fail-safe system.”²²

10. Waxman, pp. 57, 63, 158, 164-165.

11. Department of Defense communication with committee staff, January 25, 2011 (in committee possession).

12. Testimony of Suzanne E. Spaulding, “Securing America’s Safety: Improving the Effectiveness of Anti-Terrorism Tools and Inter-Agency Communication,” Senate Committee on the Judiciary, January 20, 2010.

13. See Boucek, “Saudi Arabia’s ‘Soft’ Counterterrorism Strategy.”

14. Boucek, “Saudi Arabia’s ‘Soft’ Counterterrorism Strategy.”

15. Department of Defense correspondence with committee staff, January 31, 2012 (in committee possession). Notes from committee staff travel to Saudi Arabia, September 18, 2011.

16. Department of Defense correspondence, January 31, 2012.

17. Department of Defense correspondence, January 31, 2012.

18. Department of Defense correspondence, January 31, 2012.

19. Department of Defense correspondence, January 31, 2012.

20. Official “P” email to committee staff, January 20, 2012 (in committee possession).

21. Adam Lankford and Katherine Gillespie, “Rehabilitating Terrorists Through Counter-Indoctrination: Lessons Learned From The Saudi Arabian Program,” *International Criminal Justice Review*, May 6, 2011.

22. “Is Rehabilitation of Terrorist Detainees Effective?” *CNN*, January 12, 2010.

RUSSIAN TRANSFERS

Secretary Rumsfeld had been advised in 2002 about plans for the Russians at GTMO. “As soon as we finish our own intelligence and criminal investigations, and assuming we decide not to prosecute these detainees, we will promptly ask the Russians to take them under terms consistent with our transfer policy,” the Undersecretary for Policy reported to him.⁶¹ The next year, the senior U.S. diplomat in Moscow was instructed to “initiate negotiation” on the transfer to Russia of seven detainees.⁶² The fact the transfer took eleven months to conclude demonstrates it was not an easy effort.⁶³

61. Memorandum from Douglas J. Feith and William J. Haynes to Secretary of Defense, May 20, 2002. This document was among those declassified at Secretary Rumsfeld’s request yet posted on the website of the Department of Defense FOIA reading room in “Documents Released to Secretary Rumsfeld Under MDR,” rather than in the Rumsfeld Archive.

62. Department of State cable, “Transfer of [Excised] Guantanamo detainees,” March 25, 2003.

63. Butler, p. 94; Bellingier, p. 40.

Billingslea said he considered the Russian detainees poor transfer candidates in 2004 because of “significant concern that some of these individuals posed enduring threats. . . to the United States or allies or other nations.”⁶⁴ The care the detainees might receive upon transfer was also questioned within the U.S. government. Whether they would get “humane treatment” was “definitely a consideration,” committee staff was told, and doubts on this matter may have contributed to the transfer delay.⁶⁵ Ultimately, however, for the seven detainees who went to Russia, Billingslea reported that, to his knowledge, the transfer probably “did not occur through” what became known as the Section 1 process.⁶⁶

There is evidence that the Russian government neither guarded against threatening behavior nor ensured humane treatment for the detainees once they were returned. Consequently, DIA placed five on the confirmed (two) or suspected (three) reengagement list, although the designations for these individuals were, and continue to be, particularly contentious to some observers.⁶⁷ **(For details on the Russian transfers, see companion article.)**

BRITISH TRANSFERS

In the case of the five detainees who were sent to the United Kingdom, the matter was discussed between President Bush and British Prime Minister Tony Blair.⁶⁸ Bellinger recounted to the staff that the return of the British nationals was considered “at such a high level” that the transfer negotiations were led by National Security Council staff.⁶⁹ Compared to Russia, discussions with the United Kingdom apparently proceeded apace. Bellinger told the staff that the negotiations were not “protracted.”⁷⁰

After their transfer, an announcement from the U.S. embassy in London revealed that one of the detainees “trained with an AK-47 and pistol at an al-Qaeda safe house in Kabul in September 2001.” He was a “weapons-carrying fighter” who “was wounded in battle with Coalition forces and was subsequently captured in the Tora Bora mountains,” it said. “Two of the others trained for 40 days in September-October 2000 at a military camp in Afghanistan, learning to shoot a Kalashnikov, and observing hand grenade, landmine and rocket grenade demonstrations,” the description continued. One detainee told GTMO staff that “he considers the U.K. and U.S. governments to be his enemies and travelled to Afghanistan after 9/11 for an organization known to be associated with al-Qaeda.” Furthermore, the detainee “also associated with al-Qaeda extremists in the UK” before departing for the Mideast.⁷¹

Shortly after the five detainees arrived, the U.S. embassy explained to the *Sun* newspaper that the British government “agreed to accept” these individuals “and to take responsibility to ensure they do not pose a security threat to the United States or our allies.”⁷² At the time the

64. Billingslea, pp. 64, 66.

65. Billingslea, p. 63.

66. Billingslea, p. 64.

67. “Defense Analysis Report—Terrorism,” April 8, 2009.

68. In a joint press conference in November 2003 with President Bush, Blair was asked “are you prepared” to “now” request that British nationals at GTMO be repatriated? He replied “we’re in discussions at the moment.” The President concurred. “[W]e’re working with the British government,” he said. See “Transcript: the Bush-Blair press conference,” *Guardian*, November 20, 2003; and Bellinger, p. 35.

69. Bellinger, pp. 35-36.

70. Bellinger, pp. 35-36.

71. “On the loose . . . 4 Brits trained to fight our men with an AK-47,” *The Sun*, March 18, 2004. Four of the transferred detainees have filed a civil suit claiming they were detained mistakenly while undertaking humanitarian work in Afghanistan and abusively interrogated at GTMO. See Kenneth Jost, “Closing Guantanamo,” *CQ Researcher* 19, no. 8 (February 27, 2009): 192, 194.

72. “On the loose.”

British detainees were transferred, Blair faced domestic criticism for his inability to secure the repatriation of British GTMO detainees. It seems that, notwithstanding the background of some of these individuals, President Bush may have concluded that transferring them was a relatively easy way to repay a key ally, particularly for his support of the Iraq war.⁷³

DENMARK TRANSFER

The Danish transfer occurred between detainee movements to Spain and Russia. It marked a new negotiating strategy. Previously, transfers had only been contemplated for prosecution or some form of continued legal detention.⁷⁴ These restrictions were mandated by the administration's "Deputies Committee," the informal gathering of the immediate subordinates of each national security-related cabinet department. Bellinger recounted that this resulted in "extremely stringent" guidance for the Department of State's transfer efforts.⁷⁵ He reported to committee staff that "on a pretty regular basis throughout the 2002-4 period . . . the State Department complained that . . . its hands were tied" by the transfer limitations.⁷⁶ He recalled the Department's exertions becoming "more strident towards the end" of this timeframe.⁷⁷

As a result, several changes consequently came about. Department of Defense staff joined the transfer negotiation teams so that the Department could better understand objections being lodged by potential recipient countries.⁷⁸ The Department of State also gained "negotiating latitude," another knowledgeable individual reported.⁷⁹

In connection with the Danish transfer, a negotiation "template" was approved, under the direction of the cabinet secretaries and deputies, which outlined a menu of transfer options. Rather than delineate minimally acceptable terms, it offered a basis upon which to initiate discussions.⁸⁰ While prosecution and legal detention remained possibilities, so too was monitoring or physical surveillance, parole-like requirements, or foreign travel restrictions.⁸¹ The critical element of a transfer arrangement, said one former official, was the fact that the recipient government would assume responsibility for the former detainee in a way that took into account "the national legal systems into which individuals would be transferred."⁸²

For the Danish detainee, authorities explained that they intended to interview him upon repatriation. However, because this would not likely yield sufficient information to warrant continued detention, they told a U.S. official that the detainee would be "out the door in 48 hours."⁸³ The official also recalled that Danish authorities outlined their capability and willingness to monitor the detainee instead.⁸⁴

73. Tim Golden, "Administration Officials Split Over Stalled Military Tribunals," *New York Times*, October 24, 2004. The points made at the Bush-Blair joint press conference in November 2003 about the British detainees at GTMO were noted at the Department of Defense. The General Counsel's office forwarded an annotated copy of the press conference transcript to Rumsfeld. See Memorandum (and attached transcript) from Daniel J. Dell'Orto to Secretary of Defense, November 11, 2003, Rumsfeld Archive. The transferred detainees were not among those who had been recently recommended for prosecution before military commissions. On this point, see Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005), p. 389.

74. Memorandum from William J. Haynes, II to Secretary of Defense, April 9, 2002, Rumsfeld Archive; Jonathan Mahler, "Getting Off the Island."

75. Bellinger, pp. 11-12, 18-19.

76. Bellinger, pp. 19-20.

77. Bellinger, p. 19.

78. Prosper, p. 42.

79. Transcript of committee staff interview of Matthew Waxman, August 25, 2011, p. 53 (in committee possession).

80. Waxman, pp. 53, 55; Jonathan Mahler, "Getting Off the Island."

81. Waxman, p. 24.

82. Waxman, pp. 26-27 (quotation, p. 27). A similar observation is recounted by Bellinger, p. 21.

83. Former Official "Q," p. 49.

84. Former Official "Q," p. 49.

An appointee at the Department of Defense recalled that in “the summer of 2004 [there] was a pretty big push . . . when it comes to transfers.” “[T]he activity level,” he said “was elevated during that time.” This included “within DoD” as well as “the diplomatic activity” which was involved in “going out and negotiating” prospective transfers.

These arrangements were ultimately acceptable to the United States. But they were apparently controversial within the Department of Defense. According to one account, individuals in both DIA and SO/LIC objected.⁸⁵ Their concerns may have been justified. News reports say that within a few months, the former detainee recanted his pledge to not reengage and said he was heading to fight in Chechnya with other Muslims.⁸⁶ Potentially demonstrating, however, the successful handling of the detainee, the Danes took note of this declaration. Another press account indicates that as a result, “Danish security persuaded him to reconsider and confiscated his passport.”⁸⁷

But the transfer to Denmark represented the turning point.⁸⁸ Preparing for it “finally got [us] on the same page as to what we were able to ask for and what our expectations were in return,” Prosper explained to committee staff.⁸⁹ As a consequence of the Danish transfer, other transfers were eased. “[W]e now had the template that we could work with and make things happen. And we also had an example that we could hold out to the other countries and say ‘look, the Danes did it’.”⁹⁰

The Danish experience may have been persuasive to other governments. Matthew Waxman, an appointee at the Department of Defense who was involved in detainee matters during this period, recalled that in “the summer of 2004 [there] was a pretty big push . . . when it comes to transfers.”⁹¹ “[T]he activity level,” he said “was elevated during that time.”⁹² This included “within DoD” as well as “the diplomatic activity” which was involved in “going out and negotiating” prospective transfers.⁹³

OTHER TRANSFERS

Based on committee staff analysis, it appears that in the eleven months between the Danish agreement in February 2004 and the end of President Bush’s first term, there were forty-five

85. “Department of Defense Operational Briefing,” U.S. Department of Defense News Transcript, March 25, 2004.

86. Tim Golden, “Administration Officials Split Over Stalled Military Tribunals,” *New York Times*, October 24, 2004; Lloyd de Vries, “7 Ex-Prisoners Allegedly Violated Pledge to Renounce Violence,” *Associated Press*, October 17, 2004.

87. Mahler, “Getting Off the Island.”

88. Prosper, p. 56.

89. Prosper, p. 57. The fact that this was the first transfer effectuated using the new template may have led to subsequent confusion about how to categorize the action. The detainee apparently signed the standard release agreement. Furthermore, the action is called a “transfer for release” in “Transfer of Detainee Complete,” U.S. Department of Defense News Release, February 25, 2004, yet considered a “release” in an email from Ronald W. Miller to Elizabeth A. Ewing et. al., February 19, 2004, GWU; and in “Detainee Transfer Announced,” U.S. Department of Defense News Release, April 26, 2005; and “Detainee Transfer Announced,” U.S. Department of Defense News Release, July 20, 2005. However, the movement is termed a “transfer” in declaration of Matthew W. Waxman, June 2, 2005; and in the transcript and November 11, 2011 follow-up email colloquy on this point with Prosper (in committee possession).

90. Prosper, p. 57.

91. Waxman, p. 141.

92. Waxman, p. 142.

93. Waxman, p. 142.

transfers from GTMO. Detainees were sent to France (four), Morocco (five), and Sweden (one), all in July, to Pakistan (29) in September, and to Kuwait (one), Australia (one), and the U.K. (four) in January 2005.⁹⁴

It is possible that some of these transfers were handled outside the Section 1 process, rather than by way of transfer agreements modeled upon the Danish template.⁹⁵ In the British case, Waxman told committee staff that the transfer of the four detainees was intended to “resolve the detainee issue in a way which protected our security interests . . . while also . . . being attentive to the broader strategic context of our bilateral relations” with the United Kingdom.⁹⁶ He said similar circumstances applied in the return of Mamdouh Ibrahim Ahmed Habib (ISN 661) to Australia.⁹⁷

While not referring to these detainees specifically, witnesses interviewed by committee staff explained circumstances that might have allowed transfers to take place contrary to the recommendations of JTF-GTMO, or others within the Department or elsewhere within the government. Ensuring foreign counterterrorism partnerships was one important reason. In some cases, in order to ensure information sharing and collaborative counter-terrorism efforts with other nations, their detainees were transferred to them. “[N]ations were threatening,” Butler told committee staff, “not to cooperate” with American goals abroad if their nationals were not returned.⁹⁸ That was “one factor” that had to be considered.⁹⁹

The 2003 U.S. invasion of Iraq and revelations in early 2004 of improper and unauthorized behavior by U.S. military prison guards in Abu Ghraib, Iraq were other issues. Foreign governments apparently sought a quid pro quo for their tacit support of the invasion. They also stepped up efforts to secure the return of their nationals in response to the false suggestion that detainees at GTMO were being treated similarly to those at Abu Ghraib.¹⁰⁰

“[N]ations were threatening,” one official told committee staff, “not to cooperate” with American goals abroad if their nationals were not returned. That was “one factor” that had to be considered.

REENGAGEMENT

Regardless (or perhaps because) of the circumstances of the 2004 transfers, some former detainees again took up arms. The Department was aware that a number of detainees dispatched earlier had

94. See committee transfer and release list cited in methodological note. When the 29 detainees were transferred to Pakistan in September 2004, it seems six others may have been released there simultaneously. The Prosper declaration specifies 29 (see declaration of Pierre-Richard Prosper, March 8, 2005). Yet, according to publically available unclassified documents noting detainee transfer dates (in committee possession), 35 detainees were dispatched on that date. The identity of the 35 is known, but committee staff could only surmise which were transferred and which released based on unclassified public data. Documents (in committee possession) include Combatant Status Review Tribunal information for six. Although these cases were not formally identified as “no longer enemy combatants” as discussed in the next section, they probably were deemed release cases nonetheless. Furthermore, the declaration of Charles D. Stimson, August 22, 2006 (in case file of *Associated Press v. United States Department of Defense*, available at Justia.com) contains an attachment which is a heavily redacted decision memorandum dated July 6, 2004. The memorandum discusses transferring 19 and releasing six detainees to a single government. It is possible that this memorandum pertains to Pakistan and ten additional transfers were subsequently added to the tranche. Regardless, it seems the documents make clear that transfers and releases could be mixed in a single batch. For the fact that all the Stimson declaration attachments pertain to the same detainee, see declaration of Karen L. Hecker in *Associated Press v. United States Department of Defense*, August 26, 2006, p. 3 (available at Justia.com).

95. The day after the Danish transfer and two days before the Russians left GTMO, Rumsfeld told Butler and the DOD General Counsel to “get the name of the [emphasis added] Kuwaiti detainee at GTMO to the government of Kuwait.” He continued, “[w]e also want to think about whether or not we can transfer some of the Kuwaiti detainees at GTMO to Kuwait. The Prime Minister believes they have the legal authority to detain them. I question that but we ought to look into it carefully.” (See memorandum from Donald Rumsfeld to Paul Butler and Jim Haynes, February 25, 2004, Rumsfeld Archive.) At the time, there were twelve Kuwaitis at GTMO. It is not known if “the” detainee whose identify Rumsfeld wants to convey to Kuwait is Nasser al-Mutairi (ISN 205), transferred in January 2005, but it is possible.

96. Waxman, pp. 144-5.

97. Waxman, pp. 145-6.

98. Butler, pp. 67 (quotation), 72.

99. Butler, p. 74.

100. Former Official “Q,” pp. 24-5.

reengaged. Briefing slides developed to help Butler prepare for his February 2004 press conference noted “[e]ven though we have been careful and thorough in our screening, we now believe that several of the released detainees have returned to the fight against the U.S. and coalition forces.”¹⁰¹ Nearly identical wording appeared in a document captioned “Guantanamo Detainees” and made available on the DOD website two months later.¹⁰² In November 2004, Waxman, who by then had assumed Paul Butler’s detainee responsibilities at the Department of Defense, told the American Forces News Service that “at least ten” former detainees had reengaged.¹⁰³ At that time 209 had left GTMO.¹⁰⁴

The proportion of former detainees who were suspected or confirmed to have reengaged eventually grew. Given the lag time between transfer and release and evidence of activity, it took some time for this trend to become apparent. For example, among those transferred in 2004 who press reports suggest have reengaged is Medhi-Muhammed Ghezali (ISN 166). He was sent to Sweden, but apparently left for Pakistan by 2009, thus demonstrating the absence (or insufficiency) of surveillance which was to be undertaken by Swedish intelligence. Ghezali was arrested in southern Pakistan as he tried to link up with al-Qa’eda. “He is a very dangerous man,” the local police chief declared in a news story, before apparently releasing him for some unknown reason the next month.¹⁰⁵

The Ministry of Justice in Morocco took custody of all five detainees repatriated there.¹⁰⁶ They were acquitted in a trial in 2007 after many delays.¹⁰⁷ In 2007, two were convicted for subsequently attempting to recruit Moroccans to fight for al-Qa’ida in Iraq, and both were subsequently placed on the Defense Intelligence Agency’s 2008 confirmed reengagement list.¹⁰⁸

One of the 29 detainees transferred to Pakistan in September 2004, Issa Khan (ISN 23), was suspected by the Defense Intelligence Agency in 2009 of being associated with the terrorist group Tehrik-i-Taliban.¹⁰⁹ Khan apparently had been freed from post-transfer detention in Pakistan in June 2005 “after their parents and guardians furnished guarantees that in the future they would not indulge in terrorist activities,” according to a newspaper report.¹¹⁰ Such detention and subsequent release coupled with a familial pledge to ensure proper behavior seems to have been the standard Pakistani approach with most returned detainees. **(For a review of the Pakistani approach to repatriated GTMO detainees, see companion article.)**

101. “Guantanamo Detainees,” February 4, 2004; Butler, p. 30.

102. Document captioned “Guantanamo Detainees,” April 6, 2004 (available at www.defense.gov/news/Apr2004/d20040406gua.pdf).

103. Samantha Quigley, “Former Detainees Released by U.S. Rejoining Fight,” Armed Forces Press Service, November 3, 2004.

104. See unclassified public documents noting GTMO population figures (in committee possession).

105. Lloyd de Vries, “7 Ex-Prisoners Allegedly Violated Pledge to Renounce Violence,” *Associated Press*, October 17, 2004; “Ex-Gitmo detainee arrested on terror ties,” *Washington Times*, September 15, 2009 (quotation).

106. “Guantanamo sends Moroccans home,” *BBC News*, August 2, 2004.

107. “Morocco acquits five ex-Guantanamo inmates,” *Middle East Online*, January 20, 2007. Similarly, the Kuwaiti, according to DIA, was acquitted of terrorism charges. After Kuwaiti prosecutors appealed, he was sentenced to five years of hard labor. See “(U) Transnational: Kuwaiti Former Guantanamo Bay (GTMO) Detainees,” Defense Intelligence Agency, August 23, 2006 (available at [www.dia.mil/public-affairs/foia/pdf/TRANSNATIONAL%20KUWAITI%20FORMER%20GUANTANAMO%20BAY%20\(GTMO\)%20DETAINEEES.pdf](http://www.dia.mil/public-affairs/foia/pdf/TRANSNATIONAL%20KUWAITI%20FORMER%20GUANTANAMO%20BAY%20(GTMO)%20DETAINEEES.pdf)).

108. See “Fact Sheet: Former Guantanamo Detainee Trends,” June 13, 2008, available at www.defense.gov/news/d20080613Returntothefightfactsheet.pdf; and “Defense Analysis Report—Terrorism,” Defense Intelligence Agency, April 8, 2009.

109. “Defense Analysis Report—Terrorism,” April 8, 2009.

110. “17 ex-Gitmo detainees freed,” *The Nation*, June 28, 2005 (quotation); Anjum Herald Gill, “17 ex-Guantanamo prisoners released,” *Daily Times*, June 28, 2005.

Although the consequence of entirely different circumstances, the transfer to Spain also resulted in the former detainee's release. A Spanish court ruled in 2005 that Ahmad Abd al Rahman Ahmad "had been recruited by al Qaeda and sent to Afghanistan to receive training."¹¹¹ A higher court subsequently overturned that decision, partly because it was based on "evidence collected at Guantanamo" which it "declared totally void."¹¹² News accounts report the court ordered Ahmad freed immediately.¹¹³

This was not what U.S. officials intended when they arranged the transfers to either Pakistan or Spain. In subsequent years, the United States increasingly encountered difficulties in ensuring that the prospective threat posed by former detainees was managed by recipient countries as desired. But, there was also growing pressure to reduce GTMO's population.

111. "Ex-Guantanamo Spaniard cleared by supreme court," *Reuters*, July 24, 2006.

112. "Ex-Guantanamo Spaniard cleared by supreme court."

113. "Ex-Guantanamo Spaniard cleared by supreme court."

Finding 3

Pressure to Reduce the GTMO population accelerated in the second Bush term, before reengagement dangers became fully apparent.

Efforts to reduce the GTMO population sharply accelerated in the final four years of the Bush administration. In February 2005, GTMO held 544 detainees. Between then and December 2008, there were about 252 transfers and 52 releases.¹ Most of these actions were the result of new procedures that superseded the Section 1 process in December 2004.

In May 2004, Deputy Defense Secretary Paul Wolfowitz asked then-Navy Secretary Gordon England to establish the replacement detainee review process, which involved panels of three military officers charged with reviewing each detainee's case.² Documents and witnesses provided several reasons to the committee for the advent of these Administrative Review Boards (ARBs). For example, a September 2003 Departmental memorandum indicates that DOD's General Counsel believed they might "reduce any arbitrariness present in the current system," although the extent and nature of existing "arbitrariness" is not clear.³

More significantly, it seems the origins of the ARBs were rooted in the fact that leaders wanted to simplify and accelerate the transfer and release evaluation process. This may have been because the pool of releasable detainees was nearly depleted and transfers, aside from those possibly occurring because of the intervention of senior-most officials outside of Section 1, were taking place relatively slowly.⁴

Paul Butler told committee staff that he agreed that senior leaders believed the Section 1 process "was not moving along as it should," in 2004 including in "adjudicating the status and potential risk" of detainees.⁵ "[T]he real easy cases were done," he said, but "the interagency process seemed to be stalling."⁶ Section 1 "wasn't as effective as I think Deputy Secretary Wolfowitz and Secretary England thought it should be," he recounted.⁷ Matthew Waxman,

1. Population figures calculated according to unclassified public information (in committee possession). Transfer and release calculations determined by committee staff as referenced in the methodological note.

2. Transcript of committee staff interview of Gordon England, October 6, 2011, pp. 5-6, 10, 14 (in committee possession).

3. The quotation is included in a response to an August 2003 memorandum from Rumsfeld to the Department of Defense General Counsel. In commenting about possible changes to the process of determining a detainee's status, the General Counsel wrote, "[t]he Department could adopt a plan for the periodic review of the need for continued detention of those detained at GTMO." For initial memorandum, see memorandum from Donald Rumsfeld to Jim Haynes, August 14, 2003, Rumsfeld Archive. This is a collection of documents declassified at Donald Rumsfeld's request and made available on Rumsfeld.com (hereafter "Rumsfeld Archive") in connection with the preparation of Rumsfeld's autobiography. The quoted response is in "Tab B," attached to memorandum from General Richard B. Myers to Secretary of Defense, October 31, 2003, Rumsfeld Archive.

4. Transcript of committee staff interview of Matthew Waxman, August 25, 2011, pp. 49, 122-123 (in committee possession); England, p. 17.

5. Transcript of committee staff interview of Paul Butler, July 8, 2011, p. 18 (in committee possession).

6. Butler, p. 19.

7. Butler, p. 19.

who succeeded Butler in 2004, described the extent of departures from GTMO before then as a “trickle.”⁸ Consequently, England explained to committee staff that “there was certainly pressure to review all of the people at GTMO” in order to make transfer or release determinations.⁹

Under the ARB system, each detainee’s case was heard annually. Based upon information presented to panel members about “whether each enemy combatant remains a threat to the United States and its allies,” the officers recommended continued detention, release, or transfer.¹⁰ ARB recommendations were ultimately conveyed to England who made final determinations.¹¹ (When England succeeded Wolfowitz as Deputy Secretary in 2005, he continued the responsibilities he had been delegated as Navy Secretary.)

Indeed, the ARB actions were only recommendations. England was not obligated to accept what they suggested. Furthermore, contrary to a common misunderstanding, a transfer or release that was the consequence of an ARB was not tantamount to a court ruling of innocence nor a concession by DOD that the prior detention was unjust or unnecessary. Rather, as with Section 1, released or transferred detainees were considered unlawful enemy combatants who were being moved to another country and subjected to security measures appropriate for their level of threat.

The ARBs were considered a modification of existing procedures, not an entirely new system. One witness told the committee the ARBs were meant to correct deficiencies perceived previously in the Section 1 process.¹² England explained to committee staff that “ARBs were created to have a formalized, documented and institutionalized process” for detainee transfers and release evaluations.¹³ Section 1 actions, he said, had largely taken place “in the dark” and were thus “generally suspect and open to criticism.”¹⁴ The ARB mechanism was established to address this situation.

The ARBs were distinct from Section 1 in three important and interrelated ways. First, the Office of Administrative Review of the Detention of Enemy Combatants (OARDEC), the entity which managed the ARBs, assumed responsibility for collating data on detainees and presenting the cases to the review boards. This was a time and labor-intensive task. Previously SO/LIC at the Pentagon, mostly using material provided by JTF-GTMO and CITE, had gathered relevant material for

Contrary to a common misunderstanding, a transfer or release that was the consequence of an Administrative Review Board was not tantamount to a court ruling of innocence nor a concession by the Department of Defense that the prior detention was unjust or unnecessary. Rather, released or transferred detainees were considered unlawful enemy combatants who were being moved to another country and subjected to security measures appropriate for their level of threat.

8. Waxman, p. 122.

9. England, p. 17.

10. Document captioned “Order; Subject: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base Cuba,” May 11, 2004, available at www.defense.gov/news/May2004/d20040518gtmoreview.pdf. For an example of a heavily redacted decision memorandum conveyed to the Deputy Secretary by an Administrative Review Board via the Office of the Administrative Review of the Detention of Enemy Combatants, see document captioned “Action Memo,” May 16, 2005, document 18-7 in case files of *Associated Press v. United States Department of Defense*, available at Justia.com.

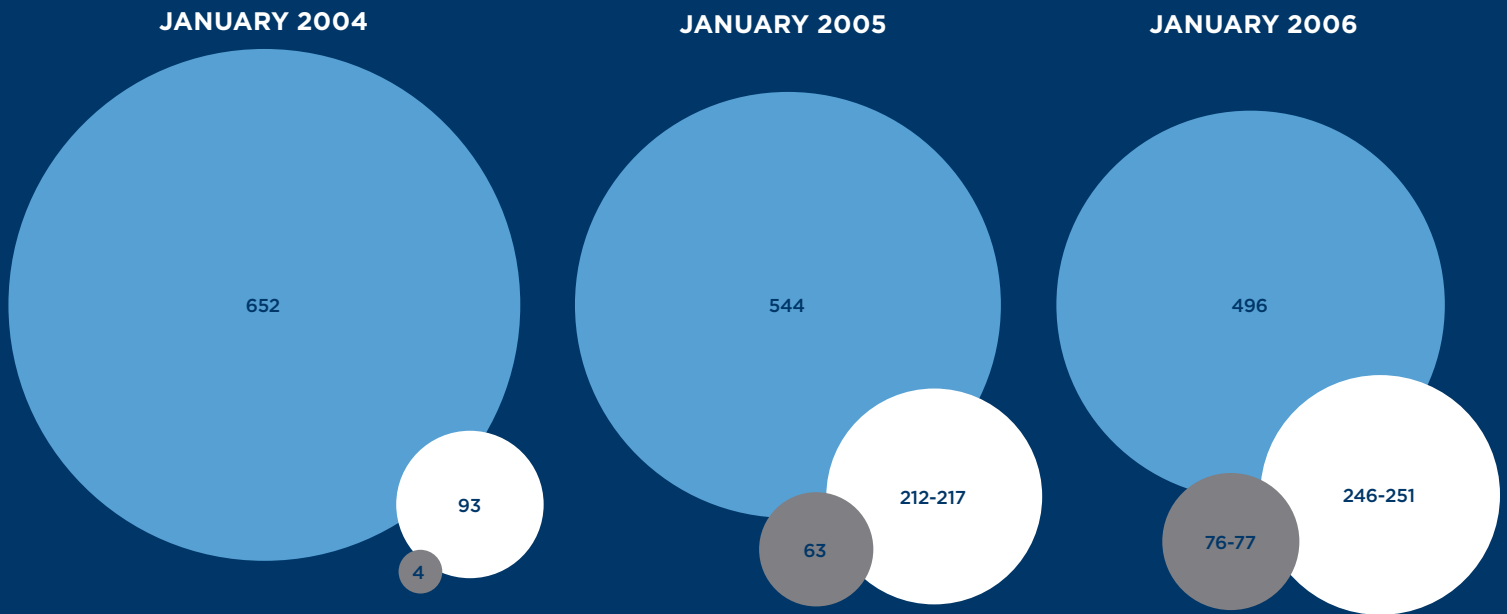
11. Document captioned “Order; Subject: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base Cuba.”

12. Notes from career official “P” meeting with committee staff, October 28, 2011 (in committee possession).

13. Gordon England email to committee staff, January 11, 2012 (in committee possession).

14. Gordon England email.

GUANTANAMO POPULATION TRENDS



consideration by the PCC and Deputy Secretary.¹⁵ The ARB process established instead a new framework and assigned personnel to collect information and present it to the boards, although JTF-GTMO and CITF continued to proffer recommendations.

Second, ARBs were intended to consider more information held by the United States on a particular detainee. In assessing detainees previously, those involved primarily had access to data gathered from interrogations, and from material collected on the battlefield, perhaps at the time of a detainee's capture.¹⁶ By reviewing information presumably held by the CIA and other intelligence organizations, OARDEC staff could gain a fuller understanding of a detainee's background and potential threat.

Third, ARBs changed the role of various agencies, including Defense components, in detainee disposition decisions. Apparently, there was the belief that some organizations too readily raised objections to transferring or releasing specific detainees.¹⁷ Under the ARBs, entities were invited to submit information or recommendations on detainees for a board's consideration. But, with the ARB system, the Deputy Secretary was the "sole decision maker." One individual told committee staff that England approvingly described his position as one in which it was not necessary "to reach consensus across multiple parties" in order to take action on a detainee's disposition.¹⁸ Senior DOD leaders believed they had greater control over the mechanics of the ARB process in comparison to Section 1, and this was a role they desired.¹⁹

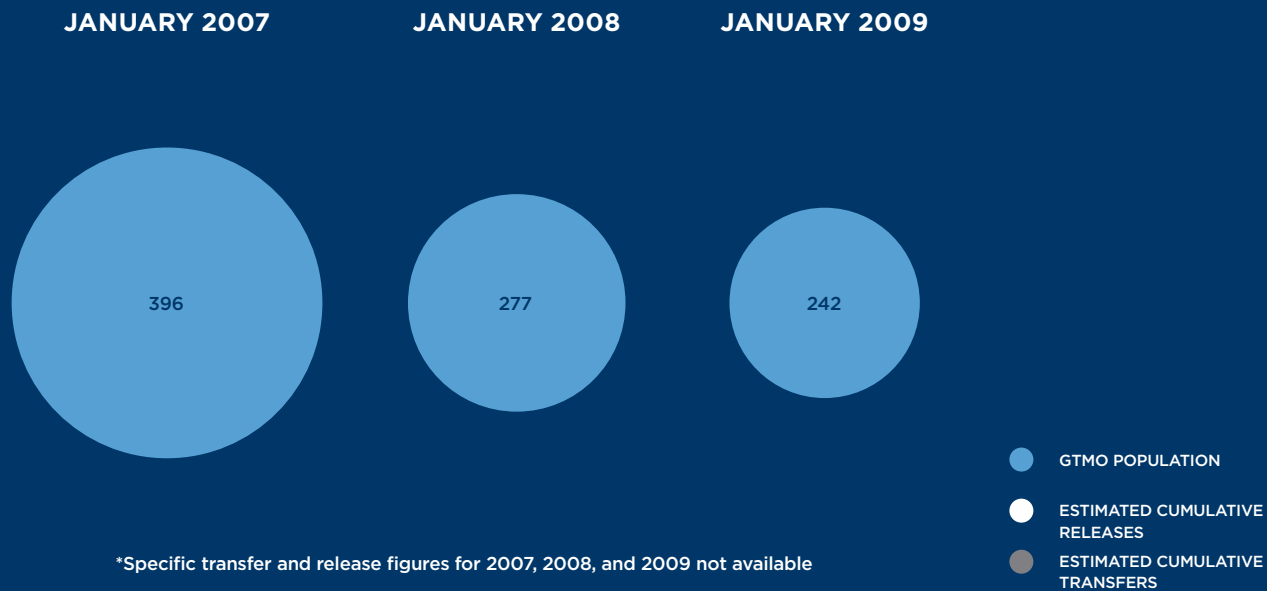
15. Waxman, pp. 85-86.

16. Official "P," October 28, 2011.

17. Waxman, pp. 48-49; transcript of committee staff interview of Former Official "D," August 16, 2011, p. 17 (in committee possession).

18. Former Official "D," p. 20.

19. Official "P," October 28, 2011.



COMBATANT STATUS REVIEW TRIBUNALS

Although the first Administrative Review Boards were anticipated to convene in the summer of 2004, they were delayed. This is because the Supreme Court issued two key decisions pertaining to GTMO: *Rasul v. Bush* and *Hamdi v. Rumsfeld*.²⁰ In *Rasul*, the Supreme Court found that detainees had the statutory right to challenge the legality of their detention in U.S. federal courts. The *Hamdi* case held that “enemy combatants” have the right to challenge their detention before a judge or other “neutral decision-maker.” Consequently, panels denoted “Combatant Status Review Tribunals” were established to provide such a determination for each GTMO detainee.

Between August 2004 and March 2005, 558 CSRTs were conducted. As a result, 38 detainees were deemed to be “no longer enemy combatants” (dubbed “NLECs”).²¹ This meant that there was no legal basis for their detention. Once the Department of State found a location willing to accept them and was satisfied that no concerns existed relating to inhumane treatment, the Department of Defense arranged outbound transportation.²²

20. *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

21. See document captioned “Combatant Status Review Tribunal Summary,” February 10, 2009, at www.defense.gov/news/csrtsummary.pdf; and “Detainees Found to No Longer Meet the Definition of ‘Enemy Combatant’ during Combatant Status Review Tribunals Held at Guantanamo,” November 19, 2007 (in committee possession); and document captioned “Combatant Status Review Tribunals,” September 26, 2006, at www.defense.gov/news/Oct2006/d20061017CSRT.pdf.

22. Waxman, p. 119; Former Official “D,” pp. 61, 62. Early CSRT determinations declared detainees as “not enemy combatants.” This designation was later altered to “no longer.” Several witnesses explained to committee staff that these were intended to be synonymous labels. The wording was changed so as not to imply that those so designated had been illegally detained. Rather, they explained that the Department’s public position was that such detainees had originally been legally detained, but a different judgment about the facts or additional clarifying information revealed at the CSRT resulted in a change of status. See, for example, Waxman, pp. 116-117. In April 2005 Secretary Rumsfeld wrote to the Secretary of the Army. “[W]e ought to have somebody take a look at how we ended up with 35 [sic] non-enemy combatants. What was the mistake that was made?” See memorandum from Donald Rumsfeld to Pete Geren, April 12, 2005, Rumsfeld Archive.

Other than gathering and presenting data for a CSRT's consideration through the established procedures, committee staff found no evidence that the Department of Defense did not recognize the independence of the tribunals or ignored any of the decisions which they rendered.²³ As Waxman recalled, CSRTs were part of an "administrative process" which sought to make a "legal determination . . . of enemy combatant status."²⁴ In other words, the tribunals made a single, specific legal determination in each case. They were not proffering "a policy judgment."²⁵

POLITICAL AND DIPLOMATIC CLIMATE

ARBs were different. It seems England sought to manage the ARB process in a way that addressed the limitations he believed GTMO was imposing on U.S. national security policy. By 2005, GTMO had become especially newsworthy and controversial. In the six month period between December 1, 2004 and May 31, 2005, there were, on average, more than five articles each day in U.S. periodicals containing the words "Guantanamo" and "release."²⁶ Nearly 1,400 articles appeared in the same timeframe in the international press.

Events in one month (May 2005) illustrate the breadth and tone of GTMO's visibility. Drawing an analogy with Stalin's death camps, Amnesty International declared the detention facility the "gulag of our times."²⁷ A play, putatively addressing "the injustice and brutality" at GTMO, based on accounts provided by the nine transferred British detainees, garnered rave reviews in London before being similarly received in New York, Washington, and Chicago.²⁸ A former soldier published a book ("a powerful cautionary tale about the risks of defaming the very values we are fighting for") which recounted his views of his GTMO assignment.²⁹

Reflecting on this period, England told committee staff that he believed the United States had "uniformly failed" to convey properly to domestic and international audiences the propriety of GTMO's operation.³⁰ He said he thought GTMO had become the subject of "mis-truths and mischaracterizations."³¹ Consequently, weeks after becoming the Deputy Secretary of Defense he determined "we should move people out of GTMO, not because people didn't belong" there but because its purpose and the nature of those in detention had been "so grossly distorted by the press and NGOs."³²

23. Various criticisms have been lodged about CRSTs generally suggesting that they were flawed in a way that led to improper enemy combatant designations, and thus continued detention. Engaging each of these critiques is outside the scope of this study. However, inasmuch as this assessment demonstrates that officials persistently sought to reduce the GTMO population, it undercuts any argument that CSRTs were intentionally implemented in such a way to *retain* detainees. For a sample of critics, see Andy Worthington, *The Guantanamo Files: The Stories of 774 Detainees in America's Illegal Prison* (London: Pluto Press, 2007), pp. 264-266; Tom Lasseter, "Studies differ on threat from Guantanamo detainees," *McClatchy*, June 15, 2008; Carol D. Leonnig and Josh White, "An Ex-Member Calls Detainee Panels Unfair," *Washington Post*, June 23, 2007; and declaration of Stephen Abraham, November 9, 2007, in *Al Bakri v. Bush*. For a rejoinder to the type of points set forth, see declaration of James M. McGarrah, May 31, 2007 in *Bismullah et al. v. Robert M. Gates*.

24. Waxman, p. 115.

25. Waxman, p. 115.

26. The Lexis Nexis search yielded 936 articles from 567 U.S. periodicals and 1,396 articles in 1769 non-U.S. publications.

27. *Amnesty International Report 2005: the state of the world's human rights*, May 24, 2005.

28. John Simon, "Recovered Memory Syndrome," *New York*, May 21, 2005 (quotation); Peter Marks, "Guantanamo: Honor Bound to Defend Freedom," *Washington Post*, November 8, 2005; Chris Jones, "Guantanamo has had time to gain insight," *Chicago Tribune*, February 13, 2006.

29. Erik Saar with Viveca Novak, *Inside the Wire: A Military Intelligence Soldier's Eyewitness Account of Life at Guantánamo* (New York: Penguin Press, 2005). Quotation from <http://www.eriksaar.com/>.

30. England, p. 36.

31. England, p. 31. A declassified August 2005 cable summarizes the difficulties of GTMO's public perception in the United Kingdom and U.S. embassy efforts to redress the issue. See Department of State cable, "Subject: Speaking out on GITMO and Detainees: 'Better to Explain the Future than Justify the Past'," August 8, 2005, available on the Department of State, Electronic Reading Room, Declassified/Released Document Collections. "Alleged CIA, 'Ghost,' or 'Secret' Detainees Collection," tranche III (hereafter "DOS FOIA" and tranche number).

32. England, p. 30.

Speaking of GTMO's continued operation, he said, "I felt it was more negative than positive."³³ England concluded GTMO should be shut down. "[I]t was literally disrupting our efforts in Iraq and Afghanistan," he said.³⁴ "[I]t was better for the country" and for "what we had to do everywhere else in the world if we got people out of GTMO."³⁵ In June 2005 England coauthored a memorandum to Rumsfeld recommending GTMO's closure.³⁶ Although Rumsfeld rejected the suggestion, and England told committee staff in retrospect he believed the recommendation to shutter GTMO was not sound because it conceded to critics the false image they had helped to create, this illustrates the political climate and policy environment in which the ARBs eventually began to operate.³⁷

Once CSRTs concluded, all those still deemed enemy combatants at GTMO received an ARB hearing between December 2004 and December 2005.³⁸ The DOD order establishing the Administrative Review Boards provided a role for the office of the Deputy Assistant Secretary of Defense for Detainee Affairs (DASD-DA), a DOD organization created in July 2004 to assume detainee responsibilities from SO/LIC and other entities.³⁹ Waxman was appointed to the position. According to him and another individual interviewed by committee staff, the DASD-DA, in addition to JTF-GTMO and CITEF, conveyed a recommendation on each detainee to OARDEC before the detainee's case was heard by the board.⁴⁰ The DASD-DA assessment drew upon views of the other two as well as other Defense organizations. Waxman said this was a "vetting process" meant to ensure that the disparate contributions from various Departmental organizations were sound and "had been checked and rechecked" and that "the tough questions had been asked."⁴¹

But, Waxman also said DASD-DA's participation, at least for the first round of ARBs, had a "calibration" function meant to align the Department's official communications regarding ARBs with the views of its senior-most leaders.⁴² "[I]n general, . . . the top leadership in the Pentagon wanted to . . . lean a bit farther forward on transfers" than other organizations he told the committee staff.⁴³ He believes England and Rumsfeld thought the Department should "be looking for opportunities to get coalition partners to shoulder the burden for . . . mitigating [the] continuing threat [of] these detainees."⁴⁴ Therefore, Waxman told staff that the DASD-DA input to ARBs was the "connective" element linking "what the Secretary and Deputy Secretary wanted to be DOD policy" with the material forwarded

33. England, p. 31.

34. England, p. 31.

35. England, p. 32.

36. Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008), pp. 317-319; and Bradley Graham, *By His Own Rules: The Ambitions, Successes, and Ultimate Failures of Donald Rumsfeld* (New York: Public Affairs, 2009), pp. 540-542.

37. See England, pp. 33-35.

38. "Guantanamo Bay Detainee Administrative Review Board Decisions Completed," U.S. Department of Defense News Release, February 9, 2006. At least one detainee deemed an enemy combatant by a CSRT did not go through an ARB because he had already been identified for transfer or release pursuant to Section 1. See former official "D," pp. 63-64.

39. For the establishment of the Office of Detainee Affairs, see "Memorandum for Secretaries of the Military Departments," July 16, 2004 (in committee's possession).

40. Waxman, pp. 86, 92, 101; Former Official "D," p. 42; document captioned "Memorandum For: See Distribution," September 14, 2004, enclosure 9, p. 4, (in committee possession) and available at www.globalsecurity.org/security/library/policy/dod/d20040914adminreview.pdf.

41. Waxman, p. 92.

42. Waxman, p. 94.

43. Waxman, p. 95.

44. Waxman, p. 95.

from GTMO.⁴⁵ That meant conveying data in a way that could help ARBs identify detainees to recommend for transfer under arrangements that minimized future dangers.

Waxman emphasized that the DASD-DA's role was separate from the recommendation independently proffered to the ARBs by JTF-GTMO and CITF. The DASD-DA activities were not meant to cast doubt on the Joint Task Force's threat assessment of a detainee. Rather, DASD-DA evaluations conveyed to the ARB were intended to place the assessment in a broader context. It might indicate, for example, that, notwithstanding a contrary JTF-GTMO recommendation, a transfer could be possible, provided arrangements to minimize the detainee's threat could be secured in the receiving nation.⁴⁶ Decision makers considered such transfers desirable because they would reduce the GTMO population (thus undercutting criticism of the facility's continued operation and potentially earning the United States goodwill abroad), while not endangering the nation's security.

Indeed, England told committee staff there frequently was a "bigger dimension" considered in detainee transfers.⁴⁷ "[A] lot of times," he said, the United States dispatched detainees from

GTMO "because it was in the total U.S. national interest" to do so.⁴⁸ "[E]ven though there was some risk," in such cases, "the upside outweighed whatever the downside risk was."⁴⁹ Such decisions involved a "trade-off between value to America" and "the threat" the detainee posed.⁵⁰

One DOD appointee emphasized that "the threat of reengagement was very, very much on the minds of officials . . . who were involved in these decisions."

As Douglas J. Feith, the Undersecretary of Defense for Policy, has written, the Department's leadership undertook "the very difficult balancing of weighty but competing interests" when considering "transferring detainees to their home countries."⁵¹ Waxman told committee staff that GTMO disposition decisions

could not only be considered narrow questions of "liberty interests" and "security risks," but had to be evaluated amidst "other important policy considerations."⁵² As with transfers apparently mandated earlier outside of Section 1, committee staff was told that such policy considerations included counterterrorism partnerships, intelligence cooperation, and coalition building.⁵³

45. Waxman, p. 96. At least one career individual knowledgeable about DASD-DA activities at the time evinced no knowledge of efforts to consider diplomatic relationships or strategic partnerships when conveying material to OARDEC for ARB review. See notes from career official "P" meeting with committee staff, October 28, 2011 and November 17, 2011 (in committee possession).

46. Waxman, p. 97.

47. England, p. 53.

48. England, p. 53.

49. England, p. 53.

50. England, pp. 89-90. In contrast to what is reported elsewhere in this report, committee staff interviewed one witness who was integrally involved in GTMO transfer and release issues between 2005-2006 who said he observed reluctance within DOD to proffer detainees as transfer or release candidates. He also reported no sense that senior White House or Department officials were making adequate efforts to reduce the GTMO population. (Transcript of committee staff interview of Sam Witten, June 21, 2011, pp. 51-52, 60, in committee possession.) He thought it likely that many detainees were being held without proper justification (Witten, pp. 61-62) and they had been "warehoused" at GTMO. He feared the possibility that the prospect of indefinite detention might radicalize them. (Witten, pp. 53-54, 57, 62-63.) He believes the Obama administration addressed many of these concerns (Witten, p. 53) including by instituting the Executive Order Task Force review process that better collected intelligence and risk assessments from across the government. (Witten, p. 95.)

51. Douglas J. Feith, *War and Decision: Inside the Pentagon at the Dawn of the War on Terrorism* (New York: Harper Collins, 2008), p. 165.

52. Waxman, p. 7.

53. Waxman, pp. 7-8, 11.

As these points all indicate, by this time, strategic considerations were seen as increasingly germane when contemplating GTMO detainee dispositions. Justifiably or not, the existence and operation of the detention facility was perceived as impeding broader U.S. goals. The challenge was redressing the situation in a way that minimized the potential threat of detainees who were sent out of GTMO.

The possibility that they might return to the fight worried decision makers. Waxman emphasized that “the threat of reengagement was very, very much on the minds of officials . . . who were involved in these decisions.”⁵⁴ This was not a hypothetical point. According to a declassified Department of State cable, as of July 2005, when 240 detainees had left GTMO, the United States believed “about 10” former detainees were involved again in terrorism or other hostile actions against the U.S. or its allies.⁵⁵

It seems this four percent reengagement rate was not entirely unexpected by policy makers. In discussing actions to reduce the GTMO population, Secretary Rumsfeld declared in his autobiography, “I knew we ran the risk of mistakenly releasing some people who might attack us in the future, just as is the case in our civilian prison system. “[B]ut” he writes, “I saw this as a risk we had to take.” “Otherwise we risked alienating populations whose assistance we needed and to do an injustice to individuals who were not actually involved in terrorism.”⁵⁶

MAKING DECISIONS

Before England made a transfer or release decision in ARB cases, the Department of State and the PCC became involved.⁵⁷ Since 2002, the Department of State’s Office of War Crimes (S/WCI) Issues, led by an ambassadorial-level appointee, had been in charge of negotiating arrangements for detainees departing GTMO. In the ARB process, S/WCI continued to work to ensure that prospective transfers or releases would be treated humanely.⁵⁸ S/WCI also endeavored to secure arrangements which would reduce the threat of a transferred detainee. These agreements often resembled those sought in the Section 1 period, although Waxman described them as more “flexible,” and “fluid.”⁵⁹ He and another knowledgeable official said final agreements were generally similar, but customized for particular cases.⁶⁰

DOD and Department of Justice staffers often participated in delegations dispatched to discuss GTMO dispositions. The Department of Defense was present, in part, potentially to provide details about the detainee, including the circumstances of his capture and other information.⁶¹ An existing policy “had the express purpose” of requiring that DOD and other relevant government agencies disclose “as much information as possible” about detainees with prospective recipient countries, committee staff was told.⁶² Department of Justice staffers also

54. Waxman, 107-108.

55. Department of State cable, “Subject: Speaking out on GITMO and Detainees” July 27, 2005, DOS FOIA, tranche II. The cable specifies Maulavi Abdul Ghaffar (ISN 363) and Mullah Shazada (ISN 367).

56. Donald Rumsfeld, *Known and Unknown: A Memoir* (New York: Sentinel, 2011), p. 568.

57. Waxman, pp. 114-115; and notes from current DOD employee “A” meeting with committee staff, October 12, 2011 (in committee possession).

58. Witten, pp. 34, 36; Former Official “D,” p. 43; Department of State cable, “Subject: Transfer of [excised] Nationals from USG Control,” June 27, 2005. This document was released by the American Civil Liberties Union in June 2010 as the result of a Freedom of Information Act request. It is available on the ACLU website in a collection captioned “Bagram FOIA: DOD and DOJ Documents Released on 6/9/2010.”

59. Waxman, pp. 113, 114.

60. Waxman, pp. 113, 136; Transcript of committee staff interview of Charles Stimson, August 26, 2011, pp. 74-75 (in committee possession).

61. Witten, pp. 27-28.

62. Department of Defense correspondence with committee staff, January 31, 2012, p. 7 (in committee possession).

SUCCESS STORY?

Committee staff met in Saudi Arabia with one former detainee who appeared to be “high risk” before he was transferred, yet who seems to no longer threaten the U.S. or its security interests.¹

The former detainee’s Combatant Status Review Tribunal transcript states that he received rudimentary weapons training in the Philippines in the mid-1990s before travelling to Afghanistan in 1997 for advanced firearms instruction and tactical training.² He told committee staff that by 2001, he was a hardened militant with connections to both Abu Zubaydah and Osama bin Laden.³ According to press reports, he was “among the fighters dug in with” the al-Qa’ida leader “in the mountains of Tora Bora.”⁴

After his capture, his high level al-Qa’ida connections were well-documented in his GTMO file.⁵ Yet, he also told officials there that he sought to separate himself from al-Qa’ida’s more extreme positions: “I think Osama bin Laden is wrong. He just wants to be famous. He doesn’t care how he does it, killing people, killing Muslims, or destroying countries,” he declared at his Combatant Status Review Tribunal.⁶ He was transferred to Saudi Arabia in 2005 and completed the Saudi rehabilitation program in 2006. He remains bitter about bin Laden’s actions at Tora Bora, believing the al-Qa’ida leader is guilty of “abandoning” fighters there.⁷

1. Notes from Ministry of Interior briefing to committee staff, Riyadh, Saudi Arabia, September 18, 2011 (in committee possession).

2. Unclassified CSRT transcript captioned “Summarized Sworn Detainee Statement” (in committee possession).

3. Notes from Ministry of Interior briefing.

4. Faiza Saleh Ambah, “Out of Guantanamo and Bitter Toward Bin Laden,” *The Washington Post*, March 24, 2008. For further discussion, see Andy Worthington blog, “The Insignificance and Insanity of Abu Zubaydah: Ex-Guantanamo Prisoner Confirms FBI’s Doubts,” April 26, 2008.

5. CSRT transcript.

6. CSRT transcript. His CSRT determined he was an enemy combatant, associated with al-Qa’ida and the Taliban. However, he consistently denied being a member of al-Qa’ida.

7. “Out of Guantanamo.”

participated on delegations to discuss prosecution possibilities. In commenting on this period, the Obama administration reported to committee staff that agencies “repeatedly sent high level delegations to more than 20 countries to gain a firsthand perspective on a country’s ability to mitigate the threat of returned detainees.”⁶³ This and various analytic efforts on “a broad range of issues” were undertaken in order “to assess a specific country’s ability” to “safely” manage individuals from GTMO who might be sent there.⁶⁴

A declassified Department of State cable from June 2005 apparently summarizes a typical transfer situation. It discusses the desire to transfer detainees to “the exclusive custody and control” of an unidentified government, and indicates that the action is “contingent upon receiving assurances” that the detainees “will not pose a continuing threat to the United States or its allies’ security interests.” The cable also specifies this “may include some form of detention, investigation and/or prosecution as appropriate and permissible” under the laws of the recipient country.⁶⁵ **(For details on U.S. efforts at foreign prosecution, see companion article.)** A press account from the same period also indicates that some transfer arrangements might have included an agreement to notify the United States and to place a former detainee on a “watch list” if he was to be freed by the recipient country.⁶⁶

63. Department of Defense correspondence, January 31, 2012, p. 3.

64. Department of Defense correspondence, January 31, 2012.

65. Department of State cable, June 27, 2005. This cable specifies that, “[a]ny detainee transferred would no longer be subject to the control of the United States.” Because of the reference to Bagram in this cable, the unidentified country is probably Afghanistan.

66. Andrea Koppel, and Elise Labott, “U.S. officials: Gitmo transfer talks active,” *CNN*, August 9, 2005.

The conditions which would apply to a potentially transferred detainee were conveyed to England before he took action on cases.⁶⁷ So too was an evaluation of a country's ability to deliver on agreed arrangements as well as outcome of any previous transfers or releases to the same country.⁶⁸ England emphasized to committee staff that he would not approve a transfer or release "unless I was comfortable with it."⁶⁹ Waxman agreed that England's decisions were the result of "careful deliberation."⁷⁰ England told committee staff that he always confirmed the existence of "solid security measures" before approving a dispatch from GTMO and he believed these measures were routinely refined.⁷¹ Secretary England also made clear that despite any diplomatic or strategic advantages that may have been perceived to be connected with a particular case, he acted independently. "[N]obody ever pressured me to make a decision," he said.⁷²

Obtaining assurances, evaluating them, and effectuating any transfers or releases which resulted was a complicated and time consuming task.⁷³ This meant there could be an extended period between an Administrative Review Board hearing and departure from GTMO.⁷⁴ When it did take place, however, the arrangement was typically codified in a diplomatic note.⁷⁵

By the time the first round of 463 ARBs concluded in December 2005, England determined that 14 detainees should be released, 120 be transferred, and 329 be kept at GTMO.⁷⁶ Those who remained had their cases reheard each year. The second round of ARBs, which ended in December 2006, resulted in no release decisions, and determinations for 55 transfers, and 273 continued detentions.⁷⁷ England made at least 33 transfer and 195 detention determinations in the course of the third ARB round in 2007.⁷⁸ Between February 2008 and the beginning of the Obama administration in January 2009, it appears he made a final 31 transfer and 92 continued detention rulings.⁷⁹

AFGHANISTAN

In 2005, in the midst of the first Administrative Review Board round, attention turned to the possibility of making large numbers of transfers to Afghanistan and Saudi Arabia. Citizens of

67. It also seems that on occasion the Department of Defense objected in the PCC meeting to the negotiated agreement and sought more stringent conditions. Sometimes changes failed to satisfy the Department's concerns. Because DOD had custody of detainees, it had the ability to block actions not meeting its approval. See, Stimson, pp. 72-73; notes from current senior DOD official "R" meeting with committee staff, October 12, 2011; and notes from career official "P" meeting with committee staff, October 28, 2011 (all in committee possession).

68. England, pp. 52, 59; DOD employee "A," transcript of committee staff interview with Former Official "J," July 5, 2011, p. 34; and notes from career official "P" meeting with committee staff, October 28, 2011 (in committee possession).

69. England, pp. 52-53.

70. Waxman, p. 107.

71. England, pp. 50-51, 61.

72. England, p. 54.

73. Witten, p. 29.

74. Waxman, p. 114.

75. Waxman, p. 135; Former Official "J," p. 23; and Department of State cable, June 27, 2005.

76. "Guantanamo Bay Detainee Administrative Review Board Decisions Completed," U.S. Department of Defense News Release, February 9, 2006. England was not bound by the ARB recommendation, and no witness could recall a specific instance when he did not act in accord with what was put forward by the majority of any particular board. (See, e.g., Former Official "D," p. 40; and Waxman, p. 108.) However, based upon information made public by the Department of Defense, it appears England approved for transfer one detainee who the ARB recommended for continued detention. Compare figures in "News Release," February 9, 2006 with those contained in "Administrative Review Board Summary," c. February 2006 (in committee possession).

77. Document captioned, "Administrative Review Board Summary, ARB-2" (in committee possession).

78. Document captioned, "Administrative Review Board Summary, ARB-3" (in committee possession). This document suggests that on the date it was drafted, there were 25 ARBs on which England had yet to rule.

79. Document captioned, "Administrative Review Board Summary, ARB-4" (in committee possession). This document notes that 124 ARBs were held, yielding seven transfer and 92 "continue to detain" decisions from England but he "authorized the transfer of 24 detainees before their respective ARB-4 proceedings were complete."

these nations comprised the two largest groups of detainees. (In total, there were 220 Afghans and 134 Saudis held at GTMO.⁸⁰) Thus, any effort to substantially reduce the GTMO population required focusing on these individuals. Concluding a transfer also offered prospective diplomatic benefits.⁸¹

In the case of Afghanistan, Waxman told committee staff the “transfer of Guantanamo detainees back to Afghanistan was a critical piece of a much broader, carefully negotiated security partnership.”⁸² But, conditions there posed complications. While the government of Afghanistan had “the will” to take back their detainees, it had “low capability” and “low capacity” to do so.⁸³ Most detainees destined for Afghanistan by 2005 were not releases. They were candidates for detention or prosecution. Yet Afghanistan lacked the necessary legal system and physical facilities to accomplish this.⁸⁴

In August of that year, Ambassador Pierre Prosper, who led S/WCI at the Department of State, and Waxman negotiated an agreement with the Afghan government that established the broad framework for detainee transfers.⁸⁵ This was intended to be a single comprehensive arrangement. By apparently stipulating general circumstances, groups of Afghan detainees could subsequently be sent back under the same authority. Each tranche did not require separate negotiations. This eased the process.⁸⁶

The agreement was coupled with funding to renovate an Afghan prison, train a guard force and create judicial institutions.⁸⁷ According to witnesses interviewed by committee staff, Department of Defense leaders insisted on these prerequisites as conditions for any transfers. There was “a very high degree of concern” in DOD about these detainees, John Bellinger, who had since moved to the Department of State, recounted.⁸⁸

GTMO detainees were probably first transferred to Afghanistan pursuant to the agreement in late 2006. Five detainees arrived there in August of that year, followed by 16 in October, and seven in December.⁸⁹ Committee staff were told that relatively lower threat detainees were transferred first, while the Afghan government’s facilities and institutional arrangements were improved.⁹⁰ As Charles D. “Cully” Stimson, Waxman’s DOD successor, said: “the feeling in the Department was that it would be prudent to send . . . a very few . . . individuals back” initially in order to determine first if the Afghans “could demonstrate their capacity to mitigate the threat that these individuals posed” and if they “were living up to the terms of the transfer agreement.” “[W]e were taking a very measured . . . deliberate pace,” he said.⁹¹ Appropriately arranged

80. Population figures from unclassified public sources (in committee possession).

81. Waxman, p. 105.

82. Waxman, p. 107.

83. Waxman, p. 154.

84. Transcript of committee staff interview of John B. Bellinger, III, May 19, 2011, p. 32 (in committee possession).

85. Josh White and Robin Wright, “Afghanistan Agrees to Accept Detainees,” *Washington Post*, August 5, 2005; Paul Richter, “U.S. to Repatriate 110 Afghans Jailed at Guantanamo Bay,” *Los Angeles Times*, August 5, 2005; Josh White and Robin Wright, “U.S. Holding Talks on Return of Detainees,” *Washington Post*, August 9, 2005; “U.S. officials: Gitmo transfer talks active.”

86. Waxman, pp. 155-157.

87. Bellinger, p. 31; Waxman, p. 155.

88. Bellinger, p. 31.

89. Detainee population figures from unclassified public documents (in committee possession). Seven were sent in February 2006, but according to the transfer/release list constructed by committee staff referenced in the methodological note, they appear to be “releases.” The date is also probably too soon after the August 2005 agreement to allow the necessary transfer conditions to be put into place.

90. Waxman, p. 154.

91. Stimson, p. 80.

Afghanistan transfers were one of Deputy Secretary England's priorities, Stimson reported, so "we were . . . watching, evaluating, [and] reassessing the efficacy" of the "initial tranche."⁹²

After the presumed 28 transfers in 2006, it seems 35 detainees were sent to Afghanistan in 2007.⁹³ Eight went in 2008.⁹⁴ In 2012 the Obama administration observed that the ARB process involved the return of "nearly all" the "Taliban 'foot soldiers'" held at GTMO.⁹⁵

The tapering of these numbers in the last year of the Bush administration may have reflected some increased dissatisfaction with the process in the United States. England told committee staff that although the United States helped create "a first-class prison" in Afghanistan, the government released some of the detainees sent there.⁹⁶ In retrospect, Waxman conceded that U.S. detention goals in Afghanistan have "been very, very hard to implement."⁹⁷

Some details of reengagement seem to support this observation. Zahir Shah (aka Nahir Shah, ISN 1010) was among those transferred to Afghanistan in November 2007. In 2009, DIA confirmed that he had participated in "terrorist training."⁹⁸ Haji Sahib Rohullah Wakil (ISN 798), transferred five months later, was suspected of "association with terrorist groups."⁹⁹ Zakir (ISN 8) was also returned in this period. **(For details on Zakir, see companion article.)**

SAUDI ARABIA

Events involving Saudi Arabia followed a similar trajectory. After negotiating the 2005 Afghanistan transfer agreement, Waxman and Prosper travelled there to conclude another omnibus arrangement.¹⁰⁰ As in the case of Afghanistan, the Saudis sought the return of their nationals and U.S. officials wanted to facilitate this outcome, provided it was possible.¹⁰¹

The ARB process allowed Deputy Secretary England and the DASD-DA office to guide the sequence in which detainee cases were presented. Before the two officials arrived in Saudi Arabia, this authority was invoked and a selection of Saudi cases were presented to ARB panels. This yielded fifteen relatively low-threat detainees who England ultimately ruled were transfer candidates provided the Saudis could make appropriate arrangements to mitigate the danger they posed. This group formed the basis of initial discussions.¹⁰²

As with other cases, the U.S. was motivated to secure transfers to Saudi Arabia also, in part, because of broader national security issues. The Saudis had become more engaged in the fight against al-Qa'ida, Waxman told committee staff. "[W]e had a strong interest in strengthening and deepening our counterterrorism ties" with that government, he said. This idea "was part of the background" of the "sustained and serious discussion" with the Saudis about a transfer agreement.¹⁰³

92. Stimson, p. 81.

93. Detainee population figures from unclassified public documents (in committee possession).

94. Detainee population figures from unclassified public documents (in committee possession).

95. Department of Defense correspondence, January 31, 2012, p. 3.

96. England, pp. 23, 24.

97. Waxman, p. 155.

98. "Defense Analysis Report—Terrorism," Defense Intelligence Agency, April 8, 2009.

99. "Defense Analysis Report," April 8, 2009.

100. Waxman, pp. 90, 152, 157.

101. Witten, pp. 38, 49, 68.

102. Waxman, pp. 88, 158, 164-165. It is noteworthy that some involved in the ARB process said they did not recall DASD-DA ever invoking the sequencing authority. (See Former Official "D," pp. 25, 26; and Stimson, p. 44.) Although England said he never did so, it would have been appropriate if he had and was similarly appropriate for the DASD-DA. (England, p. 47.) A 2006 revision to the ARB procedures made this authority explicit. See "Memorandum for Secretaries of the Military Departments," et. al., July 14, 2006, available at www.defense.gov/news/Aug2006/d20060809arbproceduresmemo.pdf.

103. Waxman, pp. 166-167 (quotation); Stimson, p. 83.

Unlike Afghanistan, however, policy makers believed Saudi Arabia had certain existing characteristics that potentially gave it the capacity to receive transferred detainees.¹⁰⁴ This included a program meant to rehabilitate violent religious extremists. Although the Saudis had “high confidence” in the potential effectiveness of this rehabilitation program, Waxman said U.S. officials had some doubts about it, primarily because it was new and untested.¹⁰⁵ Because of various uncertainties, discussions about transfer conditions took months.¹⁰⁶ Eventually, however,

“I think in hindsight, most of those countries didn’t do what they signed up to do,” England explained to committee staff.

some Saudi concessions for follow-up with transferred detainees, in addition to other U.S. government activities, adequately addressed concerns.¹⁰⁷ **(For details on Saudi Arabia, see companion article.)**

It appears that the fifteen detainees identified earlier were in the first group transferred in May 2006.¹⁰⁸ Waxman was initially “pretty content with the arrangement.”¹⁰⁹ England said “the early results were all very good.”¹¹⁰ Later Stimson noted, “we took a measured, wait and see approach.” The Department

wanted to determine “whether the program they were entering into . . . would be effective on this particular small group of detainees.”¹¹¹

Despite this caution, in 2009 the Defense Intelligence Agency reported that six detainees transferred to the Saudi program after February 2007 were confirmed (three) or suspected (three) of reengaging. Two, including Said al-Shihri (ISN 372), became leaders in al-Q’aida in the Arabian Peninsula.¹¹² **(For details on al-Shihri, see companion article.)**

THE FINAL BUSH YEARS

Although President Bush may not have been aware of the specifics of most transfers, he apparently desired that they take place. In a meeting at the White House in early 2006, Stimson recalled that Stephen Hadley, the national security advisor, said it was a “priority” for the president that GTMO detainees at “the lower end” of the threat scale be transferred. As a result, “an intense and vigorous assessment period” followed, apparently to identify additional transfer candidates meeting these criteria.¹¹³

Months later, England had a conversation with a Department of State official involved in detainee negotiations. According to this individual, England “was very much pushing for” State “to move as many people as we could.”¹¹⁴ Indeed, in September, in the course of a related speech, the President declared, “America has no interest in being the world’s jailer,” but said

104. Waxman, p. 156.

105. Waxman, pp. 156, 159 (quotation), 160.

106. Witten, pp. 18, 70.

107. Waxman, pp. 63, 159, 162.

108. Waxman, pp. 158-159, 164-165.

109. Waxman, p. 164.

110. England, p. 60.

111. Stimson, p. 82.

112. “Defense Analysis Report,” April 8, 2009.

113. Stimson, p. 102.

114. Former Official “J,” p. 58. In an email to committee staff, Secretary England specified that he pushed State “to get acceptable security agreements so we could move people out” of GTMO. See Gordon England email with committee staff, January 11, 2012 (in committee possession).

reducing the GTMO population had been stymied, in part, by the inability to secure humane treatment assurances or adequate security agreements. Nonetheless, he said, “[w]e will continue working to transfer individuals held at Guantanamo and ask other countries to work with us in this process.” He sought to “move toward the day when we can eventually close the detention facility at Guantanamo Bay.”¹¹⁵

While the president apparently believed some foreign impediments existed with respect to transfers, some also perceived difficulties within the U.S. government. The Department of State official told committee staff that it was his impression that officials at the Department of Defense thought his department was insufficiently dedicated to the task. In addition to negotiating transfer agreements, the S/WCI office focused on its namesake topic, international war crimes issues. This individual thought DOD believed this left too few staffers exclusively dedicated to GTMO detainee transfers.¹¹⁶ Alternatively, Department of State officials believed that, notwithstanding policy, DOD was sometimes unable or unwilling to provide prospective recipient countries much more than rudimentary specifics about a potentially transferrable detainee. With the information slowly (or not) forthcoming, critics of the process believed agreements were delayed or precluded.¹¹⁷ There were also continuing complaints about a sluggish interagency bureaucracy which impeded the process in various ways.¹¹⁸

In the later years of the Bush administration, transfers and releases continued as a result of England acting upon ARB recommendations overseen by OARDEC.¹¹⁹ Aside from Afghanistan, and Saudi Arabia, in the last three years of the president’s term, the ARB process resulted in transfers to many locations, including Yemen (seven), Morocco (six), Kazakhstan (four), Tajikistan (four), Sudan (four), Jordan (three) Kuwait (two), Bahrain (two), and Tunisia (two).¹²⁰

In June 2008, a Department of Defense fact sheet noted that about seven percent of individuals transferred from GTMO were confirmed or suspected of returning to the fight. It also noted that the “time lapse” between departing GTMO and “terrorist activity” was “approximately a year and a half” but it sometimes took “months or even years” for the U.S. intelligence community to learn of these actions.¹²¹ This indicates reengagement by those transferred in the last years of Bush administration may not have been fully apparent until at least the second year of the Obama presidency. By October 2010, the publicly known suspected and confirmed rate had more than tripled.¹²² The later rate suggests flaws in the transfer and release system in the earlier period.

What went wrong to produce these numbers? Despite the earnest and well meaning efforts of many individuals from across the U.S. government, it seems the agreements meant to preclude reengagement were inadequate. “I think in hindsight, most of those countries didn’t

115. See transcript of President’s remarks, “President Bush’s Speech on Terrorism,” *New York Times*, September 6, 2006.

116. Former Official “J,” pp. 58-60.

117. Former Official “J,” pp. 20-21, 60; Witten, pp. 27-28, 44-46, 59, 86, 88.

118. Witten, pp. 75-76. One Defense official involved in transfer and release decisions at this time pointed out that an assessment of the interagency process required acknowledging that each institutional participant had a perspective rooted in its role and that asserting this perspective was not necessarily an indication of dysfunction, lack of comity, or desire to delay the process. See Official “P,” October 28, 2011.

119. Stimson, esp. pp. 5-11; “Memorandum for Secretaries of the Military Departments,” et. al., July 14, 2006.

120. Detainee population figures from unclassified documents and cross referenced with unclassified NLEC list (all in committee possession). One Defense witness expressed reservations with Yemeni transfers during his tenure. See Stimson, including pp. 86-88.

121. “Fact Sheet: Former Guantanamo Detainee Trends,” June 13, 2008, available at www.defense.gov/news/d20080613Returntothefightfactsheet.pdf.

122. “Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba,” Office of the Director of National Intelligence, December 2010.

do what they signed up to do,” England explained to the committee staff.¹²³ In fact, many witnesses from the Bush administration who were interviewed by the committee were also uncertain which, if any, U.S. government agencies had responsibilities for ensuring the arrangements were properly instituted by foreign partners.¹²⁴ At least one former official also expressed dissatisfaction with the extent of earlier U.S. follow-up on transferred or released detainees.¹²⁵

In the last year of the administration other pressures arose. A detainee was granted his habeas petition as a result of a 2008 Supreme Court case.¹²⁶ This established another mechanism in which detainees could leave GTMO. This “changed the urgency of getting a lot of transfers done,” an individual then involved with negotiations at the Department of State recounted to committee staff. “[I]t brought a lot of detainees into the forefront” who the Department of Defense had not yet “worked all the way through the process.”¹²⁷ Furthermore, if courts ordered some detainees released from GTMO but they could not be sent to their home country for humanitarian treatment or other reasons, negotiations with a third country had to be initiated. The *Boumediene* decision thus increased the possibility of “resettlements,” which were often more complicated to arrange than repatriations. **(For details on the effect of GTMO litigation on the transfer and release process, see companion article.)**

By the conclusion of the president’s term, 532 detainees had departed GTMO and 242 remained.¹²⁸ Fifty-nine of these had been approved for transfer, but were still at GTMO when Barack Obama was inaugurated.¹²⁹ This included 17 Chinese Uighurs who had been deemed NLECs, but who could neither be returned to China because of humanitarian treatment concerns nor, in the absence of a country willing to receive them, be readily sent elsewhere.¹³⁰

“While I believe opening Guantanamo after 9/11 was necessary,” President Bush wrote in his memoirs, “the detention facility had become a propaganda tool for our enemies and a distraction for our allies. I worked to find a way to close the prison without compromising security.” Writing about “the hardened, dangerous terrorists” remaining at GTMO, the former president said, “[d]eciding how to handle them is the toughest part of closing Guantanamo.”¹³¹

This is the challenge the Obama administration assumed in January 2009.

123. Transcript of committee staff interview of Gordon England, October 6, 2011, pp. 21 (quotation), 22 (in committee possession).

124. England, pp. 57, 72; Witten, pp. 73, 75-76, 77-79; Stimson, p. 84; Waxman, pp. 58-59, 62; transcript of Former Official “J,” pp. 31-32; and transcript of Former Official “Q,” p. 49 (in committee possession).

125. Stimson, pp. 91-92.

126. *Boumediene v. Bush*, 533 U.S. 723, (2008).

127. Former Official “J,” p. 41.

128. Unclassified population figures (in committee possession).

129. “Final Report; Guantanamo Review Task Force,” January 22, 2010, p. 2.

130. Department of Defense correspondence, January 31, 2012.

131. George W. Bush, *Decision Points* (New York: Crown, 2010), p. 180.

Litigation Pressures

On January 20, 2002, the first habeas petition was filed in federal district court.¹ Within two weeks, 156 detainees had been sent from the battlefields of Afghanistan to GTMO.² The filing of the petition was significant. It signaled the beginning of litigation that would substantially shape the procedural framework established by the Department of Defense to evaluate GTMO detainee disposition, as well as the pace and scope of detainee transfers.

The petition raised unprecedented questions: were GTMO detainees entitled to due process, were they entitled to be informed of the accusations against them and were they entitled to legal counsel?³ More fundamentally, the petition posed the question whether federal courts had jurisdiction to review the legality of law of war detention at GTMO. Petitioners, in the filing, requested the court to direct DOD to (1) “identify [all detainees] by full name and country of domicile” “within three days;” (2) to “show the true cause(s) of the detention of each person;” and (3) “to produce the detainees at a hearing.”⁴

In a memorandum prepared for Secretary Donald Rumsfeld informing him of the lawsuit, the Department of Defense General Counsel advised: “[t]he lawsuit is unlikely to succeed, given that the Supreme Court has previously held that non-citizens detained outside the United States are not eligible to file such habeas corpus petitions.”⁵ Other senior leaders of the Bush administration agreed that the petition was “meritless.”⁶ In their

1. On January 20, 2002, petitioners filed *Coalition of Clergy, Lawyers, and Professors v. Bush*, in federal district court in Los Angeles, 189 F. Supp. 2d 1036 (2002). The case was dismissed for lack of jurisdiction and for lack of standing because petitioners failed to demonstrate a sufficient relationship with detainees. The case was appealed and later denied a writ of certiorari by the Supreme Court. The following month, the Center for Constitutional Rights filed *Rasul v. Bush* 215 F. Supp. 2d 55 (2002), on behalf of detainees in the District Court for the District of Columbia presenting similar questions. The case was also dismissed, but later considered by the Supreme Court in 2004. See *infra*. The focus of this section is to provide insight gained from interviews with senior officials charged with establishing and implementing policy regarding administrative review procedures for GTMO detainees and related affects on transfers and releases. It is not intended to address other litigation matters involving detainees such as military commissions. For a detailed overview of habeas litigation, see Jennifer K. Elsea and Michael John Garcia, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, CRS Report RL33180, April 5, 2010.

2. Population figures from public sources (in committee possession).

3. *Coalition of Clergy, Lawyers, and Professors v. Bush*, 189 F. Supp. 2d 1036, 1038 (2002).

4. 189 F. Supp. 2d at 1038.

5. Memorandum from William J. Haynes, II to Secretary of Defense, January 22, 2002, Rumsfeld Archive. This is a collection of documents declassified at Donald Rumsfeld's request and made available on Rumsfeld.com (hereafter “Rumsfeld Archive”). The memorandum informed Secretary Rumsfeld that the lawsuit had been filed “in California, challenging DOD's right to hold the detainees.”

6. Memorandum from William J. Haynes, II to Secretary of Defense, January 22, 2002, Rumsfeld Archive. An attachment to this memorandum describes the legal basis supporting the DOD/GC position: “The Al Qaida and Taliban detainees at Guantanamo are not entitled to prisoner of war status under the Third Geneva Convention for several reasons. For example, Al Qaida is a terrorist group whose goals are to attack civilians; therefore it fails to meet the requirement under the Third Geneva Convention that a regular armed force must conduct operations in accordance with the ‘laws and customs of war’. The Taliban are not the regular armed forces of any government. Rather they are an armed group of militants who have oppressed and terrorized the people of Afghanistan and have knowingly provided support to the unlawful objective of al Qaida.”

JANUARY 2002

Coalition of Clergy, Lawyers, and Professors v. Bush
Petitioners, on behalf of some detainees, seek a statutory writ of habeas corpus under 28 U.S.C. § 2242. The case is dismissed for lack of jurisdiction.

JUNE 2004

Rasul v. Bush
The Supreme Court holds that federal courts have statutory jurisdiction to consider habeas petitions of noncitizens captured abroad, but do not reach the question whether the constitution guarantees the privilege of the writ

Hamdi v. Rumsfeld
The Supreme Court holds that a citizen detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker.

DECEMBER 2005

Detainee Treatment Act (DTA) of 2005 (P.L. 109-148; P.L. 109-163)
Congress attempts to restrict U.S. courts from hearing petitions for habeas corpus and other actions filed by Guantanamo Detainees. Section 1005 (e) amends 28 U.S.C. § 2241 providing: "No court, justice or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States." The DTA grants the U.S. Court of Appeals for the District of Columbia exclusive but limited jurisdiction to hear appeals to review final CSRT decisions.

FEBRUARY 2002

Rasul v. Bush
Detainees file a habeas corpus petition challenging the legality of their detention under federal statute and the United States Constitution. The petition is dismissed for lack of jurisdiction but later considered by the Supreme Court.

JULY 2004

The Department of Defense announces the formation of Combatant Status Review Tribunals to serve as a forum for detainees to contest their status as enemy combatants. Detainees are also notified of their right to seek a writ of habeas corpus in federal court.



JUNE 2006

Hamdan v. Rumsfeld

The Supreme Court rejects the view that the Detainee Treatment Act's jurisdiction-stripping provision under Section 1005 applies to cases then pending before federal courts.

JUNE 2008

Boumediene v. Bush

The Supreme Court holds that noncitizens may assert the constitutional privilege of the writ of habeas corpus and seek its protection. The court finds that the MCA § 7, which limited judicial review to that available under the DTA, did not provide an adequate substitute for habeas and therefore acted as an unconstitutional suspension of the writ which under the Constitution "shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

OCTOBER 2006

Military Commissions Act (MCA) of 2006, § 7 (P.L. 109-366)

Congress amends 28 U.S.C. § 2241 in response to *Hamdan* expressly divesting federal courts from hearing habeas cases and "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial or conditions of confinement of an alien who is or was detained by the United States" Congress clarifies that the jurisdiction stripping provision of the DTA applies to "all cases, without exception, pending on or after the date of the enactment of this Act."

REFERENCES

Coalition of Clergy, Lawyers, and Professors v. Bush, 2002 U.S. Dist. LEXIS 907 (2002)

Rasul v. Bush, Civil Action No. 02-299 (2002)

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (Once DOD officials realized Hamdi was an American citizen, he was transferred to a naval brig in Norfolk, Virginia)

Hamdan v. Rumsfeld, 548 U.S. 557, 576-577 (2006)

Boumediene v. Bush, 553 U.S. 723 (2008)

U.S. Const. Art. I, § 9, cl. 2

judgment, the Department had exclusive authority over law of war detention matters such as the detention, transfer, and release of detainees during wartime. Moreover, they believed such detainees were not entitled to the same rights afforded U.S. citizens.

Two years later, as petitioners appealed the dismissal of their case, the Department of Defense announced its decision to implement Administrative Review Boards (ARBs). England informed committee staff that these panels were meant to provide a more “formalized, documented and institutional process” than the Section 1 process they supplanted.⁷ They were also meant to afford detainees:

[t]he opportunity for review by a neutral decision-making panel of three commissioned officers; [t]he opportunity to attend all open portions of the proceedings; [t]he opportunity to testify on his own behalf; [t]he opportunity to receive the assistance of an interpreter; and [t]he opportunity to receive assistance from a military officer to ensure he understands the process, and to prepare for his hearing.⁸

These guarantees were intended by DOD leadership to ensure openness and fairness.⁹ The Department may also have been concerned about due process criticisms lodged against the existing Section 1 review process.

In announcing the ARBs, the Department of Defense articulated the primary purpose of law of war detention: “enemy combatants are detained for a very practical reason . . . to prevent them from returning to the fight.”¹⁰ Rumsfeld emphasized to journalists that “[w]e need to keep in mind that the people in U.S. custody are . . . enemy combatants and terrorists who are being detained for acts of war against our country.”¹¹ The Department of Defense, however, did not wish to hold “detainees any longer than [was] warranted” and believed the ARB process would identify appropriate candidates for transfer or release.¹²

Subsequent legislative and judicial developments changed DOD’s perspective. In June 2004, shortly after the ARB announcement, the Supreme Court issued *Rasul v. Bush*.¹³ In its first decision relating to executive branch detention authority, the Court held that detainees were entitled to challenge the legality of their detention under federal statute.¹⁴ The Court explained that “[w]hat is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing,” and nothing more.¹⁵

The same day, the Court issued a related decision, *Hamdi v. Rumsfeld*.¹⁶ In *Hamdi*, a plurality of the Court held that a U.S. citizen is entitled to due process when detained pursuant to law of war detention and that courts have “time-honored and constitutionally mandated

7. Gordon England email to committee staff, January 12, 2012 (in committee possession).

8. Testimony of Rear Admiral James M. McGarrah, Director of the Office of the Administrative Review of the Detention of Enemy Combatants, Committee on the Judiciary, U.S. Senate, July 14, 2005.

9. England email.

10. “Review Procedures Announced for Guantanamo Detainees,” U.S. Department of Defense News Release, May 28, 2004.

11. Donald Rumsfeld, interview with Jim Lehrer, *PBS Newshour*, February 16, 2004.

12. McGarrah testimony.

13. 542 U.S. 466 (2004).

14. “Congress has granted federal district courts, ‘within their respective jurisdictions,’ the authority to hear applications for habeas corpus by any person who claims to be held ‘in custody in violation of the Constitution or laws or treaties of the United States,’” 28 U.S.C. §§ 2241(a), (c) (3), 542 U.S. at 473.

15. 542 U.S. at 485.

16. 542 U.S. 507 (2004).

roles of reviewing and resolving claims like those presented here.”¹⁷ The Court found that “[a]ny process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.”¹⁸ While *Hamdi* involved a U.S. citizen who had been transferred to the United States from GTMO, England informed committee staff that the decision “got the full attention of all branches of government” and raised concerns about potential implications for noncitizen detainees.¹⁹

Consequently, the Department of Defense stopped sending detainees to GTMO while officials assessed the situation.²⁰ The Department undertook careful analysis and engaged in “discussion, and debate among and between the legal departments in DOD, Justice, State, White House and some members of Congress” before proceeding.²¹ The Department established Combatant Status Review Tribunals (CSRTs) to address the procedural due process requirements identified in the *Hamdi* decision.²² The Department also “wanted to ‘get ahead of the curve,’” in order to “respond to the courts in a timely fashion,” England said.²³ Officials feared courts might order releases based on procedural or technical compliance issues associated with litigation, and they wanted to foreclose that possibility.²⁴

Nearly 600 detainees, from approximately 42 countries, were detained at GTMO at the time.²⁵ Each required a CSRT proceeding with attendant notification and coordination issues. This was “a very manpower intensive and time consuming process,” England informed committee staff.²⁶ He elaborated that “[t]his was a time of great confusion and frustration” since “there were different judges, different jurisdictions, different requirements for data, appeals, NGOs and governments with their own agendas, [and] daily press with their biases, [and] political agendas.”²⁷ Against this backdrop, he noted the war on terror continued.²⁸

There were other implications. The Department of Defense expanded the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) to accommodate the new mission of overseeing and managing the CSRT process.²⁹ Similarly, the Joint Intelligence Group at JTF-GTMO, the organization tasked with overseeing intelligence activities associated with detainees, shifted its focus and diverted some of its attention from intelligence activity to litigation related tasks.³⁰

17. 542 U.S. at 535.

18. 542 U.S. at 537. The Court acknowledged concerns similar to those expressed by Secretary England when it noted the possibility of structuring reviews to “alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.” *Id.* at 533.

19. England email.

20. England email. England informed committee staff that as a result he made a decision to preclude commanders from initiating future transfers without his prior approval.

21. England email.

22. Army Regulation 190-8, “Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees,” Departments of the Army, the Navy, the Air Force, and the Marine Corps, Washington, D.C. (October 1, 1997), establishes procedures to determine the status of detainees under the Geneva Conventions. See also England email; *Hamdi*, 542 U.S. at 538; McGarrah testimony.

23. England email.

24. England email.

25. Transcript of committee staff interview of Former Official “D,” August 16, 2011, pp. 6, 18 (in committee possession); E.A. Torriero, “Ruling opens prison gates for detainee,” *Chicago Tribune*, July 8, 2004.

26. England email.

27. England email.

28. England email.

29. *In re Guantanamo Bay Detainee Litigation*, Declaration of Gordon England, November 18, 2008, p. 2. Significantly, OARDEC expended “800,000 man hours preparing for and conducting CSRTs and ARBs.” (See England declaration.) One reason was “the pursuit of off-island witness input for CSRT hearings” which was apparently “very time consuming.” (See McGarrah testimony.)

30. McGarrah testimony. JTF GTMO eventually allocated “approximately 11,500 man-hours” in support of detainee related litigation.

In December 2005, Congress responded to the Supreme Court decisions. It enacted the Detainee Treatment Act (DTA).³¹ The DTA divested federal courts of jurisdiction over habeas petitions and other detainee-related litigation concerning their treatment and living conditions. In supporting the measure, Senator Lindsey Graham explained one reason why supporters believed the legislation was needed: “[n]ever in the history of the law of armed conflict has a military prisoner, an enemy combatant, been granted access to any court system, Federal or otherwise”³² Senator Graham also expressed concern for the number and types of claims detainees were making through habeas petitions.³³

After the DTA became law, however, the Supreme Court ruled in *Hamdan v. Rumsfeld* that the legislation’s jurisdiction stripping provisions could not eliminate habeas corpus jurisdiction in cases then pending before federal courts.³⁴ The decision prompted Congress to act yet again by revising the habeas statute to eliminate expressly “any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States.”³⁵

The legislation did not achieve its intended outcome. In June 2008, the Supreme Court issued *Boumediene v. Bush* and established that detainees are guaranteed the constitutional privilege of habeas corpus and access to federal court.³⁶ The Court held that Congress could not eliminate the privilege because the Constitution provides that habeas “shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”³⁷ The Court found that for the writ of habeas to be effective, “[t]he habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive’s power to detain.”³⁸ The decision did not address “whether the CSRTs, as currently constituted, satisfy due process standards” leaving that question, among many others unanswered.³⁹

Soon after the Supreme Court issued *Boumediene*, hundreds of habeas corpus petitions were filed by or on behalf of detainees in federal court.⁴⁰ From England’s perspective, the decision and related litigation “complicated things dramatically” placing “overwhelming burdens” on the Department of Defense, and diverting personnel and resources away from wartime activities.⁴¹ These were not England’s only concerns. He was bothered also by the potential of “jeopardizing [the safety] of U.S. troops” if

31. P.L. 109-148, § 1005, 119 Stat. 2739, 2742 (amending 28 U.S.C. § 2241).

32. 151 Cong. Rec. S12755 (daily ed. November 14, 2005).

33. 151 Cong. Rec. S12755 (daily ed. November 14, 2005).

34. 548 U.S. 557 (2006). Senator Graham stated: “Why not habeas for noncitizen, enemy combatant terrorists housed at Gitmo? No. 1, the whole Congress has agreed prospectively habeas is not available; the Detainee Treatment Act will be available. The only reason we are here is because of the *Hamdan* decision. The *Hamdan* decision did not apply to the Detainee Treatment Act retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now. . . . I don’t believe judges should be making military decisions in a time of war.” Cong. Rec., S10367, September 28, 2006.

35. P.L. 109-366, Military Commissions Act, § 7, 2006. Senator Graham again expressed his concern regarding the impact of litigation on military operations: “It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he has 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.” 152 Cong. Rec. S10367 (daily ed. September 28, 2006).

36. 553 U.S. 723 (2008).

37. 553 U.S. at 771; U.S. Const. Art. I, § 9, cl. 2.

38. 553 U.S. at 783.

39. 553 U.S. at 785; see also Matthew C. Waxman, “Guantanamo, Habeas Corpus, and Standards of Proof: Viewing the Law Through Multiple Lenses,” Case Western Reserve Journal of International Law, Vol. 42, p. 245, (2009).

40. Department of Defense document captioned, “Habeas Corpus and Related Litigation Brought by Guantanamo Detainees,” April 11, 2011 (in committee possession).

41. England, p. 88. As currently described by the Department of Defense: “Throughout the pendency of the Guantanamo litigation, some district court judges have enjoined the government from returning Guantanamo detainees to their home countries or to third countries as part of its transfer and release process. Other judges have required the government to provide detainees with 30-days advance notice of such a removal, in order to allow the detainee time to apply for an injunction if he does not want to be transferred to that country.” (See “Habeas Corpus and Related Litigation Brought by Guantanamo Detainees.”)

classified information was inadvertently disclosed in a judicial proceeding or presumably if a federal court ordered the release of dangerous individuals.⁴²

A Department of State official involved in detainee transfer negotiations at the time believes the Department of Defense was unprepared for the involvement of federal courts in executive detention matters. “[T]hey were looking at it from an ideological perspective,” he said, and “they just didn’t come around to it in time.”⁴³ As a result, Department of Defense officials became “overwhelmed by the workload” in his opinion.⁴⁴ They “were getting hit from every side with court decisions and court orders to produce documents and produce evidence and they weren’t in a position to do it.”⁴⁵

From this individual’s viewpoint, U.S. transfer negotiations were also affected by DOD’s lack of preparation. The *Boumediene* decision increased “the urgency of getting a lot of transfers done” and hindered negotiations meant to secure transfer agreements that adequately mitigated risks.⁴⁶ “[I]t was critical to initiate negotiations with potential recipient countries before court decisions were issued” the official said. Not just to secure “better conditions for . . . transfer,” but to “negotiate from a slightly better position.”⁴⁷ Therefore, he said that Department of State began to “push the Justice Department to do assessments of individuals” whose habeas cases “were likely to . . . get granted” in an effort to foreclose the possibility.⁴⁸

Asking a foreign government to take a detainee ordered released by a federal court was “always . . . very difficult,” the former State negotiator explained. The United States was “basically asking other governments to do [us] a favor” and “not giving them anything in return,” he said. U.S. negotiators were left in an untenable position with often only one request: “please take them.”⁴⁹ “The other government would . . . know that we were under incredible pressure to move [detainees] and that [they] could then effectively dictate the terms for accepting them.”⁵⁰

To date, 57 habeas cases have been decided.⁵¹ Of these, 37 petitions were granted and 20 denied.⁵² By the end of the first year of the Obama administration, the Department of Defense “expended hundreds of thousands of man hours conducting extensive searches and reviews of material about the Guantanamo population.”⁵³ Litigation associated with habeas continues to affect the Department of Defense as it carries out its wartime mission.⁵⁴ Furthermore, finding countries appropriate for repatriation or resettlement in cases where habeas petitions have been granted remains problematic.⁵⁵ As of October 2010, two GTMO detainees ordered released have reengaged.⁵⁶

42. England, p. 77.

43. Transcript of committee staff interview of Former Official “J,” July 5, 2011, p. 45 (in committee possession).

44. Official “J,” p. 45.

45. Official “J,” p. 45.

46. Official “J,” p. 45.

47. Official “J,” p. 45.

48. Official “J,” p. 41.

49. Official “J,” p. 41.

50. Email from Former Official “J,” January 20, 2012 (in committee possession).

51. Center for Constitutional Rights, “Guantanamo Habeas Scorecard,” February 9, 2011.

52. “Guantanamo Habeas Scorecard.”

53. Declaration of Joseph A. Benkart, May 7, 2009, *In re* Guantanamo Cases.

54. On May 21, 2009, President Obama acknowledged the persistent problems associated with detainee litigation when he referenced the “flood of legal challenges that my administration is forced to deal with on a constant, almost daily basis, and it consumes the time of government officials whose time should be spent on better protecting our country.” See “Remarks by the President on National Security,” May 21, 2009.

55. Testimony of William K. Lietzau, Deputy Assistant Secretary of Defense for Detainee Policy, Armed Services Committee, Subcommittee on Oversight and Investigations, Hearing on “Guantanamo Detainee Transfer Policy and Recidivism,” April 13, 2011.

56. Department of Defense correspondence (in committee possession), January 31, 2012.

Finding 4

While the GTMO transfer and release important instituted by the Obama administration differed in some important respects from what preceded it, there are sufficient continuities so that the threat of reengagement may not be lessened in the long term.

Like the chief executive they sought to succeed, both 2008 presidential candidates pledged to close GTMO. Republican John McCain made his views clear in March of that year.¹ Nine months before, Barack Obama had declared his intentions. By the time he was inaugurated in January 2009, the candidate had reiterated the point at least three more times.²

Within days of assuming office, the new president signed an executive order mandating that GTMO be shuttered “as soon as practicable” “but no later than 1 year” from then.³ The document cited “the significant concerns raised” by GTMO detentions “both within the United States and internationally” as the basis for this action. The executive order explained that the

prompt and appropriate disposition of the individuals detained at Guantanamo and closure of the facility . . . would further the national security and foreign policy interests of the United States and the interests of justice.⁴

In connection with the impending closure, the order mandated a “prompt and thorough,” and “comprehensive interagency review,” to be “coordinated” by the Attorney General to determine the disposition of the detainees remaining at GTMO. The executive order specified this was to be undertaken with “the full cooperation and participation of” the secretaries of Defense, State, and Homeland Security, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, and others.⁵

It was presumed that the election of a new president might induce other nations to reconsider the possibility of receiving detainees. The executive order anticipated that “[n]ew diplomatic efforts may result” in the “appropriate” dispatch of “a substantial number of individuals currently at Guantanamo.”⁶ Therefore, transfer or release “consistent with the national security and foreign policy interests of the United States” was the first option to be considered.

1. Foon Rhee, “McCain proposes new global coalition; also urges closing Guantanamo Bay,” *Boston Globe*, March 27, 2008.

2. Elizabeth White, “Obama Says Gitmo Facility Should Close,” *Associated Press*, June 24, 2007; Byron York, “Be thankful Obama broke his promise on Guantanamo,” *Examiner*, December 27, 2010.

3. “Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities,” Executive Order 13492, January 22, 2009.

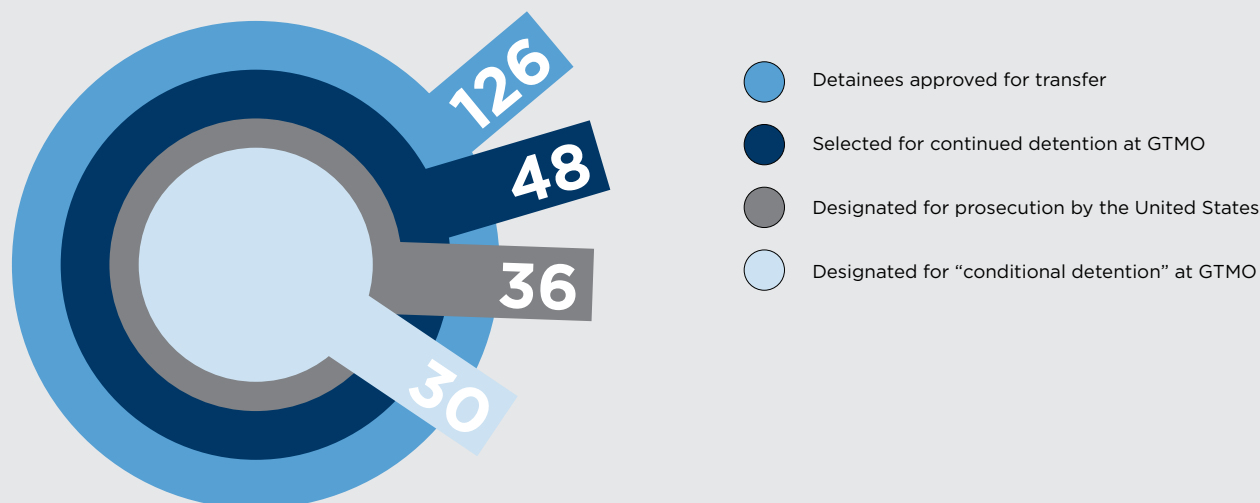
4. Executive Order.

5. Executive Order.

6. Executive Order.

Executive Order Task Force

240 detainees at GTMO (February 2009)



Notes: Figures as of January 2010. The 126 included 17 Chinese Uighurs who were approved for "transfer or release." The conditionally detained individuals are all from Yemen.

Source: "Final Report; Guantanamo Review Task Force," January 22, 2010.

Those not recommended to be sent elsewhere were to be evaluated for prosecution by federal civilian courts.⁷ However, if neither transfer nor prosecution was appropriate for any specific case, the Attorney General's group was to select some other "lawful means" for handling such detainees, provided the alternative was "consistent with the national security and foreign policy interests of the United States and the interests of justice."⁸

EXECUTIVE ORDER TASK FORCE

To carry out the mandated review, the Attorney General established the "Guantanamo Review Task Force" (also known as the Executive Order Task Force or "EOTF") on February 20, 2009.⁹ He named as executive director Matthew G. Olsen, who had served since 2006 as a Deputy Assistant Attorney General in the Department of Justice's National Security Division.¹⁰ In addition, 60 career employees from across the executive branch were seconded to work fulltime with the EOTF to carry out the detainee reviews. Represented in this group

7. Executive Order.

8. Executive Order.

9. "Final Report; Guantanamo Review Task Force," January 22, 2010, p. 3.

10. "Guantanamo Review Task Force," p. 3; see also biography of Matthew Olsen from National Counterterrorism Center (in committee possession).

In May 2009, President Obama declared, “we are acutely aware that under the last administration, detainees were released and, in some cases, returned to the battlefield. That’s why we are doing away with the poorly planned, haphazard approach that let those detainees go in the past. Instead we are treating these cases with the care and attention that the law requires and that our security demands.”

were “senior military officers, federal prosecutors, FBI agents, intelligence analysts and officers, military prosecutors and investigators, national security lawyers, [and] civil litigators.”¹¹

In May 2009, President Obama publicly described the EOTF mechanism and explained how he believed it contrasted with the procedures that preceded it. “We are currently in the process of reviewing each of the detainee cases at Guantanamo to determine the appropriate policy for dealing with them,” he said in a speech at the National Archives.¹² The president continued:

we are acutely aware that under the last administration, detainees were released and, in some cases, returned to the battlefield. That’s why we are doing away with the poorly planned, haphazard approach that let those detainees go in the past. Instead we are treating these cases with the care and attention that the law requires and that our security demands.¹³

The claim that previous decisions had not been made with “care and attention” mischaracterized the preceding approach.¹⁴ In fact, those in the Obama administration who devised the EOTF process may not have known many of the details of the ARB system it replaced. Gordon England, for example, told the committee that during the transition he was never asked about the ARBs and how they operated for the preceding four years.¹⁵

A senior Defense official who was very knowledgeable about the DASD(DA) activities (and who eventually moved to another DOD position), however, did provide the office’s perspectives to transition staffers who later received important appointments in DOD and White House.¹⁶ Career civil servants from DASD (DA) (renamed the DASD for “Detainee Policy”) also recounted the Bush administration’s processes to senior Department of Justice leaders prior to Olsen’s designation as the EOTF executive director.¹⁷ Although Olsen never received a formal briefing about the ARB mechanism, he and others nonetheless reportedly

11. “Guantanamo Review Task Force,” p. 3.

12. “Remarks by the President on National Security,” May 21, 2009.

13. “Remarks by the President on National Security.”

14. Indeed, in July 2011, Olsen described the EOTF as having undertaken “independent, professional, and rigorous threat assessments of every detainee,” which yielded “impartial and objective analysis.” This information was provided, he said, “to senior decision makers, free from any improper influence” and it allowed officials to have “full, candid and open deliberations,” about transfers and releases. (See “Statement for the Record, Matthew G. Olsen Nominee for Director, National Counterterrorism Center,” Select Committee on Intelligence, United States Senate, July 26, 2011, p. 5.) However, in an interview with committee staff, a senior EOTF leader specified that these statements were not meant to suggest that Olsen thought the previous process lacked these characteristics. (See notes from senior EOTF leader “S” meeting with committee staff, October 25, 2011, in committee possession.)

15. Transcript of committee staff interview of Gordon England, October 6, 2011, pp. 76-77 (in committee possession).

16. Notes from current Department of Defense employee “A” meeting with committee staff, October 12, 2011 (in committee possession).

17. Notes from career official “P” meeting with committee staff, October 28, 2011 (in committee possession). Career officials also briefed others involved in the EOTF. See Department of Defense correspondence with committee staff, January 31, 2012, p. 7 (in committee possession).

gained an understanding of England's role and the ARB procedures in the course of the EOTF's work.¹⁸ Some involved in the EOTF were also very familiar with what came before because they had participated in the ARB mechanism.¹⁹

Phillip Carter, after he assumed the DASD position, was briefed by civil servant subordinates who remained from the Bush administration.²⁰ Regrettably, Carter, having left the administration in 2009, declined an invitation from the committee to discuss his preparation for the assignment or his activities once in office. The absence of his perspective in this report is lamentable.

DIFFERENCES FROM THE ARB PROCESS

Regardless of the extent of knowledge of the previous detainee review process and transfer and release mechanisms, the EOTF system included several important characteristics believed to distinguish it from what came before. An individual familiar with detainee negotiations at the time the administrations changed, recounted to committee staff his observations of what he thought were important procedural and organizational deficiencies in the Bush administration. Previously this official had the opportunity to outline some of these to the Obama administration's transition team.²¹ When the EOTF was established, action was taken to redress these and other perceived problems, possibly, in part, because of his reflections.

In sum, the administration stipulated to the committee that improved interagency cooperation, more collaborative decision-making, and the availability of a wider body of intelligence information is what distinguished the EOTF from the ARB mechanism.

One issue was the concern that during the Bush administration the Department of State's War Crimes Issues office (S/WCI) had not been adequately staffed to manage detainee negotiations while also handling the organization's namesake topic. It seems that to address this matter, in March 2009 the administration created a new position to assume S/WCI's detainee transfer negotiation functions. Career foreign service officer Ambassador Daniel Fried was named as the Special Envoy for Closure of the Guantanamo Detention Facility. A Department of State press release declared this action was the result of the "need to intensify our efforts to facilitate the transfer of detainees." It said Fried would "lead a dedicated team to address this issue full-time," thus freeing S/WCI to focus solely on other matters also "of critical importance."²² Based upon DOD's persistent complaints about the Department of State's performance on detainee matters years before, this is probably a move that Defense officials from the Bush administration would have applauded.

There was also the belief that interagency activities had been "somewhat dysfunctional" and "characterized by tension" during the Bush years.²³ A Department of State official at the time

18. Senior EOTF leader "S," October 25, 2011; Department of Defense correspondence, January 31, 2012, p. 7.

19. Department of Defense correspondence, January 31, 2012, pp. 7, 8. See also DOD employee "A."

20. Official "P," October 28, 2011.

21. Transcript of committee staff interview with Former Official "J," July 5, 2011, pp. 46, 65-66 (in committee possession).

22. "Appointment of Ambassador Daniel Fried," Department of State press release, March 12, 2009.

23. Former Official "J," p. 14.

observed “frustration” between DOD and the Department of State, with each misunderstanding the other’s role in the transfer and release process. He also believed the NSC had not had “a particularly productive role.”²⁴ Furthermore, he noted “there was no . . . comprehensive file where all the information” on a detainee “could be pulled off the shelf, or . . . brought up on a computer.”²⁵ Consequently, he thought “there needed to be” an “easily accessible” compilation “in one place” of “all the information” about detainees.²⁶

EOTF staffers who evaluated detainees were located on a single floor of a secure facility. This arrangement, the EOTF reported later, was intended “to maximize collaboration and exchange of information.”²⁷ The staff composition also “was designed to ensure that all relevant agency viewpoints—including military, intelligence, homeland security, diplomatic, and law enforcement—were considered.”²⁸ This “robust” forum for multi-agency interaction in which each organization, including components of the intelligence community, had an equal “voting role” was intended as “a significant change to prior practice.”²⁹

The executive order also required the Attorney General to gather “all information in possession of the Federal Government” which was “relevant to determining the proper disposition” of the GTMO detainees.³⁰ As a result, 400,000 documents totaling 1.8 million pages were collected for the EOTF from the Department of Defense, the Central Intelligence Agency, the National Security Agency, and other entities.³¹ Further arrangements were made for the EOTF to have access to additional computerized records these organizations possessed.³²

Among other apparent benefits, this meant that EOTF reviewers consulted ARB records (which might include data classified as high as “secret”) as well as information with a higher classification level.³³ Because of the availability of this broader body of material, detainee evaluations completed by the EOTF contained “in some instances” relevant information that was missing from the ARB documents previously compiled on the same detainee.³⁴ This was “an important improvement” over the Detainee Assessment Briefs written during the Bush years and permitted more “thorough evaluations,” according to the Obama administration.³⁵

The administration believed the manner in which detainee data had been dispersed earlier had “undermined prior review efforts.”³⁶ Nonetheless, in a court filing Olsen acknowledged that the relatively fast pace of detainee reviews and the volume of data meant that evaluators were “not always able to review every available document.”³⁷ In sum,

24. Former Official “J,” p. 13.

25. Former Official “J,” p. 46.

26. Former Official “J,” p. 65. This individual and another witness who was also in the Department of State’s S/WCI during the Bush administration told committee staff that they believed that during their time in that office detainee information sought by some prospective transfer countries was not always readily available to U.S. negotiators. From their perspective, this delayed potential transfers. See Former Official “J,” pp. 19-22; and transcript of committee staff interview of Sam Witten, June 21, 2011, pp. 27-28, 44-46, 59, 86-88 (in committee possession).

27. “Guantanamo Review Task Force,” p. 3.

28. “Guantanamo Review Task Force,” p. 4.

29. Department of Defense correspondence, January 31, 2012, pp. 5, 7.

30. “Review and Disposition of Individuals Detained at the Guantanamo Bay.”

31. Declaration of Matthew G. Olsen, May 12, 2009. It is necessary to note the committee did not review these documents.

32. “Guantanamo Review Task Force,” p. 3, 5; Matthew Olsen, “Respondents’ Status Report Addressing Information Gathering Efforts of Guantanamo Review Task Force,” April 16, 2009; and Declaration of Matthew G. Olsen, p. 7.

33. Department of Defense correspondence, January 31, 2012, p. 7.

34. Department of Defense correspondence, January 31, 2012, pp. 6, 7.

35. Department of Defense correspondence, January 31, 2012, p. 7.

36. Department of Defense correspondence, January 31, 2012, p. 7.

37. Declaration of Matthew G. Olsen, p. 10. In an interview with committee staff, a senior EOTF leader explained that collecting disparate detainee data was not meant to suggest it was illogical for organizations previously to hold separately the information, or that it had necessarily been widely scattered. See senior EOTF leader “S,” October 25, 2011.

however, the administration reported to the committee that although “it may be difficult to ascertain exactly how much of a difference the collection of all relevant information made in specific cases, it is beyond dispute this led to a more comprehensive and legitimate review in the aggregate.”³⁸

At least one senior EOTF leader concurred with the sentiment that the EOTF yielded improved detainee evaluations.³⁹ One individual interviewed by the committee with knowledge of both the Administrative Review Board and EOTF processes agreed. He said the EOTF produced more and better analysis, noting especially the intelligence community’s role.⁴⁰ Indeed, the administration described the EOTF process as “rigorous and thorough” and notes that it was given “high level attention” within the executive branch.⁴¹

The Task Force also evaluated prospective detainee destinations, and the administration reported to the committee the belief that “important improvements” were made, in comparison to prior years, in “sharing detainee information with foreign governments” that agreed to accept former detainees.⁴² An EOTF summary emphasized that “extensive discussions” about “security measures” were undertaken before transfers were effectuated.⁴³ It specified that “[s]ome detainees were approved for transfer only to specific countries or under specific conditions.”⁴⁴ Only when it was thought that the threat posed by a detainee could “be sufficiently mitigated through feasible and appropriate security measures in the receiving county” would a transfer be approved.⁴⁵

In sum, the administration stipulated to the committee that improved interagency cooperation, more collaborative decision-making, and the availability of a wider body of intelligence information are what distinguished the EOTF from the ARB mechanism.⁴⁶ It is difficult to determine the extent and significance of these changes. For example, one individual familiar with the EOTF and ARB system said he believed that the Obama administration’s mechanism made incremental improvements from what came before, in much the same way that Section 1 had been supplanted by ARBs.⁴⁷ He and another individual very knowledgeable about GTMO transfer and release activities in both the Bush and Obama presidencies described the approaches as being broadly similar despite specific differences.⁴⁸

TWO OBSERVATIONS

The administration reported to the committee that the Task Force worked “hard and carefully.”⁴⁹ That is not disputed. It is necessary, however, to acknowledge two critiques about the effort.

First, it seems the EOTF’s schedule and activities were intrinsically linked to the president’s decision to shutter GTMO one year after he signed the executive order. Closing the facility required the EOTF to recommend how to disperse the GTMO population. It is possible

38. Department of Defense correspondence, January 31, 2012, pp. 7-8.

39. Senior EOTF leader “S,” October 25, 2011.

40. Official “P,” October 28, 2011.

41. Department of Defense correspondence, January 31, 2012, p. 8.

42. Department of Defense correspondence, January 31, 2012, pp. 6, 7.

43. “Guantanamo Review Task Force,” p. 17.

44. “Guantanamo Review Task Force,” p. 17.

45. “Guantanamo Review Task Force,” p. 17; Department of Defense correspondence, January 31, 2012, p. 8.

46. Department of Defense correspondence, January 31, 2012, pp. 6, 7.

47. Official “P,” November 17, 2011.

48. Department of Defense employee “A;” Official “P,” November 17, 2011.

49. Department of Defense correspondence, January 31, 2012, p. 8.

that the precise deadline for the apparent impending closure of the facility and a mandate that transfers or releases were to be prioritized over other options, could have colored EOTF disposition considerations. The administration maintains “it did not.”⁵⁰

However, some evidence might support this contention. Sometime after the EOTF staff was assembled, the Department of Justice, with the Review Panel’s concurrence, issued “detainee review guidelines” which were meant to set forth various standards.⁵¹ The guidelines noted that

Task Force review teams must work against the backdrop of the finding made in the Executive Order that closing the detention facility at Guantanamo and resolving the prolonged detention of the individuals detained there would promote the national security and foreign policy interests of the United States. . . . Accordingly, review teams must consider with respect to each detainee not only whether his transfer or release would pose some level of threat to national security—including whether such threat could be mitigated by security measures imposed by the destination country—but also the harm to the national security and foreign policy interests of the United States resulting from his continued detention.⁵²

In discussing detainee “threat factors,” the document indicates

[i]f the detainee was not substantially involved in planning, leading, financing, organizing, or executing acts of terrorism, or facilitating the movement or training of terrorists, the detainee *should generally be deemed eligible* [emphasis added] for transfer or release, absent countervailing factors.⁵³

The same instruction and caveat applied “[i]f the detainee has only received basic firearms training,” or “has only passing interactions or isolated communications with known or suspected terrorists” absent evidence of “a more substantial relationship.”⁵⁴ Taken together, these points might be seen as directing reviewers to favorably consider transfers or releases.

DOJ issued revised guidelines on June 30, 2009. This document changed these instructions related to terrorist associations or evidence of weapons training. It said instead that a detainee with such a background, “*may be an appropriate candidate* [emphasis added] for transfer or release.”⁵⁵

One senior EOTF leader, in responding to questions on this topic, told committee staff he had no particular recollection of the original verbiage or any specific reasons for the revisions.⁵⁶ In general, however, he said the changes were meant to bring written guidance into conformance with how the EOTF’s practices had evolved since its establishment.⁵⁷

50. Department of Defense correspondence, January 31, 2012, p. 8.

51. “Guantanamo Review Task Force Detainee Review Guidelines,” n.d., p. 1 (in committee possession); for concurrence, see “Guantanamo Review Task Force.”

52. “Guantanamo Review Task Force Detainee Review Guidelines,” pp. 1-2.

53. “Guantanamo Review Task Force Detainee Review Guidelines,” p. 2.

54. “Guantanamo Review Task Force Detainee Review Guidelines,” p. 3.

55. “Guantanamo Review Task Force Detainee Review Guidelines,” June 30, 2009, footnotes 3, 4, and 5 (in committee possession).

56. Senior EOTF leader “S,” October 25, 2011; notes from senior EOTF leader “S” meeting with committee staff, November 17, 2011 (in committee possession).

57. Senior EOTF leader “S,” October 25, 2011.

Another witness separately also said the same.⁵⁸ In an apparent reference to the “firearms training” discussion, the administration reported to the committee that “[n]o detainees . . . were transferred in 2009 or later using these criteria.”⁵⁹

The second point relates to the composition of the EOTF staff team that considered transfers and releases (as distinct from the group which considered U.S. prosecution possibilities). These officials were charged, in part, with determining if the threat potentially posed by a transferred detainee could be mitigated by certain arrangements in the recipient country.⁶⁰ In addition to representatives from the Department of Defense, the Joint Chiefs of Staff, the Office of the Director of National Intelligence, and the Department of State, this team included employees from the Department of Homeland Security, and DOJ.⁶¹

DHS and the Department of Justice probably assigned to this task very capable individuals who were committed to keeping the United States safe. Regardless of the dedication and talent they brought to this task, however, it is not clear if staffers from these two domestically-oriented federal departments had the necessary training and experience to make very specific judgments about possible foreign destinations and security measures which might be applicable in each location. A role was provided for DHS and DOJ in the ARB and Section 1 procedures, but they were not directly involved in evaluating how to mitigate the threat potentially posed by detainees abroad.

The evaluations of the threat posed by detainees do not seem to have been dramatically altered by the EOTF. The EOTF’s final report specified that, “in many instances, the Task Force largely agreed with prior threat assessments.” There were “a few cases” where “the Task Force discovered reliable information indicating that a detainee posed a greater threat,” and “other instances” in which earlier evaluations were seen to be “overstated.”

EOTF RESULTS

The EOTF’s detainee recommendations were submitted to a Review Panel of senior officials who had been delegated decision authority by those specified in the executive order.⁶² According to the administration, the Review Panel met over 40 times.⁶³ It was required to take unanimous action.⁶⁴ If the group could not agree, or if “higher level review was appropriate” for some reason, the principals named in the executive order considered the case.⁶⁵ The panel members or principals apparently sometimes withheld final action because one or more disagreed with an EOTF recommendation, requested additional information, or raised

58. Official “P,” November 17, 2011.

59. Department of Defense correspondence, January 31, 2012, p. 3.

60. “Guantanamo Review Task Force,” p. 4. Individuals assigned to the EOTF, including “representatives from each agency listed in the executive order,” were assigned to the transfer and release evaluation process. A companion set of detailees evaluated the detainees for prosecution. These individuals were mostly prosecutors and criminal investigators. Therefore, it seems that those involved in prosecution considerations were more narrowly drawn from professional specialties which putatively best equipped them to undertake this work. See “Guantanamo Review Task Force,” p. 3-4.

61. “Guantanamo Review Task Force,” p. 4; “Review and Disposition of Individuals Detained at the Guantanamo Bay.”

62. “Guantanamo Review Task Force,” p. i.

63. Department of Defense correspondence, January 31, 2012, p. 8.

64. Department of Defense correspondence, January 31, 2012, pp. 5, 7. No official had discretionary authority to make an independent decision such as the Deputy Secretary of Defense had outside the Section 1 process or in the ARB procedures in the Bush administration.

65. “Guantanamo Review Task Force,” p. i.

concerns about a candidate destination country.⁶⁶ The EOTF's assessments began March 5, 2009.⁶⁷ Thereafter, it took about three to four weeks to gather material and forward recommendations on six to ten detainees to the Review Panel on a "rolling basis."⁶⁸

Like the ARB process, the EOTF apparently took into account a range of factors when conducting its work and making transfer and release recommendations. Olsen's court filing says the mandate of the EOTF was to "recommend appropriate dispositions for each detainee based on broad, discretionary considerations of national security and foreign policy."⁶⁹ This was a "policy question" it declared.⁷⁰ Indeed, in a statement to the committee, the administration noted that "strategic level issues and concerns" led Obama administration officials, like those who had come before them, to conclude "that it is in the strategic and national security interests of the United States to transfer detainees out of GTMO as part of a process to close the facility."⁷¹

The EOTF's work was also calibrated with Ambassador Fried's discussions abroad. In light "of the overall mission" of the EOTF, Olsen's filing indicates, it was possible that "a diplomatic urgency" might cause staffers to "reshuffle" the order in which detainee cases were to be considered.⁷² It says the EOTF typically collectively evaluated all the detainees from the same nation in a single batch because "of various country-specific considerations" which were potentially "relevant to their dispositions."⁷³ The EOTF's final report also noted that each detainee transfer decision "was made on a case-by-case basis."⁷⁴

It seems entirely possible to conduct individualized detainee evaluations while still considering nationality. The Bush administration apparently did this as well. The Obama administration's acknowledgement of the relevance of "country specific considerations" makes confusing the argument, recounted by a knowledgeable journalist, that some current officials believed they had instituted a unique "individually fashioned, case-by-case system," which was putatively blind to nationality.⁷⁵

The Review Panel ultimately approved 126 detainees for transfer.⁷⁶ Many of these were detainees who had won habeas rulings and been ordered released by courts.⁷⁷ Others were likely

66. Department of Defense correspondence, January 31, 2012, p. 8.

67. "Guantanamo Review Task Force," p. 6; Declaration of Matthew G. Olsen, p. 7. A "compressed schedule" and "significant time constraints" are referenced on pp. 6, 9. By contrast, the administration reported to the committee "the EOTF process was not hurried." See Department of Defense correspondence, January 31, 2012, p. 8.

68. Declaration of Matthew G. Olsen, pp. 7, 9.

69. Declaration of Matthew G. Olsen, p. 9. Also cited is "the interests of justice" which is presumably a reference to the EOTF's responsibility for identifying prospectively prosecutable detainees. See p. 9.

70. Declaration of Matthew G. Olsen, p. 14.

71. Department of Defense correspondence with committee staff, January 25, 2012, pp. 3-4 (in committee possession). In making this point, the administration's communication noted that an earlier draft of this report "accurately acknowledges that both administrations . . . sought to close GTMO" but assessed that the draft document "fails to lay out and assess the strategic level issues and concerns that resulted" in this shared goal.

72. Declaration of Matthew G. Olsen, p. 13.

73. Declaration of Matthew G. Olsen, p. 6.

74. "Guantanamo Review Task Force," p. 17.

75. Carol Rosenberg, "Why Obama Can't Close Guantanamo," *Foreign Affairs*, December 14, 2011. If nationality had been the sole factor in determining transfers and releases during the Bush administration as some apparently believe, there would be no reason why any detainees from Afghanistan, Pakistan, Morocco, Tunisia, Algeria, Tajikistan, or Kuwait would have remained at GTMO by the time Barack Obama came to office. Rather, individuals from those countries probably remained there at the start of the Obama administration because earlier individualized assessments of their cases meant they were kept in detention while some fellow countrymen left.

76. Thirty-six detainees were designated for prosecution. Forty-eight were selected for continued detention, the alternative chosen for those for whom transfer or prosecution was considered inappropriate. (See "Guantanamo Review Task Force," pp. 9-10, 12-13. For details on the Yemenis, see also p. 18.) The 126 included 17 Chinese Uighurs were approved for "transfer or release" (emphasis added). See "Guantanamo Review Task Force," footnotes 5, p. 7, and footnote 12, p. 16.

77. Department of Defense correspondence, January 31, 2012, p. 8.

among the 59 who had been deemed transfer or release candidates by an ARB but they had not departed GTMO by the time President Bush left office, largely because of humanitarian concerns in the potential destinations.⁷⁸ Indeed, it is impossible to determine the commonality with recommendations proffered during the Bush administration.⁷⁹ However, a report issued when the EOTF concluded its work specified that, “in many instances, the Task Force largely agreed with prior threat assessments.” There were “a few cases” where “the Task Force discovered reliable information indicating that a detainee posed a greater threat,” and “other instances” in which earlier evaluations were seen to be “overstated.”⁸⁰

Regardless, once a transfer or release was approved, the Department of State and Department of Defense worked to bring it about as they had during the Bush administration.⁸¹ A report issued by the EOTF also reiterated points made during the ARB process: transferring a GTMO detainee did “not equate to a judgment that the government lacked the legal authority to hold” the individual nor did it “reflect a decision that the detainee poses no threat or risk of recidivism.”⁸²

The EOTF finished its work by January 2010.⁸³ At that time, 24 of the 126 had been returned home (seven to Yemen, five to Afghanistan, three to Saudi Arabia, two each to Algeria, Kuwait, Somalia, and one to the United Kingdom).⁸⁴ With more attention on resettlement (rather than repatriation) compared to the Bush administration, Obama officials also succeeded in sending 18 others to third countries (six to Palau, four to Bermuda, two each to France, Ireland, Portugal, and one each to Belgium and Hungary). Two were sent to Italy for prosecution.⁸⁵ Ambassador Fried, the Department of State negotiator, subsequently turned his attention to repatriating 16 others and finding destinations for 38 who could not be returned home because of humanitarian concerns.⁸⁶ It is possible this translated into sustained foreign efforts to properly manage the potential threat of individuals transferred elsewhere. Third countries may also prove to be better motivated or equipped to do so than detainee home nations.

In April 2011, Fried and a Department of Defense spokesperson issued a joint statement about GTMO. “[T]he previous and the current administrations have made every effort to act with the utmost care and diligence in transferring detainees from Guantanamo,” the communication specified. “Both,” it declared, “have made the protection of American citizens the top priority.”⁸⁷

78. “Guantanamo Review Task Force,” p. 15-16, 18, including footnote 16.

79. “Guantanamo Review Task Force,” pp. 15-16, including footnote 16.

80. “Guantanamo Review Task Force,” p. 9.

81. “Guantanamo Review Task Force,” pp. 4-5.

82. “Guantanamo Review Task Force,” p. 17.

83. “Guantanamo Review Task Force,” p. 17.

84. “Guantanamo Review Task Force,” p. 16, including footnotes 14, 15.

85. Notes from Department of State briefing for committee staff, March 30, 2011 (in committee possession); “Guantanamo Review Task Force,” p. 16, including footnotes 14, 15.

86. “Guantanamo Review Task Force,” p. 16; notes from Department of State briefing for committee staff, March 30, 2011, (in committee possession).

87. “A Statement by the United States Government,” *New York Times*, April 24, 2011.

Conclusion and Recommendations

As of September 2011, the U.S. government believed that 27 percent of former GTMO detainees were confirmed or suspected to have been reengaged in terrorist or insurgent activities.¹ This was up from 25 percent a year before.² At that time, the Office of the Director of National Intelligence (ODNI) issued a statement noting that the “Intelligence Community assesses that the number of former detainees identified as reengaged in terrorist or insurgent activity will increase.”³ The document further specified the IC “assesses that if additional detainees are transferred from GTMO, some of them will reengage in terrorist or insurgent activities.”⁴

That reengagement exists and might increase seems to be a given. The question facing policy makers is how to minimize the number and respond to that which occurs. Five of 66 detainees who left GTMO in the 20 months between February 2009 and October 2010 were confirmed (two) or suspected (three) by ODNI of involvement in terrorist activities as of that date.⁵ This yielded a seven and one half percent reengagement rate. But 23 of those who departed in that period did so as a result of court orders, and two of the five suspected or confirmed reengagers came from this pool.⁶ DOD has suggested that between October 2010 and September 2011 no additional detainees who departed GTMO during the Obama administration were suspected or confirmed reengagers.⁷ Therefore, it appears that three of the 44 detainees who, during the current administration, left GTMO not as a consequence of court action are on the suspected or confirmed list. This is nearly seven percent.

This is a fraction of the overall rate. It is similar to the trend experienced early in the middle of the Bush administration. Perhaps it can be sustained. On the other hand, it is difficult to compare these two disparate groups of former detainees. The smaller pool left GTMO relatively recently. A much larger group has been gone for a much longer period.

1. Testimony of General James Clapper, “The State of Intelligence Reform 10 Years After 9/11,” Joint Hearing of the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence, September 13, 2011.

2. Director of National Intelligence Report, “Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba,” December 2010.

3. “Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba.”

4. “Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba.”

5. “Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba.”

6. See Department of Defense correspondence with committee staff, January 31, 2012, pp., 1, 4, 8-9 (in committee possession).

7. Department of Defense Correspondence, January 31, 2012, pp. 1, 4.

The Bush and Obama administrations, reacting to domestic political pressures and a desire to earn goodwill abroad, sought to reduce the GTMO population by sending detainees elsewhere. Both administrations faced the persistent challenge of ensuring that the potential threat posed by each detainee had been aptly assessed before transfer or release, and that the countries that received the detainees had the capacity and willingness to handle them in a way that sufficiently recognized the dangers involved. Despite earnest and well-meaning efforts by officials in both administrations, the reengagement rate suggests failures in one or both aspects of the process.

Therefore, in light of this report's four findings, the committee recommends:

- 1.) The Department of Defense, the Central Intelligence Agency, the Defense Intelligence Agency, and the Office of the Director of National Intelligence collaborate to produce a report (in classified and unclassified versions) to congressional committees of jurisdiction assessing factors causing or contributing to reengagement; including a discussion of trends, by country and region, where reengagement has occurred;**
- 2.) The Department of Defense and Department of State produce a report (in classified and unclassified versions) to congressional committees of jurisdiction assessing the effectiveness of agreements in each country where transfers have occurred;**
- 3.) Congress continue the certification requirements on GTMO transfers which are contained in the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. No. 112-81; 125 Stat. 1561 [2011]), at least until receiving and reviewing the specified reports;**
- 4.) Additional action as outlined in the classified annex.**

Dissenting Views

Additional Statement of Rep. Jim Cooper (TN-5), joined by other minority Members

Rarely in the history of the House Armed Services Committee has so much time and money been spent with so little result. This report contains no news and certainly no fireworks. You will find some smoke and mirrors. It could have been, and should have been, a much better product. The majority, however, has turned a deaf ear to our suggestions. Not even the Departments of Defense and State were allowed sufficient time to review the report.

The report was supposed to be a comprehensive and bipartisan look at former GTMO detainees, but fails at both objectives. Much of the failure is due to the majority's insistence on releasing a public report during an election year. The majority is well aware that most of the relevant material is classified and politically sensitive. To their credit, committee staff did do a workmanlike job on the classified annex, which we recommend to all members. But the public report uses a highly problematic "methodology" in order to write ghost stories designed to scare voters. Americans deserve better.

Reports on terrorism should not further the terrorists' goal of spreading fear. After all, terrorism is a double-barreled attack on civilization: violence is one weapon and publicity of that violence is another. Without publicity, the terrorist can never succeed. Regrettably, this report gives former GTMO detainees publicity by making them seem more numerous and dangerous than they are. Reengagers will like their image in the report.

The reality is that the surest way to die is for a former GTMO detainee to reengage in terrorism. We know who they are, and we are coming to get them.

Why the majority is so interested in reviewing press clippings and interviewing a handful of officials about mistakes made during the Bush Administration is hard to understand. All three of the case studies in the report are from the Bush era, although the majority tried, in an earlier draft, to twist the dates of one story in an effort to blame the Obama Administration. Fortunately, that deliberate distortion has been omitted from the final report. Unfortunately, the report still fails to make it clear that U.S. courts ordered two of the five problematic transfers under the current Administration.

The report concludes that, despite the admitted improvements in the Obama Administration's handling of detainee issues, the number of former detainees who return to terrorism will be as high or higher. This is purely speculative, and seems politically motivated. Time will tell, but the current rate of confirmed reengagement of transferees under the Obama Administration is closer to 3%, not the report's cover graphic of 27%. The lower figure does not, however, make headlines.

In order to produce a better gloss on the classified information, it would have been helpful, in addition to time for full DoD and State input, for the House Intelligence Committee to have reviewed the report prior to publication. After all, one of the report's key criticisms of the executive branch is failure to coordinate among agencies. But the

majority refused to allow our colleagues with expertise in this area—including those on the Foreign Affairs Committee—to read the report. Surely, on issues of importance to national security, the majority should look beyond its bureaucratic turf.

The report does mention that President Bush, Senator McCain, and then-Senator Obama all agreed in 2008 on the need to close the GTMO prison—and therefore on the need to do something with the detainees—but that bipartisan policy agreement is buried deep in the report and mentioned with regret. Many other important topics are either barely mentioned, given short shrift, or cannot be mentioned without disclosing classified material. The Armed Services Committee is not accustomed, and should not lower itself, to wearing blinders, dumbing down information, and hinting darkly, all in order to attempt a partisan advantage.

This report is simply not in the tradition of honor, discipline, and bipartisanship of the House Armed Services Committee.



Jim Cooper
Member of Congress



Dissenting Views

OF MINORITY MEMBERS

The Oversight and Investigations Subcommittee is charged with oversight of the Defense Department and related agencies to ensure America's national security. We take this responsibility seriously and believe that an assertive, bipartisan approach is the best means to achieving this objective. Detainee issues remain among the most challenging we face as a nation and we are committed to supporting a careful and comprehensive approach that promotes the national security of the United States. We appreciate the assistance of all members of the subcommittee in working towards this common goal. However, we believe the report is incomplete and we disagree with several of the key findings and recommendations. For that reason we will not sign the report.

The national security of this country remains the number one priority of this subcommittee and of the full committee. We believe both the Administration and all of the members of this subcommittee are united in the agreement that it is not in the best interest of the United States to release or transfer anyone from GTMO who would endanger our national security.

The report states that the subcommittee was directed by the Chairman and Ranking Minority Member of the full committee to conduct a "comprehensive bipartisan investigation of past and present procedures governing efforts to dispatch detainees..." As the report states, this necessarily included an examination of mechanisms intended to prevent former detainees from reengaging in terror-related activities; however, we also believe that the report should include an equally rigorous examination of the risk of continuing to incarcerate individuals at GTMO who are no longer determined to be a risk to the security of the United States, our allies, and our troops abroad. While efforts were made to address our concern on this matter, they did not go far enough. We agree with former Defense Secretary Donald Rumsfeld on the importance of not detaining individuals unnecessarily. He stated "the United States doesn't want to keep any of them any longer than we have to." Senior policy leaders of the current Administration also agree on the importance of appropriate alternatives to detention, "The United States cannot expect to detain its way out of this problem."¹

We appreciate efforts by the subcommittee to be bipartisan and to accommodate our concerns. In particular, we appreciate the resolution of issues regarding the use of media reports that referenced Wikileaks documents. We believe that every member had sufficient time to review and comment on the report. We also appreciate the subcommittee giving the Administration an opportunity to comment on a draft of the report. However, we remain concerned that the Department of Defense believes it has not been able to provide a comprehensive response.²

We will not provide a line-by-line analysis of the report; however, we will highlight our concerns regarding the following key issues:

¹ John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism. *Remarks at the Brennan Center for Justice*, March 18, 2010.

² Department of Defense correspondence with committee staff, January 31, 2012 (in committee possession).

Comprehensiveness: we believe the report does not sufficiently cover the directed topic. Many of the key policy makers regarding this issue were not interviewed and only a smattering of government documents were reviewed (about 2000 pages). At a minimum, the subcommittee should hold a hearing or briefing with the key departments to obtain their comments on the report on record. Finally, as stated above, the Department of Defense has indicated that its comments were not comprehensive and would like the opportunity to make further recommendations.³ In addition, the Department of State has asked for the opportunity to discuss the findings in the report. The bottom line is that we still do not know with any degree of credibility how many GTMO detainees have reengaged.

Balance: in order to accurately assess the threat of reengagement, the report must include more than only the worst detainee transfer cases. By only assessing the selected cases, the report presents an unbalanced, one-sided view of the consequences of current transfer policy. The report should acknowledge that the vast majority of detainee transfers have not increased the threat to the national security of the United States and present a non-skewed sample of cases on which to base findings and recommendations.

Strategic Risk: the report fails to thoroughly assess the strategic-risk in not adjudicating detainees for transfer or release. Although the report accurately acknowledges that both the Bush and Obama administrations sought to close GTMO, it fails to comprehensively identify and assess the strategic-level conclusion by the national security professionals in both administrations that it is in the strategic and national security interests of the United States to transfer lower risk detainees out of GTMO as part of a process to close the facility.

Findings: we agree with the basic theme of findings 1-3, but do not agree with all the supporting arguments. We believe the facts set forth in the report do not support finding 4. Under the Obama transfer process only 2 detainees are confirmed reengagers to date (about 3.3%) and there is no evidence in the report to support the finding that the higher-levels of reengagement under the Bush Administration process will continue.

Recommendations: in principal, we agree with recommendations 1 and 2, but not with all the underlying conclusions. We do not support recommendation 3. We support giving the Executive Branch more flexibility regarding detainee transfers than under the current statutory scheme. We recommend further study of reengagement prior to the closure of the detention facilities in Afghanistan.

Classified annex: while we do not agree with all of the analysis and conclusions reached in the classified annex, we support the recommendations for further study and reporting. The Department of Defense has raised concerns with the methodology and conclusions in the classified annex and we believe these concerns should be further studied as well.

Comprehensiveness

We do not believe the report is as comprehensive or as thorough as stated in the Executive Summary. It represents a good faith start, but much remains to be done in order to provide a complete examination of this issue. At best, this should be labeled as an “interim” report, as an acknowledgement that the conclusions, findings, and recommendations are

³ Department of Defense correspondence, January 31, 2012.

preliminary. Going forward, we should work with other congressional committees, in particular the House Permanent Select Committee on Intelligence and the House Foreign Affairs Committee.

We do not believe “nearly every senior official involved in these matters in both the Bush and Obama administrations” was interviewed. We acknowledge the report includes a useful effort to interview many mid-level officials, but the record indicates only one senior policy maker, former Deputy Secretary of Defense Gordon England, was interviewed. At a minimum, to obtain a comprehensive view of this subject we would like to hear the views of former Secretary of Defense Rumsfeld, former Secretary of Defense Robert Gates, former Secretary of State Colin Powell, former Secretary of State Condoleezza Rice, and senior members of the National Security Council and the Intelligence Community.

Only an unspecified number of “several thousand pages” of government documents were reviewed, while it is known there is a much larger volume of relevant documents. While much of the information regarding detainees is known to reside with the Intelligence Community and with the Department of State, the report primarily focuses on the Department of Defense. Much work lies ahead if the report can accurately be labeled as “comprehensive.”

The report acknowledges reliance on “some secondary sources.” These secondary sources rely extensively on unverified media reports containing unsubstantiated quotes. We believe the report gives the erroneous impression that it is based primarily on reliable government information.

However, we don’t want to quibble over the data collection. Our basic understating is that despite the efforts of the subcommittee, we still don’t have a definitive answer on the number of GTMO detainees who have reengaged. We support continued efforts to resolve this issue.

Balance

We agree that detainees have been released or transferred who have reengaged, however the snapshots provided do not provide an accurate or comprehensive overview of the detainee transfer process. We do not want to release a detainee who poses an unacceptable risk to the national security of the United States. These three early “snapshots” make generalizations about the detainee transfer process as it existed prior to the current process and fail to indicate improvements with the current detainee transfer process. The snapshot section is an example of the significant use of unverified media reports.

We believe there are numerous additional success stories that should be noted. Detainees have been successfully resettled in Bermuda, Albania, and Palau to name just a few countries, although we note the difficulty of discussing this issue comprehensively in an unclassified document. However, given that at least 73%, if not more (see below), of the detainees have not been found to have reengaged (confirmed or suspected), citation to more than one success story would provide a more balanced view.

It is misleading to conflate the number of “confirmed” and “suspected” reengagers together. We disagree with the statement in the public version of the final report that 27% of detainees are confirmed or suspected of reengaging. There are important distinctions between the

two categories and the level of evidence required to add an individual to the list of suspected reengagers is very low, often based on single-source reporting or unverified information that is merely “plausible” and not proven. As indicated in the report, the latest publically available information states that 81 individuals (13.5%) are confirmed reengagers. Thus, we believe 13.5% is the more accurate statistic if only one number is highlighted. As also stated in the report, about 44% of the combined number of confirmed and suspected reengagers are imprisoned or dead. Thus, while the methodology is not precise, the more accurate number of active and confirmed reengagers may be significantly lower, perhaps about 9%.⁴

In addition, only 66 persons have been transferred from GTMO by the current Administration, with only 2 confirmed as reengagers, a figure of about 3.3%.

We believe the entire issue of reengagement merits further study and support the recommendations to do so. This is a complicated subject and we need to look at both government assessments and the academic research that has been done.⁵ We have continuing questions about DIA methodology and look forward to working with them, and other congressional committees, see above, as they continue to examine this issue.

We have a number of concerns regarding the report’s characterization of the Saudi Rehabilitation program. While the majority has worked hard to address our concerns regarding the report’s analysis of the Saudi program, we believe the report does not offer an accurate view of the program. . While we acknowledge the Saudi program allowed a group of detainees to reengage, which was an extremely serious incident, the Department of Defense has indicated to the subcommittee that this issues raised by the incident have been addressed.⁶ The Department of Defense has indicated to the subcommittee that the Saudi program provides transferred detainees a controlled and structured post-detention environment, which as the report indicates, is a significant factor regarding a detainee’s potential for reengagement.⁷ In fact, the Department continues to believe the Saudi program “is among the best available.”⁸ We also agree with the Department that no single measure is sufficient and the program should be closely monitored as part of our larger assurance package with Saudi Arabia.⁹ This is another area we need to continue looking at and note that much of the most important data is classified.

Another example of lack of balance is the section on “litigation pressures.” In discussing the congressional debate on this issue, it cites one senator. The diverse set of views on this issue should have been referenced. The report complains about the cost in time and hours of defending our values. We believe they are worth it. In addition, the report neglects to include an analysis of the habeas cases in this Administration. Jeh C. Johnson, the General Counsel of the Department of Defense recently stated to the Heritage Foundation:

⁴ The figures are imprecise because the 44% figure includes suspected reengagers. Also, there is more up to date information in the classified annex.

⁵ We appreciate the work done by Professor Mark Denbeaux and his students at Seton Hall Law School Center for Policy and Research. While their research is based only on open-source documents, we have been assisted by their analysis. See, *Revisionist Recidivism: A New Analysis of the Government's Representations of Alleged "Recidivism" of the Guantanamo Detainees*, (June 2009).

⁶ Department of Defense correspondence, January 31, 2012.

⁷ Department of Defense correspondence, January 31, 2012.

⁸ Department of Defense correspondence, January 31, 2012.

⁹ Department of Defense correspondence, January 31, 2012.

“Third, the government is seeing consistent success in the habeas cases brought by Guantanamo detainees. The courts have largely recognized and accepted our legal interpretation of our detention authority, and the government has now prevailed at the District Court level in more than 10 consecutive habeas cases brought by Guantanamo detainees. We are seeing similar good results in the D.C. Circuit.”¹⁰

Strategic Risk

Although the report accurately acknowledges that both the Bush and Obama Administrations have sought to close GTMO, it fails to analyze in depth the strategic issues and concerns that resulted in each Administration separately reaching the same conclusion: that it is in the strategic and national security interest of the United States to transfer low-risk detainees out of GTMO as part of a process to close the facility and develop a long-term military detention policy. The professional assessment of our military commanders and civilian leaders in both these Administrations was that closing the detention facilities at Guantanamo is a national security imperative in the war against Al Qaeda. Former Secretary Gates, former Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, and current CIA Director, General David Petraeus, each of whom served under both Administrations, also concluded that closing Guantanamo will help our troops by eliminating a potential recruiting tool.

Finding 4

We believe the EOTF process constitutes an improvement over the transfer process of the previous Administration. We see little in Finding 4 regarding the Obama EOTF relating to domestic political pressure. In fact, as noted by the report on page 59, the former Director of the EOTF, Matthew G. Olsen, who currently runs the National Counterterrorism Center, stated in his NCTC confirmation hearing that the EOTF process undertook “independent, professional and rigorous threat assessments of every detainee,” which yielded “impartial and objective analysis.” This was provided, he said, “to senior decision makers, “free from any improper influence” and it allowed officials to have “full, candid and open deliberations,” about transfers and releases.¹¹ Olsen also noted that the EOTF review process was based on “a more complete set of information.”¹²

The report also states, “For the Obama administration’s procedures to yield lower reengagement rates, detainee assessments must have been substantially improved and arrangements instituted by other nations made far better. There is little evidence of this.” We disagree. It is misleading to predict detainee reengagement based on assessments that have changed as more data has become available. Regardless of the length of time between release and reengagement, the detainees transferred by the current Administration left GTMO under a different process and with different results, to date, than the previous process. The current public data supports this, with only 2 confirmed reengagers and 3 suspected reengagers out of the 66 transfers publically reported by the Obama Administration. We see no evidence to support the

¹⁰ Jeh Johnson at Heritage Foundation, October 18, 2011.

¹¹ Matthew G. Olsen, “Statement for the Record,” Senate Select Committee on Intelligence, July 26 2011, p. 5.

¹² NCTC confirmation hearing, p 5.

speculation in the report that the EOTF transfers will follow the same trends as earlier. As noted earlier, there are additional details in the classified annex.

We find the current Administration has acted responsibly regarding problematic transfers. We note that because of concerns about Kuwait's record discussed in the report, no additional transfers (other than two court-ordered release) have been made to Kuwait, despite diplomatic pressure and legal challenges.¹³ Similarly, once legitimate concerns were raised about the capacity of the Yemeni government, there have been no further transfers to Yemen, despite the determination by both the Bush and Obama Administrations that there are Yemeni detainees eligible for transfer.¹⁴ As noted in the report, there are humane treatment concerns in Russia, and no detainee has been transferred to Russia by this Administration.¹⁵

In addition, as noted in the report, the Obama Administration has not transferred a detainee without the agreement of the Department of Defense, the Joint Chiefs of Staff, and the Office of the Director of National Intelligence.¹⁶

We disagree with the suggestion in the report that DHS officials serving on the EOTF were not equipped to assist the review process.¹⁷ DHS officials serving on the EOTF and subsequent GTMO review panel included a Senior Intelligence Analyst and other Senior Executive Service officials.¹⁸ As a member of both the Intelligence Community and the Law Enforcement Community, DHS is qualified to evaluate if an individual detainee posed a security threat to the United States.

The report also questions if staffers from the Department of Justice "had the necessary training and experience to" properly analyze detainee reports. We note that since 9/11, the FBI now has a National Security Branch, comprised of the Counterterrorism Division, the Counterintelligence Division, a Directorate of Intelligence, and a WMD Directorate, as well as field intelligence groups in each of its 56 field offices, all of which put into practice FBI priorities and the emphasis on integration of criminal and intelligence efforts. As is well documented, the FBI and DOJ have coordinated counterintelligence and law enforcement functions and increased the FBI's resources and focus on intelligence collection and analysis.¹⁹ David S. Kris, the former Assistant Attorney General for the National Security Division of the Department of Justice from 2009-2011, has stated, "the FBI has long been the Intelligence Community element with primary responsibility for collecting and coordinating intelligence about terrorist threats in the United States, and since 9/11 it has made this mission its highest priority."²⁰ We have no reason to doubt the ability of the DoJ officials assigned to the EOTF.

¹³ Department of Defense correspondence, January 31, 2012.

¹⁴ Department of Defense correspondence, January 31, 2012. See, Wittes, *infra*.

¹⁵ It should be noted that once issues were raised regarding Russia, the Bush Administration also declined further transfers to that country.

¹⁶ Report at 63.

¹⁷ Report at 63.

¹⁸ Executive Order 12333 as amended, *See* 50 U.S.C. §401a; Homeland Security Act of 2002, P.L. 107-296.

¹⁹ See, David Kris, *Law Enforcement as a Counterterrorism Tool*, 5 *Journal of National Security Law & Policy* 9, footnote 35, January 2011.

²⁰ Kris, at 9, fn 35 (citations omitted).

In both the Executive Summary and the Conclusion the report states the Obama Administration sought to release detainees in response to “domestic political pressures.”²¹ We see no evidence in the report to support this conclusion.

Recommendations

We do not support recommendation 3. While agreeing that no dangerous detainee should be transferred, we continue to believe the current statutory provisions regarding detainees unnecessarily limit the President’s flexibility to bring terrorists to justice and in some circumstances undermine our values and traditions of due process.

Benjamin Wittes, a fellow at the Brookings Institute, stated the following in comments regarding Yemeni detainees at GTMO prepared for the subcommittee:

The present risk, in our judgment, lies, rather, in the other direction. It is that overbroad legislative transfer restrictions intended to prevent releases of Yemenis—who, with or without such restrictions, are not going to leave Guantánamo—are encumbering reasonable repatriation and resettlement efforts for detainees from countries that do not pose challenges remotely comparable to those presented by Yemen. There are a number of current opportunities for the resettlement of Guantánamo detainees, opportunities which the legislative restrictions in place tend to frustrate. These restrictions are maintained largely out of fear of the situation in Yemen, but the chief effect is not felt by the Yemeni detainees. It is felt by others who, unlike the Yemenis, might plausibly be removed from U.S. custody to other countries where they would pose little risk of reengagement with the enemy.²²

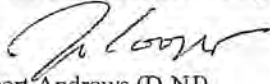
Going forward we need to apply the lessons learned from the detainees transferred from GTMO to the remaining detainees at GTMO and in Afghanistan. We agree with recommendations 1 and 2 and with others in the classified annex that the issues raised in the report merit coordinated reporting and study by the Executive Branch.

- We need to continue the study started by this report and definitively answer the question: “How many GTMO detainees have reengaged?”
- We need to find out why they reengaged.
- We need to find out the best way to prevent reengagement for the remaining detainees in GTMO and those in Afghanistan.

²¹ Report, at 2 and 66.

²² *Transfer of Guantanamo Detainees to Yemen: Policy Continuity between Administrations*, June 15, 2011.

Jim Cooper (D-TN), Ranking Member



Robert Andrews (D-NJ)



Colleen Hanabusa (D-HI)



Mark Critz (D-PA)



Appendix

HEARING

“Guantanamo Detainee Transfer Policy and Recidivism”

April 13, 2011

WITNESSES:

William K. Lietzau, Deputy Assistant Secretary of Defense for Detainee Policy, U.S.

Department of Defense

Ambassador Daniel Fried, Special Envoy for the Closure of the Guantanamo Bay Detention Facility, U.S. Department of State

Ed Mornston, Director, Joint Intelligence Task Force, Defense Intelligence Agency

Corin Stone, Deputy Assistant Director of National Intelligence for Policy and Strategy, Office of the Director of National Intelligence

Brad Wiegmann, Principal Deputy Assistant Attorney General, U.S. Department of Justice

BRIEFINGS

“The Terrorist Threat: A Profile on Reengagement (The Abdullah Rassoul Zakir Story)”

June 3, 2011

WITNESSES:

Thomas Joscelyn, Senior Fellow and Executive Director, Center for Law and Counterterrorism, Foundation for Defense of Democracies

Seth Jones, Senior Political Scientist, Rand Corporation

“Al-Qa’ida in the Arabian Peninsula: Profiles in Terror (The Othman Ahmed al Ghamdi and Abu Sufyanal-Azdi al-Shihri Stories)”

June 15, 2011

WITNESSES:

Jeremy M. Sharp, Specialist in Middle East Affairs, Congressional Research Service

Benjamin Wittes, Senior Fellow in Governance Studies, The Brookings Institution

Katherine Zimmerman, Analyst and the Gulf of Aden Team Lead for the American Enterprise Institute’s Critical Threats Project

MEMBER CLASSIFIED BRIEFING

“Guantanamo Detainee Transfer Policy and Recidivism”

April 13, 2011

MEMBER TRAVEL

AFGHANISTAN

U.S. Embassy
International Security Assistance Force/U.S. Forces
Afghanistan
United States Detention Facility at Parwan

PAKISTAN

President of Pakistan, Asif Ali Zardari
Minister of the Interior, Mr. A. Rehman Melik
Army Chief of Staff, General Ashfaq Parvez Kayani
Parliamentarians
U.S. Embassy

STAFF TRAVEL

AFGHANISTAN

U.S. Embassy

ALGERIA

U.S. Embassy
Ministry of Justice

BRITAIN

U.S. Embassy
Ministry of Justice
Ministry of Foreign Affairs
Ministry of Defense
Home Office
Parliament
Faith Matters
Henry Jackson Society
Imam, London Metropolitan University

FRANCE

U.S. Embassy
Amnesty International
International Federation for Human Rights
Ministry of Justice

KUWAIT

U.S. Embassy
Kuwait Central Prison and Rehabilitation Center
Ministry of Justice
Ministry of Foreign Affairs

MOROCCO

U.S. Embassy
Ministry of Foreign Affairs and Cooperation
Ministry of Justice
Sidi Moumen Cultural Center for Children

PAKISTAN

U.S. Embassy
International Committee of the Red Cross
Ministry of Foreign Affairs
Ministry of Interior

RUSSIA

U.S. Embassy
*Russian officials refused repeated requests for meetings.

TAJKISTAN

U.S. Embassy
Ministry of Foreign Affairs
Ministry of Justice
Ministry of Internal Security

TURKEY

U.S. Embassy
Ministry of Foreign Affairs
Ministry of Justice

SAUDI ARABIA

U.S. Embassy
Ministry of Interior (including meeting with former Guantanamo Bay detainees)

GUANTANAMO BAY CUBA DETENTION FACILITY

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- Paul Butler. Deputy Assistant Secretary of Defense for Special Operations Program Support, Bush administration
- Daniel J. Dell'Orto. Principal Deputy General Counsel, Department of Defense, Bush administration
- Daniel Fried. Special Envoy for the Closure of Guantanamo Detention Facility, Department of State, Obama administration; National Security Council Senior Director for European and Eurasian Affairs; and Assistant Secretary of State for European and Eurasian Affairs, Bush administration
- Gordon R. England. Deputy Secretary of Defense, Bush administration
- Mark Fallon. Special Advisor to the Deputy Secretary of Defense, Bush administration
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- Sam W. McCahon. Chief Legal Advisor to the Criminal Investigative Task Force, Department of Defense, Bush administration
- William K. Lietzau. Deputy Assistant Secretary of Defense for Detainee Policy, Obama administration
- Matthew G. Olsen. Executive Director, Guantanamo Review Task Force, Obama administration
- Pierre Richard Prosper. Ambassador-at-Large for War Crimes Issues, Department of State, Bush administration
- Michael K. Stransky. Counsel to the Deputy Attorney General, Bush administration
- Charles D. Stimson. Deputy Assistant Secretary of Defense for Detainee Affairs, Bush administration
- Matthew Waxman. Deputy Assistant Secretary of Defense for Detainee Affairs; Special Assistant to the National Security Adviser; Principal Deputy Director of Policy Planning, Department of State, Bush administration
- J. Clint Williamson. Former Ambassador at Large for War Crimes Issues, Department of State, Bush administration
- Samuel M. Witten. Acting Ambassador-at-large, Office of War Crimes Issues, Department of State, Bush administration

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Department of State (2)

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United States Southern Command

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Thomas Joscelyn. Journalist

Andrea Prasow. Human Rights Watch

David H. Remes. Appeal for Justice

Naureen Shah. Columbia Law School, Counsel, Counterterrorism and
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Stephen I. Vladeck. American University Washington College of Law

Raha Wala. Human Rights First

Benjamin Wittes. Brookings Institution

Andy Worthington. Journalist

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