

# Exhibit A



# WE CAN'T WAIT ON CONGRESS: THE TIME TO ACT IS NOW

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THE WHITE HOUSE  
Office of the Press Secretary

For Immediate Release May 21, 2009

## REMARKS BY THE PRESIDENT ON NATIONAL SECURITY

National Archives  
Washington, D.C.

10:28 A.M. EDT

THE PRESIDENT: Good morning, everybody. Please be seated. Thank you all for being here. Let me just acknowledge the presence of some of my outstanding Cabinet members and advisors. We've got our Secretary of State, Hillary Clinton. We have our CIA Director Leon Panetta. We have our Secretary of Defense William Gates; Secretary Napolitano of Department of Homeland Security; Attorney General Eric Holder; my National Security Advisor Jim Jones. And I want to especially thank our Acting Archivist of the United States, Adrienne Thomas.

I also want to acknowledge several members of the House who have great interest in intelligence matters. I want to thank Congressman Reyes, Congressman Hoekstra, Congressman King, as well as Congressman Thompson, for being here today. Thank you so much.

These are extraordinary times for our country. We're confronting a historic economic crisis. We're fighting two wars. We face a range of challenges that will define the way that Americans will live in the 21st century. So there's no shortage of work to be done, or responsibilities to bear.

And we've begun to make progress. Just this week, we've taken steps to protect American consumers and homeowners, and to reform our system of government contracting so that we better protect our people while spending our money more wisely. (Applause.) The -- it's a good bill. (Laughter.) The engines of our economy are slowly beginning to turn, and we're working towards historic reform on health care and on energy. I want to say to the members of Congress, I welcome all the extraordinary work that has been done over these last four months on these and other issues.

In the midst of all these challenges, however, my single most important responsibility as President is to keep the American people safe. It's the first thing that I think about when I wake up in the morning. It's the last thing that I think about when I go to sleep at night.

And this responsibility is only magnified in an era when an extremist ideology threatens our people, and technology gives a handful of terrorists the potential to do us great harm. We are less than eight years removed from the deadliest attack on American soil in our history. We know that al Qaeda is actively planning to attack us again. We know that this threat will be with us for a long time, and that we must use all elements of our power to defeat it.

Already, we've taken several steps to achieve that goal. For the first time since 2002, we're providing the necessary resources and strategic direction to take the fight to the extremists who attacked us on 9/11 in Afghanistan and Pakistan. We're investing in the 21st century military and intelligence capabilities that will allow us to stay one step ahead of a nimble enemy. We have re-energized a global non-proliferation regime to deny the world's most dangerous people access to the world's deadliest weapons. And we've launched an effort to secure

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all loose nuclear materials within four years. We're better protecting our border, and increasing our preparedness for any future attack or natural disaster. We're building new partnerships around the world to disrupt, dismantle, and defeat al Qaeda and its affiliates. And we have renewed American diplomacy so that we once again have the strength and standing to truly lead the world.

These steps are all critical to keeping America secure. But I believe with every fiber of my being that in the long run we also cannot keep this country safe unless we enlist the power of our most fundamental values. The documents that we hold in this very hall -- the Declaration of Independence, the Constitution, the Bill of Rights -- these are not simply words written into aging parchment. They are the foundation of liberty and justice in this country, and a light that shines for all who seek freedom, fairness, equality, and dignity around the world.

I stand here today as someone whose own life was made possible by these documents. My father came to these shores in search of the promise that they offered. My mother made me rise before dawn to learn their truths when I lived as a child in a foreign land. My own American journey was paved by generations of citizens who gave meaning to those simple words -- "to form a more perfect union." I've studied the Constitution as a student, I've taught it as a teacher, I've been bound by it as a lawyer and a legislator. I took an oath to preserve, protect, and defend the Constitution as Commander-in-Chief, and as a citizen, I know that we must never, ever, turn our back on its enduring principles for expedience sake.

I make this claim not simply as a matter of idealism. We uphold our most cherished values not only because doing so is right, but because it strengthens our country and it keeps us safe. Time and again, our values have been our best national security asset -- in war and peace; in times of ease and in eras of upheaval.

Fidelity to our values is the reason why the United States of America grew from a small string of colonies under the writ of an empire to the strongest nation in the world.

It's the reason why enemy soldiers have surrendered to us in battle, knowing they'd receive better treatment from America's Armed Forces than from their own government.

It's the reason why America has benefitted from strong alliances that amplified our power, and drawn a sharp, moral contrast with our adversaries.

It's the reason why we've been able to overpower the iron fist of fascism and outlast the iron curtain of communism, and enlist free nations and free peoples everywhere in the common cause and common effort of liberty.

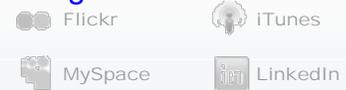
From Europe to the Pacific, we've been the nation that has shut down torture chambers and replaced tyranny with the rule of law. That is who we are. And where terrorists offer only the injustice of disorder and destruction, America must demonstrate that our values and our institutions are more resilient than a hateful ideology.

After 9/11, we knew that we had entered a new era -- that enemies who did not abide by any law of war would present new challenges to our application of the law; that our government would need new tools to protect the American people, and that these tools would have to allow us to prevent attacks instead of simply prosecuting those who try to carry them out.

Unfortunately, faced with an uncertain threat, our government made a series of hasty decisions. I believe that many of these decisions were motivated by a sincere desire to protect the American people. But I also believe that all too often our government made decisions based on fear rather than foresight; that all too often our government trimmed facts and evidence to fit ideological predispositions. Instead of strategically applying our power and our principles, too often we set those principles aside as luxuries that we could no longer afford. And during this season of fear, too many of us -- Democrats and Republicans, politicians, journalists, and citizens -- fell silent.

In other words, we went off course. And this is not my assessment alone. It was an assessment that was shared by the American people who nominated candidates for President from both major parties who, despite our many differences, called for a new approach -- one that rejected torture and one that recognized the imperative of closing the prison at Guantanamo Bay.

Now let me be clear: We are indeed at war with al Qaeda and its affiliates. We do need to update our institutions to deal with this threat. But we must do so with an abiding confidence in the rule of law and due process; in checks and balances and accountability. For reasons that I will explain, the decisions that were made over the last eight years established an ad hoc legal approach for fighting terrorism that was neither effective nor sustainable -- a framework that failed to rely on our legal traditions and time-tested institutions, and that failed to use our values as a compass. And that's why I took several steps upon taking office to better protect the American people.



First, I banned the use of so-called enhanced interrogation techniques by the United States of America.

(Applause.)

I know some have argued that brutal methods like waterboarding were necessary to keep us safe. I could not disagree more. As Commander-in-Chief, I see the intelligence. I bear the responsibility for keeping this country safe. And I categorically reject the assertion that these are the most effective means of interrogation. (Applause.) What's more, they undermine the rule of law. They alienate us in the world. They serve as a recruitment tool for terrorists, and increase the will of our enemies to fight us, while decreasing the will of others to work with America. They risk the lives of our troops by making it less likely that others will surrender to them in battle, and more likely that Americans will be mistreated if they are captured. In short, they did not advance our war and counterterrorism efforts -- they undermined them, and that is why I ended them once and for all. (Applause.)

Now, I should add, the arguments against these techniques did not originate from my administration. As Senator McCain once said, torture "serves as a great propaganda tool for those who recruit people to fight against us." And even under President Bush, there was recognition among members of his own administration -- including a Secretary of State, other senior officials, and many in the military and intelligence community -- that those who argued for these tactics were on the wrong side of the debate, and the wrong side of history. That's why we must leave these methods where they belong -- in the past. They are not who we are, and they are not America.

The second decision that I made was to order the closing of the prison camp at Guantanamo Bay. (Applause.)

For over seven years, we have detained hundreds of people at Guantanamo. During that time, the system of military commissions that were in place at Guantanamo succeeded in convicting a grand total of three suspected terrorists. Let me repeat that: three convictions in over seven years. Instead of bringing terrorists to justice, efforts at prosecution met setback after setback, cases lingered on, and in 2006 the Supreme Court invalidated the entire system. Meanwhile, over 525 detainees were released from Guantanamo under not my administration, under the previous administration. Let me repeat that: Two-thirds of the detainees were released before I took office and ordered the closure of Guantanamo.

There is also no question that Guantanamo set back the moral authority that is America's strongest currency in the world. Instead of building a durable framework for the struggle against al Qaeda that drew upon our deeply held values and traditions, our government was defending positions that undermined the rule of law. In fact, part of the rationale for establishing Guantanamo in the first place was the misplaced notion that a prison there would be beyond the law -- a proposition that the Supreme Court soundly rejected. Meanwhile, instead of serving as a tool to counter terrorism, Guantanamo became a symbol that helped al Qaeda recruit terrorists to its cause. Indeed, the existence of Guantanamo likely created more terrorists around the world than it ever detained.

So the record is clear: Rather than keeping us safer, the prison at Guantanamo has weakened American national security. It is a rallying cry for our enemies. It sets back the willingness of our allies to work with us in fighting an enemy that operates in scores of countries. By any measure, the costs of keeping it open far exceed the complications involved in closing it. That's why I argued that it should be closed throughout my campaign, and that is why I ordered it closed within one year.

The third decision that I made was to order a review of all pending cases at Guantanamo. I knew when I ordered Guantanamo closed that it would be difficult and complex. There are 240 people there who have now spent years in legal limbo. In dealing with this situation, we don't have the luxury of starting from scratch. We're cleaning up something that is, quite simply, a mess -- a misguided experiment that has left in its wake a 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.

Indeed, the legal challenges that have sparked so much debate in recent weeks here in Washington would be taking place whether or not I decided to close Guantanamo. For example, the court order to release 17 Uighurs -- 17 Uighur detainees took place last fall, when George Bush was President. The Supreme Court that invalidated the system of prosecution at Guantanamo in 2006 was overwhelmingly appointed by Republican Presidents -- not wild-eyed liberals. In other words, the problem of what to do with Guantanamo detainees was not caused by my decision to close the facility; the problem exists because of the decision to open Guantanamo in the first place. (Applause.)

Now let me be blunt. There are no neat or easy answers here. I wish there were. But I can tell you that the wrong answer is to pretend like this problem will go away if we maintain an unsustainable status quo. As President, I refuse to allow this problem to fester. I refuse to pass it on to somebody else. It is my responsibility to solve the problem. Our security interests will not permit us to delay. Our courts won't allow it. And neither should our conscience.

Now, over the last several weeks, we've seen a return of the politicization of these issues that have characterized

the last several years. I'm an elected official; I understand these problems arouse passions and concerns. They should. We're confronting some of the most complicated questions that a democracy can face. But I have no interest in spending all of our time relitigating the policies of the last eight years. I'll leave that to others. I want to solve these problems, and I want to solve them together as Americans.

And we will be ill-served by some of the fear-mongering that emerges whenever we discuss this issue. Listening to the recent debate, I've heard words that, frankly, are calculated to scare people rather than educate them; words that have more to do with politics than protecting our country. So I want to take this opportunity to lay out what we are doing, and how we intend to resolve these outstanding issues. I will explain how each action that we are taking will help build a framework that protects both the American people and the values that we hold most dear. And I'll focus on two broad areas: first, issues relating to Guantanamo and our detention policy; but, second, I also want to discuss issues relating to security and transparency.

Now, let me begin by disposing of one argument as plainly as I can: We are not going to release anyone if it would endanger our national security, nor will we release detainees within the United States who endanger the American people. Where demanded by justice and national security, we will seek to transfer some detainees to the same type of facilities in which we hold all manner of dangerous and violent criminals within our borders -- namely, highly secure prisons that ensure the public safety.

As we make these decisions, bear in mind the following face: Nobody has ever escaped from one of our federal, supermax prisons, which hold hundreds of convicted terrorists. As Republican Lindsey Graham said, the idea that we cannot find a place to securely house 250-plus detainees within the United States is not rational.

We are currently in the process of reviewing each of the detainee cases at Guantanamo to determine the appropriate policy for dealing with them. And as we do so, 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.

Now, going forward, these cases will fall into five distinct categories.

First, whenever feasible, we will try those who have violated American criminal laws in federal courts -- courts provided for by the United States Constitution. Some have derided our federal courts as incapable of handling the trials of terrorists. They are wrong. Our courts and our juries, our citizens, are tough enough to convict terrorists. The record makes that clear. Ramzi Yousef tried to blow up the World Trade Center. He was convicted in our courts and is serving a life sentence in U.S. prisons. Zacarias Moussaoui has been identified as the 20th 9/11 hijacker. He was convicted in our courts, and he too is serving a life sentence in prison. If we can try those terrorists in our courts and hold them in our prisons, then we can do the same with detainees from Guantanamo.

Recently, we prosecuted and received a guilty plea from a detainee, al-Marri, in federal court after years of legal confusion. We're preparing to transfer another detainee to the Southern District Court of New York, where he will face trial on charges related to the 1998 bombings of our embassies in Kenya and Tanzania -- bombings that killed over 200 people. Preventing this detainee from coming to our shores would prevent his trial and conviction. And after over a decade, it is time to finally see that justice is served, and that is what we intend to do. (Applause.)

The second category of cases involves detainees who violate the laws of war and are therefore best tried through military commissions. Military commissions have a history in the United States dating back to George Washington and the Revolutionary War. They are an appropriate venue for trying detainees for violations of the laws of war. They allow for the protection of sensitive sources and methods of intelligence-gathering; they allow for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts.

Now, some have suggested that this represents a reversal on my part. They should look at the record. In 2006, I did strongly oppose legislation proposed by the Bush administration and passed by the Congress because it failed to establish a legitimate legal framework, with the kind of meaningful due process rights for the accused that could stand up on appeal.

I said at that time, however, that I supported the use of military commissions to try detainees, provided there were several reforms, and in fact there were some bipartisan efforts to achieve those reforms. Those are the reforms that we are now making. Instead of using the flawed commissions of the last seven years, my administration is bringing our commissions in line with the rule of law. We will no longer permit the use of evidence -- as evidence statements that have been obtained using cruel, inhuman, or degrading interrogation methods. We will no longer place the burden to prove that hearsay is unreliable on the opponent of the hearsay. And we will give detainees greater latitude in selecting their own counsel, and more protections if they refuse to testify. These reforms, among others, will make our military commissions a more credible and effective means of administering justice, and I will

work with Congress and members of both parties, as well as legal authorities across the political spectrum, on legislation to ensure that these commissions are fair, legitimate, and effective.

The third category of detainees includes those who have been ordered released by the courts. Now, let me repeat what I said earlier: This has nothing to do with my decision to close Guantanamo. It has to do with the rule of law. The courts have spoken. They have found that there's no legitimate reason to hold 21 of the people currently held at Guantanamo. Nineteen of these findings took place before I was sworn into office. I cannot ignore these rulings because as President, I too am bound by the law. The United States is a nation of laws and so we must abide by these rulings.

The fourth category of cases involves detainees who we have determined can be transferred safely to another country. So far, our review team has approved 50 detainees for transfer. And my administration is in ongoing discussions with a number of other countries about the transfer of detainees to their soil for detention and rehabilitation.

Now, finally, there remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people. And I have to be honest here -- this is the toughest single issue that we will face. We're going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country. But even when this process is complete, there may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted, but who nonetheless pose a threat to the security of the United States. Examples of that threat include people who've received extensive explosives training at al Qaeda training camps, or commanded Taliban troops in battle, or expressed their allegiance to Osama bin Laden, or otherwise made it clear that they want to kill Americans. These are people who, in effect, remain at war with the United States.

Let me repeat: I am not going to release individuals who endanger the American people. Al Qaeda terrorists and their affiliates are at war with the United States, and those that we capture -- like other prisoners of war -- must be prevented from attacking us again. Having said that, we must recognize that these detention policies cannot be unbounded. They can't be based simply on what I or the executive branch decide alone. That's why my administration has begun to reshape the standards that apply to ensure that they are in line with the rule of law. We must have clear, defensible, and lawful standards for those who fall into this category. We must have fair procedures so that we don't make mistakes. We must have a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified.

I know that creating such a system poses unique challenges. And other countries have grappled with this question; now, so must we. But I want to be very clear that our goal is to construct a legitimate legal framework for the remaining Guantanamo detainees that cannot be transferred. Our goal is not to avoid a legitimate legal framework. In our constitutional system, prolonged detention should not be the decision of any one man. If and when we determine that the United States must hold individuals to keep them from carrying out an act of war, we will do so within a system that involves judicial and congressional oversight. And so, going forward, my administration will work with Congress to develop an appropriate legal regime so that our efforts are consistent with our values and our Constitution.

Now, as our efforts to close Guantanamo move forward, I know that the politics in Congress will be difficult. These are issues that are fodder for 30-second commercials. You can almost picture the direct mail pieces that emerge from any vote on this issue -- designed to frighten the population. I get it. But if we continue to make decisions within a climate of fear, we will make more mistakes. And if we refuse to deal with these issues today, then I guarantee you that they will be an albatross around our efforts to combat terrorism in the future.

I have confidence that the American people are more interested in doing what is right to protect this country than in political posturing. I am not the only person in this city who swore an oath to uphold the Constitution -- so did each and every member of Congress. And together we have a responsibility to enlist our values in the effort to secure our people, and to leave behind the legacy that makes it easier for future Presidents to keep this country safe.

Now, let me touch on a second set of issues that relate to security and transparency.

National security requires a delicate balance. On the one hand, our democracy depends on transparency. On the other hand, some information must be protected from public disclosure for the sake of our security -- for instance, the movement of our troops, our intelligence-gathering, or the information we have about a terrorist organization and its affiliates. In these and other cases, lives are at stake.

Now, several weeks ago, as part of an ongoing court case, I released memos issued by the previous administration's Office of Legal Counsel. I did not do this because I disagreed with the enhanced interrogation techniques that those memos authorized, and I didn't release the documents because I rejected their legal rationales -- although I do on both counts. I released the memos because the existence of that approach to

interrogation was already widely known, the Bush administration had acknowledged its existence, and I had already banned those methods. The argument that somehow by releasing those memos we are providing terrorists with information about how they will be interrogated makes no sense. We will not be interrogating terrorists using that approach. That approach is now prohibited.

In short, I released these memos because there was no overriding reason to protect them. And the ensuing debate has helped the American people better understand how these interrogation methods came to be authorized and used.

On the other hand, I recently opposed the release of certain photographs that were taken of detainees by U.S. personnel between 2002 and 2004. Individuals who violated standards of behavior in these photos have been investigated and they have been held accountable. There was and is no debate as to whether what is reflected in those photos is wrong. Nothing has been concealed to absolve perpetrators of crimes. However, it was my judgment -- informed by my national security team -- that releasing these photos would inflame anti-American opinion and allow our enemies to paint U.S. troops with a broad, damning, and inaccurate brush, thereby endangering them in theaters of war.

In short, there is a clear and compelling reason to not release these particular photos. There are nearly 200,000 Americans who are serving in harm's way, and I have a solemn responsibility for their safety as Commander-in-Chief. Nothing would be gained by the release of these photos that matters more than the lives of our young men and women serving in harm's way.

Now, in the press's mind and in some of the public's mind, these two cases are contradictory. They are not to me. In each of these cases, I had to strike the right balance between transparency and national security. And this balance brings with it a precious responsibility. There's no doubt that the American people have seen this balance tested over the last several years. In the images from Abu Ghraib and the brutal interrogation techniques made public long before I was President, the American people learned of actions taken in their name that bear no resemblance to the ideals that generations of Americans have fought for. And whether it was the run-up to the Iraq war or the revelation of secret programs, Americans often felt like part of the story had been unnecessarily withheld from them. And that caused suspicion to build up. And that leads to a thirst for accountability.

I understand that. I ran for President promising transparency, and I meant what I said. And that's why, whenever possible, my administration will make all information available to the American people so that they can make informed judgments and hold us accountable. But I have never argued -- and I never will -- that our most sensitive national security matters should simply be an open book. I will never abandon -- and will vigorously defend -- the necessity of classification to defend our troops at war, to protect sources and methods, and to safeguard confidential actions that keep the American people safe. Here's the difference though: Whenever we cannot release certain information to the public for valid national security reasons, I will insist that there is oversight of my actions -- by Congress or by the courts.

We're currently launching a review of current policies by all those agencies responsible for the classification of documents to determine where reforms are possible, and to assure that the other branches of government will be in a position to review executive branch decisions on these matters. Because in our system of checks and balances, someone must always watch over the watchers -- especially when it comes to sensitive administration -- information.

Now, along these same lines, my administration is also confronting challenges to what is known as the "state secrets" privilege. This is a doctrine that allows the government to challenge legal cases involving secret programs. It's been used by many past Presidents -- Republican and Democrat -- for many decades. And while this principle is absolutely necessary in some circumstances to protect national security, I am concerned that it has been over-used. It is also currently the subject of a wide range of lawsuits. So let me lay out some principles here. We must not protect information merely because it reveals the violation of a law or embarrassment to the government. And that's why my administration is nearing completion of a thorough review of this practice.

And we plan to embrace several principles for reform. We will apply a stricter legal test to material that can be protected under the state secrets privilege. We will not assert the privilege in court without first following our own formal process, including review by a Justice Department committee and the personal approval of the Attorney General. And each year we will voluntarily report to Congress when we have invoked the privilege and why because, as I said before, there must be proper oversight over our actions.

On all these matters related to the disclosure of sensitive information, I wish I could say that there was some simple formula out there to be had. There is not. These often involve tough calls, involve competing concerns, and they require a surgical approach. But the common thread that runs through all of my decisions is simple: We will safeguard what we must to protect the American people, but we will also ensure the accountability and oversight that is the hallmark of our constitutional system. I will never hide the truth because it's uncomfortable. I will deal with Congress and the courts as co-equal branches of government. I will tell the American people what I

know and don't know, and when I release something publicly or keep something secret, I will tell you why.

(Applause.)

Now, in all the areas that I've discussed today, the policies that I've proposed represent a new direction from the last eight years. To protect the American people and our values, we've banned enhanced interrogation techniques. We are closing the prison at Guantanamo. We are reforming military commissions, and we will pursue a new legal regime to detain terrorists. We are declassifying more information and embracing more oversight of our actions, and we're narrowing our use of the state secrets privilege. These are dramatic changes that will put our approach to national security on a surer, safer, and more sustainable footing. Their implementation will take time, but they will get done.

There's a core principle that we will apply to all of our actions. Even as we clean up the mess at Guantanamo, we will constantly reevaluate our approach, subject our decisions to review from other branches of government, as well as the public. We seek the strongest and most sustainable legal framework for addressing these issues in the long term -- not to serve immediate politics, but to do what's right over the long term. By doing that we can leave behind a legacy that outlasts my administration, my presidency, that endures for the next President and the President after that -- a legacy that protects the American people and enjoys a broad legitimacy at home and abroad.

Now, this is what I mean when I say that we need to focus on the future. I recognize that many still have a strong desire to focus on the past. When it comes to actions of the last eight years, passions are high. Some Americans are angry; others want to re-fight debates that have been settled, in some cases debates that they have lost. I know that these debates lead directly, in some cases, to a call for a fuller accounting, perhaps through an independent commission.

I've opposed the creation of such a commission because I believe that our existing democratic institutions are strong enough to deliver accountability. The Congress can review abuses of our values, and there are ongoing inquiries by the Congress into matters like enhanced interrogation techniques. The Department of Justice and our courts can work through and punish any violations of our laws or miscarriages of justice.

It's no secret there is a tendency in Washington to spend our time pointing fingers at one another. And it's no secret that our media culture feeds the impulse that lead to a good fight and good copy. But nothing will contribute more than that than an extended relitigation of the last eight years. Already, we've seen how that kind of effort only leads those in Washington to different sides to laying blame. It can distract us from focusing our time, our efforts, and our politics on the challenges of the future.

We see that, above all, in the recent debate -- how the recent debate has obscured the truth and sends people into opposite and absolutist ends. On the one side of the spectrum, there are those who make little allowance for the unique challenges posed by terrorism, and would almost never put national security over transparency. And on the other end of the spectrum, there are those who embrace a view that can be summarized in two words: "Anything goes." Their arguments suggest that the ends of fighting terrorism can be used to justify any means, and that the President should have blanket authority to do whatever he wants -- provided it is a President with whom they agree.

Both sides may be sincere in their views, but neither side is right. The American people are not absolutist, and they don't elect us to impose a rigid ideology on our problems. They know that we need not sacrifice our security for our values, nor sacrifice our values for our security, so long as we approach difficult questions with honesty and care and a dose of common sense. That, after all, is the unique genius of America. That's the challenge laid down by our Constitution. That has been the source of our strength through the ages. That's what makes the United States of America different as a nation.

I can stand here today, as President of the United States, and say without exception or equivocation that we do not torture, and that we will vigorously protect our people while forging a strong and durable framework that allows us to fight terrorism while abiding by the rule of law. Make no mistake: If we fail to turn the page on the approach that was taken over the past several years, then I will not be able to say that as President. And if we cannot stand for our core values, then we are not keeping faith with the documents that are enshrined in this hall. (Applause.)

The Framers who drafted the Constitution could not have foreseen the challenges that have unfolded over the last 222 years. But our Constitution has endured through secession and civil rights, through World War and Cold War, because it provides a foundation of principles that can be applied pragmatically; it provides a compass that can help us find our way. It hasn't always been easy. We are an imperfect people. Every now and then, there are those who think that America's safety and success requires us to walk away from the sacred principles enshrined in this building. And we hear such voices today. But over the long haul the American people have resisted that temptation. And though we've made our share of mistakes, required some course corrections, ultimately we have held fast to the principles that have been the source of our strength and a beacon to the world.

Now this generation faces a great test in the specter of terrorism. And unlike the Civil War or World War II, we can't count on a surrender ceremony to bring this journey to an end. Right now, in distant training camps and in crowded cities, there are people plotting to take American lives. That will be the case a year from now, five years from now, and -- in all probability -- 10 years from now. Neither I nor anyone can stand here today and say that there will not be another terrorist attack that takes American lives. But I can say with certainty that my administration -- along with our extraordinary troops and the patriotic men and women who defend our national security -- will do everything in our power to keep the American people safe. And I do know with certainty that we can defeat al Qaeda. Because the terrorists can only succeed if they swell their ranks and alienate America from our allies, and they will never be able to do that if we stay true to who we are, if we forge tough and durable approaches to fighting terrorism that are anchored in our timeless ideals. This must be our common purpose.

I ran for President because I believe that we cannot solve the challenges of our time unless we solve them together. We will not be safe if we see national security as a wedge that divides America -- it can and must be a cause that unites us as one people and as one nation. We've done so before in times that were more perilous than ours. We will do so once again.

Thank you, God bless you, and God bless the United States of America. (Applause.)

END

11:17 A.M. EDT



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	<a href="#">Legislation</a>	<a href="#">Ethics</a>	<a href="#">Executive Office of the President</a>	<a href="#">Eisenhower Executive Office Building</a>	<a href="#">State &amp; Local Government</a>
	<a href="#">Nominations &amp; Appointments</a>	<a href="#">Family</a>	<a href="#">Other Advisory Boards</a>	<a href="#">Camp David</a>	<a href="#">Resources</a>
	<a href="#">Disclosures</a>	<a href="#">Fiscal Responsibility</a>		<a href="#">Air Force One</a>	
		<a href="#">Foreign Policy</a>		<a href="#">White House Fellows</a>	
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# Exhibit B

ISN	SEQ	Last Name	First Name	Second Name	Third Name	Citizenship	Capture Date	Report Date	Days Detained	Capture Location	Circumstances of Capture
(b)(2)	000459	ZAMAN	GUL			(b)(1)	(b)(1)	9/22/2009	(b)(1)	(b)(1)	(b)(1)
	000831	KADIR	KHADAN			(b)(1)	(b)(1)	9/22/2009	(b)(1)	(b)(1)	(b)(1)
	001001	SHABAZ KHAUL	HAFIZULLAH					9/22/2009			
	001207	WAZIR	HAJI PACHA			AFGHANISTAN		9/22/2009			
	001209	AL-GHARISI	LUTFI AL-ARABI			(b)(1)		9/22/2009			
	001220	KHAN	ARSALA			(b)(1)		9/22/2009			
	001282	WALI	SAIFULLAH	ABDUL				9/22/2009			
	001286	ZAFAR	MALANG					9/22/2009			
	001287	ABU BAKR	GULAM RABBANI					9/22/2009			
	001288	QALAM	FNU					9/22/2009			
	001432	DILSHAD	AHMAD					9/22/2009			
	001433	ALI	SALAH	MOHAMMAD				9/22/2009			
	001442	FAROOQ	HAJI GHULAM					9/22/2009			
	001455	FEZZANI	MOEZ BIN ABDUL QADIR					9/22/2009			
	001464	AL BAKRI	MOHAMMED AMIN			AFGHANISTAN		9/22/2009			
	001466	NAJJAR	RIDHA AHMAD			AFGHANISTAN		9/22/2009			KARACHI, PAKISTAN
	001474	KHAN	AMAL			(b)(1)		9/22/2009			(b)(1)
	001503	AGHA	NOOR			(b)(1)		9/22/2009			(b)(1)
	001658	JAN	ZAHIR					9/22/2009			
	001691	AYOOB	MOHAMMED					9/22/2009			
	001718	JAN	HAFEZULLAH					9/22/2009			
	001815	AHMAD	FADI			YEMEN		9/22/2009			LUDIN KALAY, DAY CHOPAN, ZABUL
	001869	HAMIDULLAH	UNK			(b)(1)		9/22/2009			(b)(1)
	001877	RAHMAN	ABDUL					9/22/2009			
	001897	KARIM	FAZEL					9/22/2009			
	002273	HAMIDULLAH	MOLVIA					9/22/2009			
	002284	ZADRAN	ABDUL	BASSET				9/22/2009			
	002321	BABARAK	FNU					9/22/2009			
	002343	SAMIULLAH	FNU					9/22/2009			
	002369	KHAN	JAMSHIR					9/22/2009			
	002401	ANWAR	MOHAMMAD					9/22/2009			
	002421	RAIZ	FNU					9/22/2009			
	002422	KABIR	ABDUL					9/22/2009			
	002463	MOHAMMED	DOST					9/22/2009			
	002505	ALIM	ABDUL					9/22/2009			
	002521	GULAB	SAYED					9/22/2009			
	002615	KHAN	SHAM ALI					9/22/2009			
002619	SHAFIQ	FNU	MNU				9/22/2009				
002633	ENAYATULLAH	FNU					9/22/2009				
002634	AGHA	MOHAMMED					9/22/2009				
002635	JAN	SHER					9/22/2009				
002638	ABDULLAH	MULLAH	MNU				9/22/2009				
002650	GUL	SHAD					9/22/2009				
002660	GHAFOR	ABDUL					9/22/2009				
002667	NABI	HAJI SAID					9/22/2009				
002689	YASIN	ZABIT					9/22/2009				
002720	NOORI	MOHAMMED	RAHIM				9/22/2009				
002724	NOORI	MOHAMMED	YOSEF				9/22/2009				
002737	MOHAMMED	LALAY					9/22/2009				

(b)(2)	002773	WALI	NOOR			(b)(1)	(b)(1)	9/22/2009	(b)(1)	(b)(1)	(b)(1)
	002784	NIYAZ	FNU					9/22/2009			
	002802	JAN	WALI					9/22/2009			
	002825	FAROOQ	NFN					9/22/2009			
	002827	FAROOQ	GULAM					9/22/2009			
	002842	KERAMAT	FNU					9/22/2009			
	002904	LAYAQ	MOHAMMED					9/22/2009			
	002909	NAJMUDDIN	HAJI					9/22/2009			
	002910	WALI	ABDUL					9/22/2009			
	002965	GHAFAR	ABDUL					9/22/2009			
	002974	KHAN	FEROZ					9/22/2009			
	002977	ENAMULLAH	NFN					9/22/2009			
	002979	SADAR	ALI					9/22/2009			
	003014	KARIM	ABDUL					9/22/2009			
	003015	JAN	PALIK					9/22/2009			
	003028	WALI	MOHAMMED					9/22/2009			
	003034	QADIR	ABDUL					9/22/2009			
	003066	ZAHIR	ABDUL					9/22/2009			
	003068	KADIR	MOHAMMED					9/22/2009			
	003070	GUL	HAMID					9/22/2009			
	003086	RAHMATULLAH	NFN					9/22/2009			
	003088	ABDULLAH	BISMULLAH					9/22/2009			
	003094	KHAN	MOHAMMED HASSAN					9/22/2009			
	003096	NOOR	AWAL					9/22/2009			
	003111	AGHA	GUL					9/22/2009			
	003112	GUL	AKHTAR					9/22/2009			
	003154	MOHMAND	QARI					9/22/2009			
	003160	KHAN	NAZIR					9/22/2009			
	003167	KHAN	GUL SHEZAD					9/22/2009			
	003170	SHAH	AKBAR					9/22/2009			
	003197	GUL	SULTAN					9/22/2009			
	003205	HADAYTULLAH	NFN	NMN				9/22/2009			
	003207	HASSAN	NOOR					9/22/2009			
	003222	AL-AFGHANI	SALEH					9/22/2009			
	003226	JAMILI	GHULAM	SAWAR				9/22/2009			
003246	RAZIQ	ABDUL					9/22/2009				
003264	MOHAMMED	HAJI					9/22/2009				
003273	JAN	SAID	WALI				9/22/2009				
003278	BOI	HAJI QAYUM					9/22/2009				
003279	HAFIZULLAH	MAULAWI					9/22/2009				
003281	KHAN	AKA					9/22/2009				
003303	GUL	MOHAMMED					9/22/2009				
003305	KHAN	SHADI					9/22/2009				
003306	BACHA	NUR					9/22/2009				
003308	MUHAMAD	KAHN					9/22/2009				
003310	JAN	GUL	MAR				9/22/2009				
003314	JAN	MAULAWI	AHMAD				9/22/2009				
003316	AKUND	MULLAH ABDUL	MALIK				9/22/2009				
003343	GOLOGAI	NFN	NMN				9/22/2009				
003345	HANAN	GUL	NMN				9/22/2009				

<b>(b)(2)</b>	003346	ALAM	NFN	NMN	<b>(b)(1)</b>	<b>(b)(1)</b>	9/22/2009	<b>(b)(1)</b>	<b>(b)(1)</b>	<b>(b)(1)</b>
	003355	ZAMAN	GUL				9/22/2009			
	003362	IZATULLAH	NFN	NMN			9/22/2009			
	003363	WALI	HAZRAT	NMN			9/22/2009			
	003364	QADIM	MULLAH				9/22/2009			
	003366	MOHAMMED	ALI				9/22/2009			
	003378	DAUD	QARI SAID				9/22/2009			
	003393	HOTEQ	HAJJI ABDUL RAHMAN				9/22/2009			
	003400	RAHMAN	SHER				9/22/2009			
	003401	QADIR	ABDUL	NMN			9/22/2009			
	003402	AMIR	HAJI	NMN			9/22/2009			
	003404	AZIZURAHMAN	MALIK	NMN			9/22/2009			
	003406	ALI	GAWHAR	NMN			9/22/2009			
	003409	SATAR	ABDUL	NMN			9/22/2009			
	003410	KHAN	AKEEB	NMN			9/22/2009			
	003417	NLN	ROHULLAH	NMN			9/22/2009			
	003418	ZAHIR	DAUD	NMN			9/22/2009			
	003422	ARAB	MAULAWI AHMAD ZAHIR				9/22/2009			
	003437	KHAN	MOMEN				9/22/2009			
	003438	TORYALAY	GUL	INAM			9/22/2009			
	003439	GULZAR	MOHAMMAD	DAUD			9/22/2009			
	003444	GUL	JUMA				9/22/2009			
	003445	KHAN	PACHA				9/22/2009			
	003446	KHAN	NASIMULLAH				9/22/2009			
	003447	ZAHIR	MOHAMMAD				9/22/2009			
	003451	KHAL	AMANULLAH				9/22/2009			
	003452	JAN	SAKHI				9/22/2009			
	003453	MOHAMMAD	SALEH				9/22/2009			
	003454	MALIM	ISMAIL				9/22/2009			
	003463	KHAN	SHAMS				9/22/2009			
	003464	MOHAMMAD	RAIS				9/22/2009			
	003466	KHEL	HAJI	ZENI			9/22/2009			
	003468	SHABIR	MULLAH				2/25/2008 9/22/2009			
	003469	MOHAMMAD	KHAN	NMN			9/22/2009			
	003470	ANAN	ABDUL	NMN			9/22/2009			
	003474	TORAKAY	NFN	NMN			9/22/2009			
	003479	ARIF	QARI	NMN			9/22/2009			
	003483	JAN	MAK	MALI			9/22/2009			
	003484	HUSSEIN	MOHAMMAD				9/22/2009			
	003485	WALI	QARI	ABDUL			9/22/2009			
	003486	NAFI	ABDUL				9/22/2009			
	003494	NLN	HAYATULLAH	NMN			9/22/2009			
	003496	GUL	KHAN	NMN			9/22/2009			
	003497	MOHAMMAD	NIK	NMN			9/22/2009			
	003498	SOUP	SHEIKH YOUSEF	NMN			9/22/2009			
	003499	NADER	SHASWAR	MOHAMMAD			9/22/2009			
	003503	GHANAM	MOHAMMAD	NMN			9/22/2009			
	003505	BADER	SHER				9/22/2009			
003509	IZATULLAH	NLN		9/22/2009						
003510	KHAN	HAJJ	ABDUL MAJID	3/3/2008 9/22/2009						
							567	ZARGAR, GHAZNI, GHAZNI		
							<b>(b)(1)</b>	<b>(b)(1)</b>	<b>(b)(1)</b>	
							559	QALAT, QALAT, ZABUL		





<b>(b)(2)</b>	003728	QAYUM	ABDUL			<b>(b)(1)</b>	<b>(b)(1)</b>	9/22/2009	<b>(b)(1)</b>	<b>(b)(1)</b>	<b>(b)(1)</b>
	003729	KHAN	NOOR					9/22/2009			
	003730	JAMSHEED	ABDULLAH					9/22/2009			
	003733	LNU	ATIQULLAH					9/22/2009			
	003735	ZAINULLAH	HAFEZ					9/22/2009			
	003743	MOHAMMAD	MULLAH					9/22/2009			
	003744	KASHMIR	HAJI					9/22/2009			
	003747	KHAN	EID		MAR			9/22/2009			
	003748	LNU	SHAHBODIN					9/22/2009			
	003749	YILDAZ	NAJIMUDDIN					9/22/2009			
	003750	GUL	JANAT					9/22/2009			
	003751	JAN	MIR		SAHIB			9/22/2009			
	003752	KHODAIDAD	AMIR					9/22/2009			
	003754	MOHAMMAD	LAL					9/22/2009			
	003755	KHAN	WAZIR					9/22/2009			
	003756	SHAH	HABIB					9/22/2009			
	003757	KHAN	RAI					9/22/2009			
	003758	WAKIL	ABDUL					9/22/2009			
	003760	WALI	EID					9/22/2009			
	003761	RAQIB	MOHAMMAD					9/22/2009			
	003763	NASIR	MAULAWI		LAL			9/22/2009			
	003764	KHAN	SHOAB					9/22/2009			
	003765	AL-QAHTANI	KHALID		FUNAYIS	SAYID		9/22/2009			
	003766	RIAZ	ABD		AL-AZIZ			9/22/2009			
	003767	AL-MANSOUR	MANSOUR					9/22/2009			
	003770	IBRAHIM	MULLAH					9/22/2009			
	003771	RAHMAN	FAZEL					9/22/2009			
	003772	MOHAMMAD	GUL					9/22/2009			
	003773	LNU	HAZRATULLAH					9/22/2009			
	003774	SHAH	HAJI		ZAHAR			9/22/2009			
003775	SALIM	ABDUL					9/22/2009				
003776	HAIDAR	GUL					9/22/2009				
003777	ZAHIR	MULLAH					9/22/2009				
003778	KHODAIDAD	HAJI					9/22/2009				
003779	KHAN	NAWAR					9/22/2009				
003782	MARJAN	NEK					9/22/2009				
003783	MOHAMMAD	AHKTAR					9/22/2009				
003784	LNU	BAITULLAH					9/22/2009				
003785	SHARIF	MOHAMMAD					9/22/2009				
003787	RAFIULLAH	QARI					9/22/2009				
003788	AGHA	SHER					9/22/2009				
003789	WALI	SHAH					9/22/2009				
003791	AGHA	SHIRIN					9/22/2009				
003799	SHAH	SULTAN					9/22/2009				
003800	ISMAEL	MOHAMMAD					9/22/2009				
003801	NASIR	MOHAMMAD					9/22/2009				
003802	LNU	RAHMATULLAH					9/22/2009				
003804	YOUSEF	MOHAMMAD					9/22/2009				
003805	GUL	DAWAR					9/22/2009				
003806	SHIR	AMIN					9/22/2009				



(b)(2)	003860	HANAN	ABDUL		(b)(1)	(b)(1)	9/22/2009	(b)(1)	(b)(1)	(b)(1)
	003861	KHAN	ROZEE				9/22/2009			
	003862	AZIZ	ABDUL				9/22/2009			
	003863	NAZIM	MAULAWI				9/22/2009			
	003865	ZAHAR		ABDUL			9/22/2009			
	003866	LNU	BASIRULLAH				9/22/2009			
	003867	KHAN	JUMA GUHL				9/22/2009			
	003868	SALIM	MAULAWI				9/22/2009			
	003869	AGHA	GUL				9/22/2009			
	003870	LNU	ZIAUDDIN				9/22/2009			
	003871	SADIQ	OMAR				9/22/2009			
	003872	LNU	KAIFAYATULLAH				9/22/2009			
	003874	LNU	HIATULLAH				9/22/2009			
	003876	AHMADULLAH	QARI				9/22/2009			
	003877	RAHMAN	SHAMSUDDIN	UL			9/22/2009			
	003881	LNU	HAMIDULLAH				9/22/2009			
	003882	MOHAMMAD	TAJ				9/22/2009			
	003883	ISMAEL	MULLAH				9/22/2009			
	003884	LNU	BILAL				9/22/2009			
	003885	KHAN	ABAS				9/22/2009			
	003886	KHAN	JANAT				9/22/2009			
	003887	RAHMAN	ZIA				9/22/2009			
	003888	LNU	TAHLIMIN				9/22/2009			
	003891	GUL	IMAN				9/22/2009			
	003893	SALAM	GUL				9/22/2009			
	003894	JAN	HAKIM				9/22/2009			
	003895	KHAN	QASIM				9/22/2009			
	003896	LNU	SHAHKARIN				9/22/2009			
	003897	KHAN	OMAR				9/22/2009			
	003898	RAHMAN	MOHAMMAD				9/22/2009			
	003899	AZIZ	HAJI ABDUL				12/15/2008	9/22/2009	277	NANGARHAR
	003900	RAHMAN	ABDUL				12/15/2008	9/22/2009	277	NANGARHAR
	003901	WAHID	ABDUL				12/17/2008	9/22/2009	275	NANGARHAR
003906	QALAM	SAYED					9/22/2009			
003907	ALIM	SAID			(b)(1)		9/22/2009	(b)(1)	(b)(1)	
003908	UL-HAQ	ZIA					9/22/2009			
003909	AHMAD	NAQIB					9/22/2009			
003910	LNU	HIDAYATULLAH					9/22/2009			
003911	AGHA	QANDI					9/22/2009			
003912	AGHA	TOTEE					9/22/2009			
003913	DUHR	KAISER					9/22/2009			
003914	IBRAHIM	MOHAMMED					9/22/2009			
003915	MOHAMMAD	SAYED	DIN				9/22/2009			
003917	KHAN	MIR	SALAM				9/22/2009			
003918	JAN	ABDULLAH					9/22/2009			
003919	LNU	ADIL					9/22/2009			
003920	AYOUB	MOHAMMAD					9/22/2009			
003921	KHAN	TAWIZ					9/22/2009			
003922	JAN	HAJI	KHAWA				9/22/2009			
003923	LNU	QASIM					9/22/2009			

<b>(b)(2)</b>	003924	GUL	ZARIN			<b>(b)(1)</b>	<b>(b)(1)</b>	9/22/2009	<b>(b)(1)</b>	<b>(b)(1)</b>	<b>(b)(1)</b>
	003925	JAN	MIRAM					9/22/2009			
	003926	SHAH	SALEH	BAD				9/22/2009			
	003927	KHAN	MOBARAK					9/22/2009			
	003928	LNU	ALLUDEEN					9/22/2009			
	003929	JALAL	ABDUL					9/22/2009			
	003930	BAQI	HAJI	ABDUL				9/22/2009			
	003932	JAN	BAHRAM					9/22/2009			
	003933	WALI	NOOR					9/22/2009			
	003934	GUL	SAHAR					9/22/2009			
	003935	ALI	SULTAN					9/22/2009			
	003936	ALI	NOOR					9/22/2009			
	003937	GHAFOUR	ABGUL					9/22/2009			
	003938	LNU	ABDULLAH					9/22/2009			
	003939	ALAM	NOOR					9/22/2009			
	003940	ZATAR	ABDUL					9/22/2009			
	003941	KALIM	HAJI	MUSA				9/22/2009			
	003943	LNU	HEKMATULLAH					9/22/2009			
	003944	LNU	BARAKATULLAH					9/22/2009			
	003945	LNU	SALIM					9/22/2009			
	003947	NOOR	AHMAD					9/22/2009			
	003948	GUL	KHIALI					9/22/2009			
	003949	LNU	JANAN					9/22/2009			
	003950	MOHAMMAD	EID					9/22/2009			
	003951	AL-MADANI	MUSTAFA					9/22/2009			
	003952	GUL	TAJ					9/22/2009			
	003953	AKBAR	MOHAMMAD					9/22/2009			
	003954	RAHMAN	SHAMSUL					9/22/2009			
	003955	GUL	BAZ					9/22/2009			
	003956	NABI	GHOLAM					9/22/2009			
	003958	GUL	CHINAR					9/22/2009			
	003959	LNU	MUNIB					9/22/2009			
	003960	WAHAB	ABDUL					9/22/2009			
	003961	MOHAMMAD	RAZ					9/22/2009			
003962	ISRAEL	QARI					9/22/2009				
003965	GIR	JAHAN					9/22/2009				
003966	MOHAMMAD	KHANAI					9/22/2009				
003967	SHAH	JAWAL					9/22/2009				
003968	RAOUF	MULLAH	ABDUL				9/22/2009				
003969	AHAD	ABDUL					9/22/2009				
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	020021	SATAR	ABDUL					9/22/2009			
	020022	DAWOOD	MOHAMMAD					9/22/2009			
	020023	UNKNOWN	MAHMOOD					9/22/2009			

# Exhibit C

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## Afghan prison transfer delayed

By [Kevin Sieff](#), Published: August 12

BAGRAM AIRFIELD, Afghanistan — The United States will remain in control of Afghanistan's highest-profile prison well beyond January 2012, missing a key milestone in the plan to transfer judicial and detention operations to Afghans, U.S. military officials say.

The transfer of the prison and its burgeoning population of detainees had been regarded as a critical marker of the war's endgame — a sign that Afghan officials are ready to inherit institutions essential to the nation's future.

But U.S. officials decided that the Afghan legal system is [still too weak](#) to permit the handover of the Parwan Detention Center, even after the United States spent millions attempting to improve the country's judiciary. The United States will now be unable to relinquish authority at Parwan until at least 2014, just as the last foreign troops are scheduled to [leave Afghanistan](#).

"At this point, the Afghans don't have the legal framework or the capacity to deal with violence being inflicted on the country by the insurgency," said one U.S. official, who spoke on the condition of anonymity to discuss a sensitive matter.

The existence of the U.S. military prison near Bagram Airfield, about 30 miles north of Kabul, has long been seen by Afghans as a sign of imperial overreach, and it has been singled out for criticism by President Hamid Karzai.

The U.S. military has detained suspected insurgents at facilities in the area for nearly a decade. Most have been kept without trial, with less than a third of the prison's detainees having been handed over for prosecution to an Afghan-run court.

The prison population has grown rapidly as the U.S. military has expanded its operations in Afghanistan: Military officials say that over the past three years, the number of detainees has tripled. Parwan now holds 2,600 inmates, ranging from high-profile insurgents to those who have played a more peripheral role in the conflict.

The transfer of the prison — an agglomeration of cinder-block rooms and cellblocks built in 2009 to replace an older, dilapidated facility — was supposed to be part of a broader transition to Afghan control that began this summer. Seven cities and provinces have been formally transferred to Afghan security forces in the past month.

A transition at Parwan was expected to hold special symbolic value: Afghan defense officials argue that the Taliban has successfully used the prison for propaganda to galvanize insurgents, drawing on reports of harsh interrogation methods. An Army investigation into the deaths of two detainees in 2002 uncovered evidence of prisoners being chained to the ceiling by their wrists, and being severely beaten by guards.

"There's no question that taking control and bringing these courts within Afghan law will be a significant step," said Mohammad Qasim Hashimzai, the deputy minister of justice.

But as the number of detainees at Parwan continues to grow, U.S. officials say that giving Afghans control over the fates of suspected insurgents would allow dangerous Taliban fighters to slip through the cracks of an undeveloped legal system.

The inability of Afghan judges to handle classified intelligence is one of many problems delaying Parwan's handover, according to U.S. officials who say they would be willing to share such information if the proper Afghan procedures existed. The Afghan legal code — crafted in 1976, during a time of relative peace — lacks the capacity to deal with the demands of wartime criminal justice, officials said.

Detainees must be indicted within three days of being arrested. Forensic evidence is rarely considered. And the accused must be tried within the province where he is apprehended, even though many provincial courts are notoriously corrupt and insecure.

To develop judicial capacity in Parwan and beyond, the United States has helped train a slew of Afghan judges and lawyers, aiming to develop institutions that have long languished because of political gridlock and a lack of funding.

Efforts to address the shortcomings of the legal code in parliament or through a presidential decree have stalled, even though some of the country's top legal advisers acknowledge the need for reform.

Some Afghans, including Karzai, remain eager to expedite the transition process at Parwan and could still push for an earlier transfer than 2014. But U.S. officials say significant reforms would have to be in place before such a handover could occur.

### **Other missed deadlines**

This is not the first time the United States has missed a deadline related to Parwan's transition. Gen. Stanley A. McChrystal, then the top U.S. military commander in Afghanistan, pledged in June 2010 that U.S. forces would "hand over all detention operations" at Parwan to Afghans by January 2011.

But the transfer of judicial operations has proven even more challenging. Top Afghan and American officials agreed in a public memorandum last year that Afghans should expect to assume responsibility for Parwan's courts as well as its security in January 2012, with the caveat that the timeline was subject to "demonstrated capacity." In retrospect, U.S. officials said, that transition date was also too ambitious.

News that the country's largest prison will remain in American hands until at least 2014 has been bitterly received by some.

"This is our country. We have our own laws. The process at Parwan should be an Afghan process," said Fareed Ahmad Najeebi, the Justice Ministry's spokesman. "We might have some technical problems with our penal code, but we're ready to take over judicial and detention operations."

The Afghan-run court at Parwan is growing, albeit slowly, and is now hearing about 50 cases a month. Despite its flaws, it marks a significant improvement over the rest of the country's courts. About 150 of Afghanistan's 398 districts lack judges, and threats and bribes lead to the manipulation of verdicts in many courts.

Among the Afghan proposals to reform the legal system is the development of a national security court that would adopt the U.S. practice of detaining suspected insurgents indefinitely without trial.

U.S. and Afghan officials say the legal basis for continuing the detentions derives from a provision of the Geneva Conventions that allows combatants to be held without trial, as long as standards of review and humane treatment are met. The [advocacy group Human Rights First](#) argued in a report published this year that Parwan's U.S.-military-run detainee review board "fails to provide detainees with an adequate opportunity to defend themselves against charges that they are collaborating with insurgents and present a

threat to U.S. forces." U.S. officials reject that assertion.

Earlier this month, during a typical review board hearing — which includes no lawyers or judges — three U.S. military officers sat in front of a slim, bearded detainee who pleaded with cuffed hands for mercy.

"I am not Taliban," he said in his native Pashto. "I am a farmer. This is all a mistake."

But the officers were looking at classified intelligence that said otherwise, labeling the man a "Taliban facilitator" from Kandahar. Now the board had to decide: Could an Afghan court be trusted to handle his case, or would he be detained without a trial?

Because the evidence is largely classified, the three officers said they could not risk handing him over to local judges.

The suspect was escorted to a wheelchair used to transport detainees and pushed back to his cell. He will be questioned by another review board in six months, and the decision will be reassessed.

Staff researcher Julie Tate in Washington contributed to this report.

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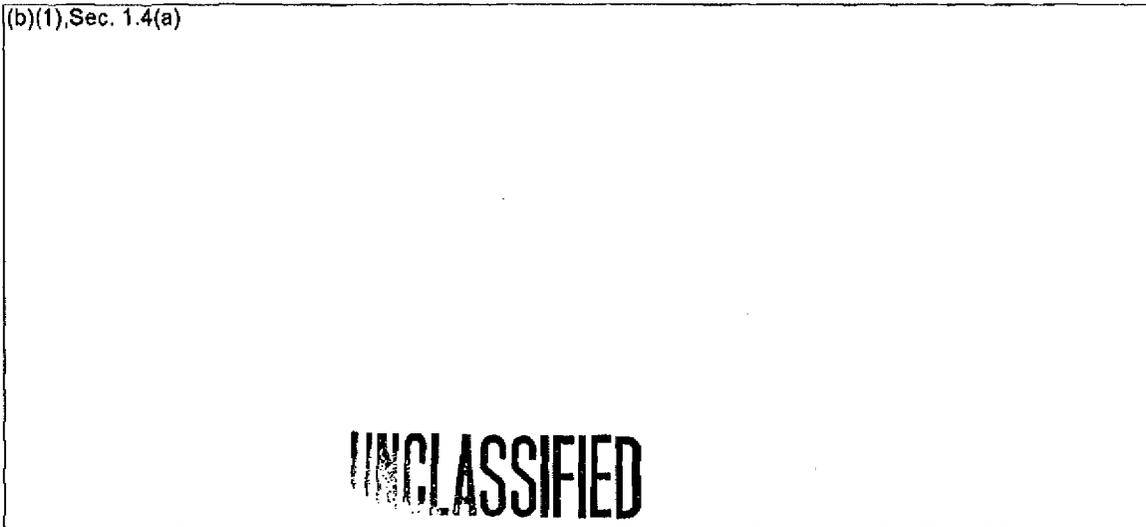
MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
UNDER SECRETARY OF DEFENSE FOR POLICY  
UNDER SECRETARY OF DEFENSE FOR INTELLIGENCE  
COMMANDER U.S. CENTRAL COMMAND  
COMMANDER U.S. SPECIAL OPERATIONS COMMAND

SUBJECT: Policy Guidance on Review Procedures and Transfer and Release Authority  
at Bagram Theater Internment Facility (BTIF), Afghanistan (U)

~~(S//NF)~~ On April 27, 2009, Commander, USCENTCOM requested policy guidance concerning proposed changes to the Unlawful Enemy Combatant Review Board procedures in Afghanistan. Commander, USCENTCOM also requested new guidance in lieu of the 2004 "Global Screening Criteria" (GSC), specifically for detainee threat-level classifications that are not linked to criteria for transfers to detention facilities at Guantanamo Bay (GTMO). The attached policy guidance responds to that request.



(b)(1), Sec. 1.4(a)



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*W. H. Colby*

Attachment: As Stated

Derived from Multiple Sources  
Declassify on June 4, 2019

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OSD 76338-09



Bagram Policy 30

*3 of 6*

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**Detainee Review Procedures at Bagram Theater Internment Facility (BTIF), Afghanistan (U)**

*Authority to Detain and Intern (U)*

(U) U.S. Forces operating under Operation Enduring Freedom (OEF) authority are authorized to detain persons temporarily, consistent with the laws and customs of war (e.g., in self-defense or for force protection). Additionally, OEF forces are authorized to detain, and to intern at the Bagram Theater Internment Facility (BTIF), persons who meet the following criteria:

- (U) Persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks;
- (U) Persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

(U) Internment must be linked to a determination that the person detained meets the criteria detailed above and that internment is necessary to mitigate the threat the detainee poses, taking into account an assessment of the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society. If, at any point during the detainee review process, a person detained by OEF forces is determined not to meet the criteria detailed above or no longer to require internment to mitigate their threat, the person shall be released from DOD custody as soon as practicable. The fact that a detainee may have intelligence value, by itself, is not a basis for internment.

*Capturing Unit Review (U)*

(U) Commander, USCENTCOM, shall ensure that OEF detainee review procedures include a review by the capturing unit commander, with the advice of a judge advocate, to assess whether persons detained by the unit meet the criteria for detention. This review shall occur prior to requesting a detainee's transfer to the BTIF for internment, and normally within 72 hours of the detainee's capture.

*Transfer Request (U)*

(U) Commander, USCENTCOM, shall ensure that OEF detainee review procedures include a request, by the capturing unit commander, to transfer to the BTIF those detainees the capturing unit commander assesses may meet the criteria for internment. The capturing unit commander shall forward the transfer request to the BTIF commander for review.

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**Detainee Review Procedures at Bagram Theater Internment Facility (BTIF), Afghanistan (U)**

*Authority to Detain and Intern (U)*

(U) U.S. Forces operating under Operation Enduring Freedom (OEF) authority are authorized to detain persons temporarily, consistent with the laws and customs of war (e.g., in self-defense or for force protection). Additionally, OEF forces are authorized to detain, and to intern at the Bagram Theater Internment Facility (BTIF), persons who meet the following criteria:

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*Capturing Unit Review (U)*

(U) Commander, USCENTCOM, shall ensure that OEF detainee review procedures include a review by the capturing unit commander, with the advice of a judge advocate, to assess whether persons detained by the unit meet the criteria for detention. This review shall occur prior to requesting a detainee's transfer to the BTIF for internment, and normally within 72 hours of the detainee's capture.

*Transfer Request (U)*

(U) Commander, USCENTCOM, shall ensure that OEF detainee review procedures include a request, by the capturing unit commander, to transfer to the BTIF those detainees the capturing unit commander assesses may meet the criteria for internment. The capturing unit commander shall forward the transfer request to the BTIF commander for review.

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*Review of Transfer Request (U)*

(U) Commander, USCENTCOM, shall further ensure that OEF detainee review procedures include a review by the BTIF commander, with the advice of a judge advocate, to assess whether detainees whose transfer to the BTIF the capturing unit commander has requested meet the criteria for internment. This review shall occur prior to approving a request to transfer a detainee to the BTIF for internment, and normally within 14 days of the detainee's capture.

*Initial Detainee Notification (U)*

(U) Commander, USCENTCOM, shall ensure that detainees receive timely notice of the basis for their internment, including an unclassified summary of the specific facts that support the basis for their internment. Commander, USCENTCOM shall further ensure that detainees also receive a timely and adequate explanation of the detainee review procedures, including, at a minimum: the fact that the detainee will have an opportunity to present information and evidence to a board of officers convened to determine whether the detainee meets the criteria for internment; the projected dates of the detainee's initial and periodic review boards; and the fact that a personal representative will be appointed to assist the detainee before the review boards. Detainees shall receive such notice and explanation, in writing and orally in a language the detainee understands, within 14 days after the detainee's transfer to the BTIF whenever feasible.

*Detainee Review Boards (U)*

(U) Commander, USCENTCOM shall ensure that a board of officers reviews all reasonably available information to determine whether each person transferred to the BTIF meets the criteria for internment and, if so, whether the person's continued internment is necessary. These reviews shall occur within 60 days after the detainee's transfer to the BTIF and at least every six months thereafter.

(U) Commander, USCENTCOM shall designate a flag or general officer to serve as the convening authority for review boards.

(U) Review boards shall be composed of three field-grade officers authorized access to all reasonably available information (including classified information) relevant to the determinations of whether the detainee meets the criteria for internment and whether the detainee's continued internment is necessary. In order to ensure the neutrality of the review board, the convening authority shall ensure that none of its members was directly involved in the detainee's capture or transfer to the BTIF. The senior officer shall serve as the president of the review board. Another, non-voting officer shall serve as the recorder for the board proceedings.

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(U) The convening authority shall ensure that a judge advocate is available to advise the review board on legal and procedural matters.

(U) Review boards shall follow the procedures prescribed by AR 190-8, paragraph 1-6.e., as supplemented below:

- (U) The convening authority shall ensure that a personal representative, as described below, is appointed to assist each detainee before the review board.
- (U) Prior to each review board, appropriate U.S. military personnel shall conduct a reasonable investigation into any exculpatory information the detainee offers.
- (U) Review board proceedings shall follow a written procedural script in order to provide the detainee a meaningful opportunity to understand and participate in the proceedings (e.g., similar to the script used in Multi-National Force Review Committee proceedings in Iraq).
- (U) Members of the review board and the recorder shall be sworn. The recorder shall be sworn first by the president of the review board. The recorder will then administer the oath to all voting members of the review board, including the president.
- (U) A written record shall be made of the proceedings.
- (U) Proceedings shall be open except for deliberations and voting by the members and testimony or other matters that would compromise national or operational security if held in the open.
- (U) The detainee shall be advised of the purpose of the hearing, his or her opportunity to present information, and the consequences of the board's decision, at the beginning of the review board proceedings.
- (U) The detainee shall be allowed to attend all open sessions, subject to operational concerns, and will be provided with an interpreter if necessary.
- (U) The detainee shall be allowed to call witnesses if reasonably available and considered by the Board to have relevant testimony to offer, and to question those witnesses called by the review board, subject to any operational or national security concerns. Relevant witnesses serving with U.S. Forces shall not be considered reasonably available if, as determined by their commanders, their presence at the review board would affect combat or support operations. In these cases, written statements, preferably sworn, may be substituted and considered by the review board.

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The president of the review board shall determine whether witnesses not serving with U.S. Forces are reasonably available. At the discretion of the president of the review board, such relevant witnesses may testify by means of video teleconference, teleconference, or sworn written statement, if it would not be feasible for the witness to testify in person.

- (U) The detainee shall be allowed to testify or otherwise address the review board.
- (U) The detainee may not be compelled to testify before the review board.
- (U) The detainee shall be allowed to present reasonably available documentary information relevant to the determination of whether the detainee meets the criteria for internment and/or whether the detainee's continued internment is necessary.
- (U) Following the hearing of testimony and the review of documents and other information, the review board shall determine whether the detainee meets the criteria for internment, as defined above. The review board shall make this determination in closed session by majority vote. Preponderance of the evidence shall be the standard used in reaching the determination.
- (U) If the review board determines that the detainee does not meet the criteria for internment, the detainee shall be released from DoD custody as soon as practicable. If the review board determines that the detainee does meet the criteria for internment, the review board shall recommend an appropriate disposition to the convening authority. The review board shall make this recommendation in closed session by majority vote. Possible recommendations are as follows:
  - (U) Continued internment at the BTIF. Such a recommendation must include a determination not only that the detainee meets the criteria for internment, but also that continued internment is necessary to mitigate the threat the detainee poses.
  - (U) Transfer to Afghan authorities for criminal prosecution.
  - (U) Transfer to Afghan authorities for participation in a reconciliation program.
  - (U) Release without conditions.
  - (U) In the case of a non-Afghan and non-U.S. third-country national, possible recommendations may also include transfer to a third country for criminal prosecution, participation in a reconciliation program, or release.

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- (U) The review board's recommendations regarding disposition shall include an explanation of the board's assessment of the level of threat the detainee poses and the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society.
  - (U) In assessing threat, the review board shall further assess whether the detainee is an Enduring Security Threat, as defined in separate policy guidance regarding detainee threat assessment criteria and transfer and release authority at the BTIF. "Enduring Security Threat" is not a legal category, but rather an identification of the highest threat detainees for purposes of transfer and release determinations, as discussed below.
  - (U) In assessing potential for rehabilitation, reconciliation, and eventual reintegration into society, the review board shall consider, among other things, the detainee's behavior and participation in rehabilitation and reconciliation programs while detained by OEF forces. Information relevant to the assessment of potential for rehabilitation, reconciliation, and eventual reintegration into society may not be available for purposes of the detainee's initial review, but should be considered as it becomes available.
- (U) A written report of the review board determinations and recommendations shall be completed in each case.

(U) The recorder shall prepare the record of the review board within seven working days of the announcement of the board's decision. The record will then be forwarded to the first Staff Judge Advocate in the BTIF's chain of command.

(U) The record of every review board proceeding resulting in a determination that a detainee meets the criteria for internment shall be reviewed for legal sufficiency when the record is received by the office of the Staff Judge Advocate for the convening authority.

(U) Whenever possible, detainees shall receive notice of the results of their review boards, in writing and orally in a language the detainee understands, within 7 days after completion of the legal sufficiency review.

*Personal Representative (U)*

(U) The personal representative shall be a commissioned officer familiar with the detainee review procedures and authorized access to all reasonably available information (including classified information) relevant to the determination of whether the detainee meets the criteria for internment and whether the detainee's continued internment is necessary.

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(U) The personal representative shall be appointed not later than 30 days prior to the detainee's review board. The detainee may waive the appointment of a personal representative, unless the detainee is under 18 years of age, suffers from a known mental illness, or is determined by the convening authority to be otherwise incapable of understanding and participating meaningfully in the review process.

(U) The personal representative shall act in the best interests of the detainee. To that end, the personal representative shall assist the detainee in gathering and presenting the information reasonably available in the light most favorable to the detainee. The personal representative's good faith efforts on behalf of the detainee shall not adversely affect his or her status as a military officer (e.g., evaluations, promotions, future assignments).

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**Detainee Threat Assessment Criteria and Transfer and Release Authority at  
Bagram Theater Internment Facility (BTIF), Afghanistan (U)**

*Threat Criteria (U)*

(U) In assessing whether internment is necessary to mitigate the threat that detainees pose, as is required by separate policy guidance regarding detainee review procedures at the BTIF, detainee review boards shall consider whether detainees meet the criteria for classification as an Enduring Security Threat. Although detainees who are not classified as an Enduring Security Threat can still be detained at the BTIF, there are limitations on the approval authority of a transfer or release decision for those classified as an Enduring Security Threat (see "*Transfer and Release Authority*" paragraph below).

- ~~(S)~~ An "Enduring Security Threat" is an individual who, assessed by capability and commitment.

(b)(1), Sec. 1.4(a)

- ~~(S)~~ The following definitions apply when assessing a detainee's status as an Enduring Security Threat:

(b)(1), Sec. 1.4(a)

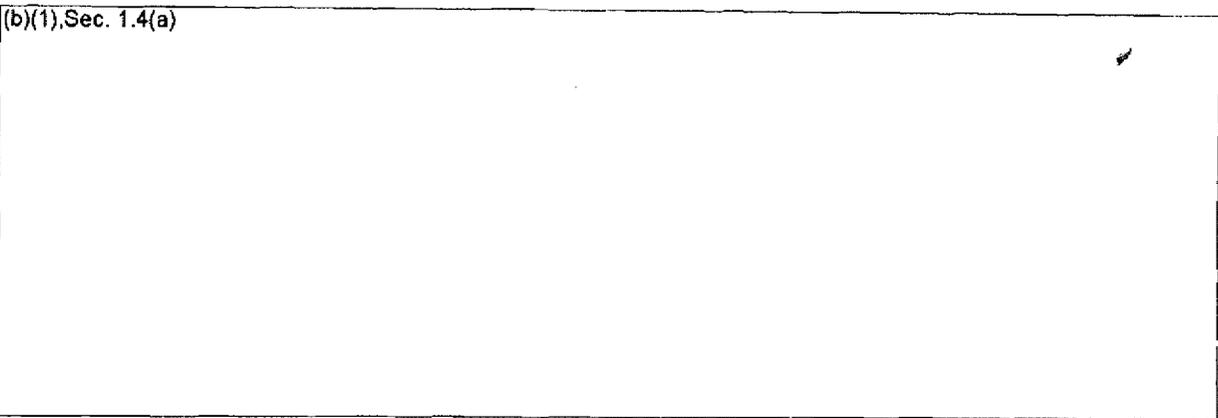
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Derived from: Multiple Sources  
Declassify on: June 30, 2019

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(b)(1), Sec. 1.4(a)



*Transfer and Release Authority (U)*

(U) Commander, USCENTCOM, or his designee, is the approval authority for the transfer or release of detainees in Afghanistan, including transfers of third-country nationals, under the control of OEF forces, to Afghan authorities for criminal prosecution or any other lawful purpose.

(U) Commander, USCENTCOM, or Deputy Commander, USCENTCOM, is the approval authority for the transfer or release of detainees classified as Enduring Security Threats. This authority may not be further delegated. USCENTCOM shall ensure that the Under Secretaries of Defense for Policy and Intelligence are notified, in writing, through the Director, Joint Staff, at least 7 days prior to the release of a detainee designated as an Enduring Security Threat.

(U) The return of third-country nationals to their countries of origin, and the transfer of third-country nationals to countries other than Afghanistan, require approval by the Deputy Secretary of Defense, or his designee. Recommendations for such transfers shall be transmitted to the Under Secretary of Defense for Policy, through the Director, Joint Staff. OSD will ensure that recommendations are coordinated with the Department of State prior to seeking approval from the Deputy Secretary of Defense.

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## Comparison of Detainee Process Models

	Article 5 (AR 190-8)	UECRB (existing)	UECRB (proposed)
<b>Purpose</b>	To determine whether person is EPW	To recommend combatant status and disposition	To determine whether detainee meets criteria for internment and recommend disposition
<b>Nature</b>	Non-adversarial	Non-adversarial	Non-adversarial
<b>Standard</b>	Article 4, GPW	Unlawful Enemy Combatant	Detainable Person, as defined in March 13, 2009 DOJ filing
<b>Possible Findings</b>	EPW, RP, innocent civilian, CI	<input type="checkbox"/> Status: HLEC, LLEC, NLEC <input type="checkbox"/> Disposition: GTMO, continued detention at the BTIF, transfer, release w/o conditions	<input type="checkbox"/> Status: does/does not meet criteria for internment, plus threat assessment <input type="checkbox"/> Disposition: continued internment at the BTIF, transfer for prosecution or reconciliation, release w/o conditions
<b>Timing</b>	Not specified	Capturing unit review within 72 hours; transfer request within 14 days; initial board within 75 days; periodic boards every 6 months	Capturing unit review within 72 hours (w/ JAG); transfer request within 14 days (w/ JAG); initial board within 60 days; periodic reviews every 6 months

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## Comparison of Detainee Process Models (cont.)

	Article 5 (AR 190-8)	UECRB (existing)	UECRB (proposed)
<b>Composition</b>	<input type="checkbox"/> 3 officers, at least 1 field grade <input type="checkbox"/> Senior officer is President <input type="checkbox"/> Non-voting recorder (preferably JAG)	<input type="checkbox"/> 3 officers, at least 1 field grade <input type="checkbox"/> Senior officer is President <input type="checkbox"/> Non-voting recorder	<input type="checkbox"/> 3 field grade officers authorized access to all relevant information <input type="checkbox"/> Senior officer is President <input type="checkbox"/> Non-voting recorder
<b>Legal Advisor</b>	No	No	Yes
<b>Personal Rep.</b>	No	No	Yes; authorized access to all relevant information
<b>Open/ Closed</b>	Open except for deliberation and voting, security; person whose status is to be determined allowed to attend open sessions	Closed; detainee allowed to appear at initial board	Open except for deliberation and voting, security; detainee allowed to attend open sessions
<b>Witnesses</b>	Yes, if reasonably available	No	Yes, if reasonably available
<b>Legal sufficiency review</b>	Yes	No	Yes

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Policy Coordination Sheet

**Subject:** Policy Guidance on Review Procedures and Transfer and Release Authority at Bagram Theater Internment Facility (BTIF), Afghanistan (U)  
**USP Number:** USP007105-09

<u>Title/Organization</u>	<u>Name</u>	<u>Date</u>
DASD, APSA/CEN	Mr. Sedney	May 18, 2009
GC	Mr. Johnson	May 21, 2009
USD(C)	Mr. Hale	May 22, 2009
Director, Joint Staff	LTG McChrystal	June 4, 2009

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# Exhibit E



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**DEPARTMENT OF DEFENSE**  
US FORCES-AFGHANISTAN  
KABUL, AFGHANISTAN  
APO AE 09356

DC-DO

Change One  
July 11 2010

**MEMORANDUM FOR US Military Forces Conducting Detention Operations in Afghanistan**

**SUBJECT: Detainee Review Board Policy Memorandum**

**1. References.**

a. Deputy Secretary of Defense, Memorandum for Commander, USCENTCOM, et. al., subj: Policy Guidance on Review Procedures and Transfer and Release Authority at Bagram Theater Internment Facility (BTIF), Afghanistan (U) (July 2, 2009).

b. Dept. of Army, Army Regulation 190-8—Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1 October 1997).

2. Purpose. This memorandum establishes policies and procedures within JTF-435 for Detainee Review Boards (DRBs). This update supersedes all previous command policies and guidance pertaining to the review of individual detentions at the Detention Facility in Parwan (DFIP), which is now the U.S. Theater Internment Facility in Afghanistan, having replaced the BTIF in December 2009. Nothing in this memorandum is intended to supersede or conflict with existing U.S. law and Department of Defense (DoD) policy. If such conflict does exist, the interpretation of U.S. law or policy will prevail.

**3. Applicability.**

a. This policy applies to all Operation Enduring Freedom (OEF) forces in Afghanistan who are responsible for providing support, administering, and or conducting Detainee Review Boards at the Detention Facility in Parwan (DFIP).

**4. Responsibilities.**

a. Commander, JTF 435 serves in a dual capacity as the United States Forces– Afghanistan (USFOR-A) Deputy Commander for Detainee Operations (DC-DO) and has been made responsible for U.S. OEF detainee operations in Afghanistan.

b. Commander, JTF 435 has designated Commander, Task Force Protector and successor Task Forces, as Commander of the DFIP. Commander, Task Force Protector is responsible for providing oversight of U.S. OEF theater-level detention operations and for providing the support to DRBs as specified in this memorandum.

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SUBJECT: Detainee Review Board Policy Memorandum

c. The JTF 435 Director of Legal Operations exercises control and oversight the Recorder Cell, Detainee Assistance Center (DAC), Detainee Assessments Branch (DAB), and DRB operations. The Director of Legal Operations is responsible to the Commander JTF 435 for processes, procedures, personnel, and policy for DRB execution and related efforts.

5. **Commander's Intent.** Detention operations are tactical missions with broad-ranging strategic effects. As we separate those who use violence and terror to achieve their aims from the rest of the Afghan population, we must do so in a lawful and humane manner. We have an obligation to treat all Afghan citizens and third-country nationals (TCNs) with dignity and respect. Fulfilling this obligation strengthens our partnership with both the Government of the Islamic Republic of Afghanistan (GIRoA) and the Afghan people. Failure to fulfill this obligation jeopardizes public support for both the Coalition and the GIRoA.

6. **Authority to Detain and Intern.** U.S. Forces operating under OEF authority are authorized to detain persons temporarily, consistent with the laws and customs of war (e.g., in self-defense or for force protection). Additionally, in accordance with Reference A, OEF forces are authorized to detain, and to intern at the DFIP, persons who meet the following criteria:

a. Persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks;

b. Persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

c. Continued internment is based upon a determination that the person detained meets the criteria detailed above and that internment is necessary to mitigate the threat the detainee poses, taking into account an assessment of the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society. If, at any point during the detainee review process, a person detained by OEF forces is determined by the Commander of a Field Detention Site or the Commander or Deputy Commander of JTF 435, not to meet the criteria detailed above or to no longer to require internment to mitigate their threat, the person shall be released from DoD custody as soon as practicable. The fact that a detainee may have intelligence value, by itself, is not a basis for internment.

7. **Detainee Review Board (DRB).** A board of officers shall review all reasonably available information to determine whether each person transferred to the DFIP meets the criteria for internment and, if so, whether the person's continued internment is necessary. These reviews shall occur within 60 days after the detainee's transfer to the DFIP and at least every six months thereafter, for the duration of the individual's detention. Each DRB shall review the detainee's continued detention *de novo*. Therefore, although the information presented in previous hearings will likely remain relevant to future boards, the specific findings and recommendations of prior DRBs (or its predecessors) or other targeting decisions shall not be treated as dispositive or binding on subsequent DRBs.

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8. **Convening Authority.** The Commander, JTF 435 has designated the Deputy Commander, JTF 435 to serve as the Convening Authority for detainee review boards.

9. **Detainee Review Board Composition.**

a. **Board Members.** The Convening Authority, JTF 435, will convene DRBs from candidates nominated by commands subordinate to USFOR-A and ISAF. DRBs will be composed of three (3) field grade officers. U.S. field grade officers of any USFOR-A or ISAF unit may serve on the board. Due to the unpredictability of air travel in Afghanistan, these members must live on the Bagram Air Field complex (BAF) or temporarily relocate to BAF during periods of service on the board.

(1) **Board Member Qualifications.** Detainee reviews present a challenging and strategically important mission for OEF. Board members, by age, experience, and temperament, must be able to exercise sound judgment and have a general understanding of combat operations and the current campaign plan to assess threats in theater and further the counterinsurgency mission through their participation on each board.

(2) Board members must serve willingly in this capacity.

(3) Board members must have at minimum a SECRET clearance, with TOP SECRET clearance preferred. Board members will have access to all reasonably available information (including classified information) relevant to the determinations of whether the detainee meets the criteria for internment and whether the detainee's continued internment is necessary.

(4) In order to ensure the neutrality of the review board, no board members will be among those directly involved in the detainee's capture or transfer to the DFIP. Board members will familiarize themselves with the case files prior to the Board. If a member was directly involved in the detainee's capture or transfer to the DFIP, the member will excuse himself from that hearing.

(5) **Scheduling and Substitutes.** The DRB Officer in Charge (OIC) will schedule DRB service dates for the members at least two weeks in advance, and the the board schedule will be posted by Task Force Protector or successor Task Forces. If a panel member is unavailable to serve for a certain DRB as scheduled, that member is responsible for providing a substitute from the other appointed members, and then informing the Board President and the DRB OIC of the change. If the member unable to serve cannot find a substitute, he will notify the Board President and the DRB OIC no less than 72 hours prior to the board.

(6) A board member who will be on rest and recuperation leave (R&R), temporary duty (TDY), or other extended absence must submit dates of absences to JTF 435 Legal Operations to ensure that board schedule is not interrupted.

b. **Board President.** The senior officer shall serve as the president of the DRB.

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c. **Board Legal Advisor.** The Board Legal Advisor is a Judge Advocate assigned to the Office of the Staff Judge Advocate who will be available during the board to advise on legal and procedural matters, and who will review the findings of the board and submit a legal sufficiency review to the Convening Authority, except when a board does not find the criteria for continued detention is met, in which case the Legal Advisor shall certify that the board and its findings were reached in accordance with Reference (a).

d. **Recorder.** A non-voting officer, preferably an officer in the Judge Advocate General Corps, shall serve as the Recorder for DRB proceedings. The Recorder is neutral and does not represent or advocate on behalf of either the government or the detainee. The Recorder presents the detainee case file to assist the Board in its functions. The Recorder is obligated to present all relevant evidence to the Board that is reasonably available, including evidence tending to show that internment criteria are or are not met, exculpatory evidence, and evidence that bears on the detainee's potential for rehabilitation or reintegration. The Recorder is responsible for administrative preparation and support for the DRB and will perform the following duties:

(1) Give timely notice of the time and place of the DRB to board members, witnesses, the legal advisor, personal representative, capturing units, interpreters, and DFIP operations.

(2) Coordinate with the Detainee Assistance Center (DAC) to arrange for witnesses who are to testify in person or by videoteleconference (VTC) or phone call.

(3) Provide an unclassified and classified file to the board and personal representative containing all reasonably available documentary evidence/information relevant to the detainee's internment.

(4) Administer necessary oaths.

(5) Present unclassified and classified information.

(6) Provide the script for the proceedings. The script may not be modified without the permission of JTF 435 Director, Legal Operations. Submit suggested changes via the DRB OIC.

(7) Arrange for the necessary personnel (reporter and interpreter) and equipment.

(8) Prepare the DRB record within 7 days and forward it to Legal Advisor.

e. **Personal Representative (PR).** The personal representative shall be a commissioned officer familiar with the detainee review procedures and authorized access to all reasonably available information (including classified information) relevant to the determination of whether the detainee meets the criteria for internment and whether the detainee's continued internment is necessary.

(1) The personal representative shall be appointed not later than 30 days prior to the detainee's review board and preferably soon enough to be present during the initial detainee notification of the basis for internment, which notification is required by Reference (a) within 14

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days after the detainee's transfer to the DFIP. The detainee may waive the appointment of a personal representative, unless the detainee is under 18 years of age, suffers from a known mental illness, or is determined by the Convening Authority to be otherwise incapable of understanding and participating meaningfully in the review process.

(2) The personal representative shall act and advocate in the best interests of the detainee. To that end, the personal representative shall assist the detainee in gathering and presenting information that is reasonably available in the light most favorable to the detainee. The personal representative's good faith efforts on behalf of the detainee shall not be permitted to adversely affect his or her status as a military officer (e.g. evaluations, promotions, future assignments).

(3) The personal representative will explain orally and in writing in a language the detainee understands that he is not an attorney but is bound by a non-disclosure policy not to disclose information detrimental to the detainee's case that was obtained through communications between the detainee and the personal representative (himself). The nondisclosure policy also applies to adverse information discovered by the personal representative's independent investigatory efforts. The exceptions to this nondisclosure policy are disclosures necessary to prevent property damage, serious bodily harm or death. A PR is under an obligation to disclose detainee conduct that is fraudulent, and may refuse to offer evidence that he firmly believes is false, so long as such belief is ground in an objectively reasonable assessment of the facts.

(4) The personal representative may not reveal any classified information to the detainee at any time.

(5) The personal representative is responsible for coordinating the appearance of witnesses and acquiring any reasonably available evidence requested by the detainee. Requests for support will be submitted, using the Personal Representative Request Form, at least 21 days in advance and will be published via a USFOR-A fragmentary order (FRAGO) that is prepared by Task Force Protector at least 14 days in advance of the detainee's hearing. Personal representatives may prepare and submit intelligence Requests for Information (RFIs) through the Task Force Protector S2. The personal representative shall also review the DFIP progress report reflecting detainee's participation in programs and detainee's disciplinary record. Requests for support not meeting these timelines but deemed critical to a full and fair hearing will be forwarded to the Director of Legal Operations for decision.

(6) The personal representative shall meet with the detainee at least twice prior to the day of the detainee's hearing and shall not decline any reasonable request for a meeting submitted by the detainee.

(7) In the event that the personal representative is assigned a detainee who has been previously assigned another personal representative, the new representative will contact and consult with the prior representative regarding the detainee's case, so long as the prior representative is reasonably available for such consultation. Whenever feasible the same personal representative should represent the detainee at a subsequent DRB hearing.

f. Linguists. CAT II certified linguists will be available for all detainees and used as required.

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**g. Reporter.** A certified court reporter will record the proceedings and make a summarized record within 7 days of the board. A copy of the record will be placed in each detainee's file.

**10. Training:**

**a.** Each Recorder and Personal Representative will complete a 35-hour Detainee Review Board Training Course prepared by and primarily taught by Professors from the US Army Judge Advocate General's Legal Center and School. Each PR and Recorder will also complete basic and refresher training on a weekly basis.

**b.** The JTF 435 Legal Directorate shall train Board Members on their duties and responsibilities prior to sitting as a member of the DRB. When available, Board Members can complete the 35-hour DRB course to satisfy the training requirements. Attendance at Counter Insurgency (COIN) Academy Training should be accommodated whenever practicable.

**11. Initial Detainee Notification.** Each detainee transferred to the DFIP shall receive timely notice of the basis for his internment, including an unclassified summary of the specific facts that support the basis for his internment in accordance with reference (a). Each detainee shall also receive a timely and adequate explanation of the DRB procedures, including, at a minimum: the fact that the detainee will have an opportunity to present information and evidence (including testimony by family members and other reasonably available witnesses and the means of procuring such testimony), to a board of officers convened to determine whether the detainee meets the criteria for internment; the projected dates of the detainee's initial and periodic review boards; and the fact that a personal representative will be appointed to assist the detainee before the review boards. Detainees shall receive such notice and explanation, in writing and orally in a language the detainee understands, within 14 days after the detainee's transfer to the DFIP whenever feasible.

**12. Detainee Review Board Procedures.** Detainee Review Boards shall follow the procedures delineated below:

**a.** The Convening Authority shall appoint a Personal Representative, as described above, to assist each detainee before the review board.

**b.** Prior to each review board, the DAC, assisted as necessary by the DRB Recorder Cell and the operational commands, shall conduct a reasonable investigation into any exculpatory information the detainee offers.

**c.** The DRB shall follow a written procedural script in order to provide the detainee a meaningful opportunity to understand and participate in the proceeding. The script shall be translated in a language the detainee understands and the interpreter will use words that the detainee understands.

**d.** Members of the DRB and the Recorder shall be sworn. The Recorder shall be sworn first by the president of the review board. The recorder will then administer the oath to all voting members of the board, including the president.

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- e. A written record shall be made of the proceedings.
- f. Proceedings shall be open except for deliberations and voting by the members and testimony or other matters that would compromise national or operational security if held in the open.
- g. The detainee shall be advised of the purpose of the hearing, his or her opportunity to present information, and the consequences of the board's decision, at the beginning of the review board proceedings.
- h. The detainee shall be allowed to attend all open sessions, subject to operational concerns, and will be provided with an interpreter if necessary. The detainee will not be present at the classified portions of the board, but the personal representative may be present.
- i. The detainee shall be allowed to call witnesses if reasonably available and considered by the Board to have relevant, non-cumulative testimony to offer, and to question, in person or via his personal representative, those witnesses called by the review board, subject to any operational or national security concerns. The detainee shall also be allowed to present reasonably available documentary information relevant to the determination of whether the detainee meets the criteria for internment and/or whether the detainee's continued internment is necessary.
  - (1) Relevant witnesses serving with the U.S. Forces shall not be considered reasonably available if, as determined by their commanders, their presence at the review board would negatively affect combat or support operations. In these cases, written statements, preferably sworn, may be submitted and considered by the review board. The president of the board shall determine whether witnesses not serving with U.S. Forces are reasonably available. At the discretion of the president of the board, such relevant witnesses may testify by means of video teleconference, teleconference, or sworn written statement, if it would not be feasible for the witness to testify in person. In order to provide complete and credible information to the DRB live witnesses are preferred where possible; VTC is the next option to be considered, then telephone or video tape, sworn statements, and unsworn statements.
  - (2) Presentation of information. The rules of evidence for court-martial and other judicial proceedings are not applicable before the DRB. However, reasonable restrictions concerning relevancy and competency of evidence are applicable.
  - (3) Relevant information. Relevant information means information having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the information.
  - (4) Excluded Information. No statement obtained by torture, or through cruel, inhuman, or degrading treatment will be considered by a DRB. Statements obtained through such coercive conduct will not be considered by a DRB, except against a person accused of torture as evidence that the statement was made.

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**SUBJECT: Detainee Review Board Policy Memorandum**

(5) **Witnesses.** Witnesses may testify during the board hearing if their testimony is relevant and not cumulative. Cumulative testimony is that testimony which goes to prove the same point which has been established by other information or evidence. Testimony may be live, via telephone or VTC, in writing as a sworn or unsworn statement, or by any other means deemed appropriate by the board president to assist the board make an appropriate findings and recommendations in a particular case.

(6) **Hearsay.** Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered to prove the truth of the matter asserted. The Detainee Review Board may properly receive and consider information identified as hearsay, including but not limited to, classified/intelligence reports, threat assessments, detainee transfer requests, targeting packages, disciplinary reports, observation reports, photographs, video and sound recordings, sworn/unsworn statements and character letters. As with any other type of evidence or information, the board should use its sound judgment to determine whether the information provided is trustworthy, and the board retains the discretion to determine the appropriate weight to be given to any information presented.

j. The detainee shall be allowed to testify or otherwise address the board.

k. The detainee may not be compelled to testify before the board.

l. **Unit Input and Attendance.** Capturing units, battle space owners (BSOs), and any other interested staff elements and commands may attend the DRB. Units or staff elements with substantive information about a detainee or the current battle-space conditions that may impact a Board's determination on release are encouraged to coordinate in advance with JTF 435 and the Recorder to present this information to the board, in writing, via VTC, conference call, or in person.

m. **Guard Force Input.** The commander of the Theater Internment Facility may provide input, written, in person, or via phone or VTC, related to the detainee's behavior in the DFIP and participation in work and education programs. The Theater Internment Facility Progress Report will be used as the written form of this information.

n. **Findings and Recommendations.** Following the hearing of testimony and the review of documents and other information, the DRB shall determine whether the detainee meets the criteria for internment, as defined above. The Board shall make this determination in closed session by majority vote with each member having an equal vote. The Board shall use the preponderance of the evidence standard in reaching its determination. Preponderance of the evidence means evidence that, after consideration of all evidence presented, tends to make one conclusion more credible and probable than any other conclusion. This preponderance is based upon the more convincing evidence and its probable truth or accuracy, and not on the amount of evidence. Preponderance of the evidence means for example that you are persuaded by the evidence presented at the board hearing that it is more probable than not that a detainee meets the criteria for detention. Where the evidence equally supports two or more opposing conclusions on whether the criteria for detention is met, the Board must deem that evidence insufficient and vote that the detainee does not meet internment criteria.

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SUBJECT: Detainee Review Board Policy Memorandum

(1) DRB Recommendation Memorandum. Following each DRB session, the DRB Recorder shall produce a memorandum, stating: (1) whether the Board found that the detainee meets the criteria for continued internment; and, (2) if so, whether or not continued internment is necessary to mitigate the threat posed by the detainee. If the answer to the first question is "no," the detainee will be released as soon as practicable. If the answer to the first question is "yes," and the answer to the second questions is also "yes," then the Board will recommend the detainee for continued internment. If the answer to the first question is "yes," but the answer to the second questions is "no," the Board will further recommend whether the detainee should be released, transferred to GIRoA for reintegration or prosecution, or transferred to a third country.

(2). If the review board determines that the detainee does not meet the criteria for internment, the detainee shall be released from DoD custody as soon as practicable, normally within 30 days of the board, without any further action necessary.

(3). If the review board determines that the detainee does meet the criteria for internment, the board shall recommend an appropriate disposition to the Convening Authority. The board shall make this recommendation in closed session by majority vote. If two-third of the board determines that the detainee meets the criteria for continued internment, but there is a not a majority recommendation for disposition, the board will further deliberate on the recommendation for disposition only. The initial finding of the board as to whether or not the detainee meets the criteria for continued detention shall not be re-visited as part of the further discussion on recommendation for disposition. Possible recommendations are as follows:

(a) Continued internment at the DFIP. Such recommendation must include a determination not only that the detainee meets the criteria for internment, but also that continued internment is necessary to mitigate the threat the detainee poses.

(b) Transfer to Afghan authorities for criminal prosecution.

(c) Transfer to Afghan authorities for participation in a reconciliation program.

(d) Release without conditions.

(e) In the case of a non-Afghan and non-U.S. third-country national, possible recommendations may also include transfer to a third country for criminal prosecution, participation in a reconciliation program, or release.

(4) The board's recommendations regarding disposition shall include an explanation of the board's assessment of the level of threat the detainee poses and the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society.

o. Enduring Security Threat Assessment. In assessing threat, the review board shall further assess whether the detainee is an Enduring Security Threat (EST), as defined in the Office of the Deputy Secretary of Defense Memorandum, Policy Guidance on Review Procedures and Transfer and Release Authority at Bagram Theater Internment Facility (BTIF), Afghanistan (U), dated 2 July 2009. "Enduring Security Threat" is not a legal category, but rather an identification of the highest threat detainees for purposes of transfer and release determinations. The

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**SUBJECT: Detainee Review Board Policy Memorandum**

assessment that a detainee is an Enduring Security Threat raises the release authority outside of theater IAW CENTCOM policy.

(1) Board assessments of detainees as either Enduring Security Threats or not are not binding on the approval authority. Such assessments are recommendations.

(2) If a detainee was previously assessed as an EST by the Convening Authority, that determination may only be changed by the Convening Authority following a subsequent board. The Convening Authority shall notify CENTCOM of changes in status.

(3) In assessing potential for rehabilitation, reconciliation, and eventual reintegration into society, the board shall consider, among other things, the detainee's behavior and participation in the rehabilitation and reconciliation programs while detained by OEF forces, and whether the detainee's family and local community have demonstrated a commitment to the peaceful reintegration of the detainee. Information relevant to the assessment of potential for rehabilitation, reconciliation, and eventual reintegration into society may not be available for purposes of the detainee's initial review, but should be considered as it becomes available.

p. A written report of the review board determinations and recommendations shall be completed in each case. The findings and recommendations written report / worksheet may be modified by the DRB OIC as long as modifications are consistent with law and policy. The DRB OIC will notify the Director of Legal Operations and the Staff Judge Advocate prior to making any modifications to the findings and recommendations worksheet.

(1) Processing DRB Findings and Recommendations.

(a) The recorder shall prepare the record of the review board within seven working days of the announcement of the board's decision. The record will then be forwarded to the Board Legal Advisor who is assigned to the Staff Judge Advocate.

(b) If the board finds that the detainee does not meet the criteria for continued detention, the Legal Advisor shall certify to the Convening Authority that the board and its findings were reached in accordance with reference (a).

(c) The Legal Advisor shall provide a legal sufficiency review where the DRB determines the detainee should remain in detention. The findings and recommendations, as well as legal sufficiency review, shall be forwarded to the Convening Authority for final action.

(d) Final action on all DRB proceedings, including preparation of legal sufficiency review, shall occur within 14 days from the date of each board. Commander, JTF 435, or his designee, will review the DRB findings and recommendations and take appropriate action.

(2) The detainee will be notified, in writing and verbally in a language he or she clearly understands, within 14 days of the approval authority's decision concerning his status classification.

(3) Battle Space Owners. Battle Space Owners will be notified of all detainees approved

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**SUBJECT: Detainee Review Board Policy Memorandum**

for release.

**13. Authority to Release or Transfer.**

a. The Commander JTF 435, or his designee, is the approval authority for the transfer or release of detainees in Afghanistan, including transfers of third-country nationals, under the control of OEF Forces, to Afghan authorities for criminal prosecution or any other lawful purpose.

b. Commander, USCENTCOM, or Deputy Commander, USCENTCOM is the approval authority for the transfer or release of detainees classified as Enduring Security Threats.

c. The return of Third Country Nationals (TCNs) to their countries of origin and the transfer of TCNs to countries other than Afghanistan requires approval by the Deputy Secretary of Defense or his designee.

d. Any other transfers not covered above, must be requested through CENTCOM.

**14. Battle Space Owner (BSO) Support to the DRB. BSOs shall:**

a. Familiarize pertinent members of their command with this memorandum, all references and enclosures, and provide training to units to comply with requirements set forth in this memorandum in order to ensure that units accurately assess threats of detainees, provide sufficient evidence for continued internment or prosecution of the irreconcilable threats, and provide for reintegration of those who are no longer a threat.

b. Include as much evidence in the Detainee Transfer Request (DTR) as possible to maximize options for prosecution or continued internment. Classify evidence at the lowest appropriate level. See para. 14-15, Base Detainee Operations Memorandum.

c. Review the published list of DRB detainees posted on the JTF 435 portal to identify detainees of interest who will be appearing before the board in order to provide relevant information or evidence to the Recorder.

d. Reply to published requests for information from personal representatives (PRs) in a timely manner in order to provide relevant information to the PR prior to each board to support detention and reintegration programs. Make witnesses available via VTC, phone call, or sworn statement.

e. Provide liaisons or unit representation at the DRB, if desired, in order to assist the board in determining whether a detainee is a continuing threat and should remain interned.

f. Request strategic releases (e.g., releases requested by the BSO to further counterinsurgency efforts in their areas of operations) from JTF 435. Strategic releases will be reviewed by the Operations Officer, Theater Intelligence Group, Legal Operations

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**SUBJECT: Detainee Review Board Policy Memorandum**

other applicable staff and directorates, JTF 435 Staff Judge Advocate, and the Deputy Commander before being reviewed by Commander JTF 435.

g. Review the published list of detainees found not to meet internment criteria at the JTF 435 web site and coordinate for timely pickup and release to adhere to DoD timelines.

h. Battle Space Owners are not responsible for transporting any witnesses who may want to appear in person before the DRB, but will make all reasonable arrangements to provide them:

- (1) access to a VTC,
- (2) access to a phone call,
- (3) digital transmission of sworn statements or video taped statements in a timely manner.

i. The Detainee Assistance Center will provide travel directions and assist with access to post for any witnesses who wish to appear in person, in conjunction with Task Force Wolverine and its successor Base Operations units.

j. Battle Space Owner units are responsible for all logistical and transportation support in the transfer and release of detainees, in accordance with published release FRAGOs. The preference is for released detainees to be escorted and released as close as practicable to their homes. Units should be prepared for travel delays and inclement weather. In the event of a travel delay, a released detainee should be escorted as if he were an unbadged local national worker on post. He should be provided with food, water, latrine facilities, and a place to sit and sleep protected from the weather while awaiting transportation. Escorts must ensure reciprocal security for both the detainee and the US force personnel during the transition period until final release.

15. Task Force Protector and Successor Commands Support to DRB Operations. Provide direct support to the DRB, including but not limited to, de-conflicting and publishing DRB schedules; coordinating and executing the movement of detainees to facilitate the process; coordinating for BSO and LNO visits; providing DFIP input to the DRB; processing RFIs from all DRB personnel; providing access badging for members and approved visitors to the DRB; sourcing and managing linguist assets for the DRB hearing and preparation; sourcing and maintaining equipment (VTC, automation, recording equipment, computers, etc) necessary to conduct DRB hearings; providing life support, accountability, force protection, and administrative and logistical support for all attachments; and providing a company grade officer to serve as the DRB Executive Officer for administrative, logistic, and life cycle support.

16. Task Force Wolverine (Bagram Base Ops). Provide access in coordination with JTF 435 Legal Operations for Afghan witnesses who testify before the DRB in accordance with base access policies and procedures.

17. Support from the Theater Intelligence Group. J2, in conjunction with the Theater Interrogation Group (TIG)

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SUBJECT: Detainee Review Board Policy Memorandum

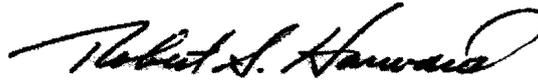
- (1) Review Enduring Security Threat criteria and transfer criteria in submitted DTRs, in conjunction with TF Protector, in order to identify and assess threats.
  - (2) Review DRB lists, input to the DRB packets, and files of those detainees recommended for transfer and strategic releases and make appropriate recommendations.
  - (3) Review the files of those detainees recommended for transfer and strategic releases and make appropriate recommendations.
18. Support from the Staff Judge Advocate. Provide legal and procedural advice to the DRB and provide the Commander or his designee a legal opinion on the legal sufficiency of DRB proceedings, findings, and recommendations.
  19. Support from the PAO. Provide all required public affairs planning, support, and guidance on detainee operations IAE published Public Affairs Guidance from OSD, CENTCOM, and USFOR-A.
  20. Engagement and Outreach Cell. Provide all required public diplomacy planning, support, and guidance on released detainee reconciliation and reintegration.
  21. Abuse Prevention and Reporting. TF Protector serves as the staff proponent for JTF-435 for abuse prevention and reporting. ***All detainees, regardless of capturing unit or place of detention, will be treated humanely at all times, in accordance with applicable US law and DoD regulations, policies, and directives.*** All JTF-435 personnel who witness, suspect, or become aware of any possible, suspected, or alleged act of detainee abuse, whether by US, Coalition, or ANSF personnel, shall take any and all necessary steps to immediately report the allegation through their chain of command. All allegations of detainee abuse or mistreatment will be investigated. The DRB Legal Advisor will report any allegations arising during a DRB hearing of abuse or mistreatment to the TF Protector S3 and the TF Protector CJA for processing. The TF Protector CJA will immediately report such allegations to the JTF 435 SJA. If a Personal Representative is made aware of an allegation of detainee abuse, the Personal Representative will report the allegation to the TF Protector S3 and the TF Protector CJA. TF Protector CJA will assist the TF Protector S3 in processing the inquiries, including forwarding all such allegations to the JTF 435 CHOPS and SJA for action.

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**SUBJECT: Detainee Review Board Policy Memorandum**

22. The point of contact for interpretation of this memorandum as well as any situation not covered herein is the JTF 435, Legal Operations Director at DSN: 318-431-6170. The JTF 435 SJA shall be responsible for interpretation of legal sufficiency and requirements concerning DRBs.



**ROBERT S. HARWARD**  
Vice Admiral, U.S. Navy  
Deputy Commander, Detention Operations

**Enclosure**

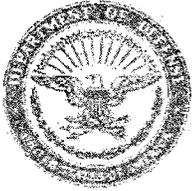
Office of the Deputy Secretary of Defense  
Memorandum, Policy Guidance on Review  
Procedures and Transfer and Release Authority  
at Bagram Theater Internment Facility  
Afghanistan (U), dated 2 July 2009

CF:

Commander, USCENTCOM  
Commander, USFOR-A  
Commander, CJTF-82  
Commander, CSTC-A  
Commander, CFSOCC-A  
Commander, Task Force Protector  
Commander, Task Force Paladin  
Commander, TF Cyclone  
Commander, Combined Joint Special Operations Task Force

# Exhibit F

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REPLY TO  
ATTENTION OF:

DEPARTMENT OF DEFENSE  
DEPUTY COMMANDER - DETAINEE OPERATIONS  
JOINT TASK FORCE 435  
APO AE 09354



JTF-435-LO

JUL 1 2010

MEMORANDUM FOR Commander, Task Force Protector, Bagram Airfield, Afghanistan, APO AE 09354

SUBJECT: 2 June 2010 Detainee Review Board (DRB) Recommendation for Continued Internment Approval for ISN 3806

1. I reviewed the findings and recommendation of the DRB conducted on 2 June 2010 concerning the internment of Detainee ISN 3806. By a vote of 3 to 0, the board members found that internment is necessary to mitigate the threat ISN 3806 poses. After consideration, I approve the DRB's finding and direct that ISN 3806 continue to be detained at the Detention Facility in Parwan.
2. The DRB's recommendation that ISN 3806 not be assessed as an Enduring Security Threat is approved
3. The point of contact for this memorandum is CAPT [REDACTED (b)(3), (b)(6)], Director of Legal Operations, JTF 435, at DSN [REDACTED (b)(2)].

MARK S. MARTINS  
Brigadier General, U.S. Army  
Deputy Commander

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BAGRAM / CENTCOM /001501

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REPLY TO  
ATTENTION OF:

DEPARTMENT OF DEFENSE  
DEPUTY COMMANDER – DETAINEE OPERATIONS  
US FORCES AFGHANISTAN  
JOINT TASK FORCE 435  
APO AE 09356



JTF-435-LO

2 June 2010

MEMORANDUM FOR Deputy Commander, Joint Task Force 435, Kabul, Afghanistan, APO  
AE 09356

SUBJECT: 2 June 2010 Detainee Review Board Legal Review: Amin Shir (ISN 3806)

1. I reviewed Enclosure 1, the findings and recommendations of Amin Shir's (ISN 3806) 2 June 2010 Detainee Review Board (DRB), and find them to be legally sufficient.
2. The DRB found that Amin Shir (ISN 3806) meets the criteria for internment.
3. The DRB recommends that the continued internment of Amin Shir (ISN 3806) is necessary to mitigate the threat he poses.
4. The DRB recommends that Amin Shir (ISN 3806) should be considered for Reintegration programs at the Detention Facility in Parwan.
5. The DRB assessed Amin Shir (ISN 3806) not to be an Enduring Security Threat.
6. The point of contact for this review is MAJ [redacted (b)(3), (b)(6)], Joint Task Force 435 at DSN [redacted (b)(2)] or [redacted (b)(2), (b)(3), (b)(6)].

3 Encls.

1. DRB Recommendation Memorandum
2. DRB Voting Packet
3. Summarized Testimony with Exhibits

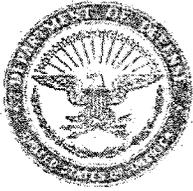
[redacted (b)(3), (b)(6)]

MAJ, JA  
Legal Advisor, Detainee Review Board

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BAGRAM / CENTCOM /001502

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REPLY TO  
ATTENTION OF:

DEPARTMENT OF DEFENSE  
DEPUTY COMMANDER – DETAINEE OPERATIONS  
US FORCES AFGHANISTAN  
JOINT TASK FORCE 435  
APO AE 09356



JTF-435-LO

2 June 2010

MEMORANDUM FOR Deputy Commander, Joint Task Force 435, Kabul, Afghanistan, APO  
AE 09356

SUBJECT: 2 June 2010 Detainee Review Board Recommendation for the Continued Internment  
of Amin Shir (ISN 3806)

1. The Detainee Review Board (DRB) met on 2 June 2010 and made the following findings and  
recommendations concerning the internment of Amin Shir (ISN 3806):

- a. Amin Shir (ISN 3806) meets the criteria for internment.
- b. The continued internment of Amin Shir (ISN 3806) is necessary to mitigate the threat  
he poses.
- c. Amin Shir (ISN 3806) should be considered for Reintegration programs within the  
Detention Facility in Parwan.
- d. Amin Shir (ISN 3806) is not Enduring Security Threat.

2. In arriving at its recommendation, the DRB found significant evidence, including an  
explosive residue test confirming exposure to explosive materials (TNT), links Amin Shir (ISN  
3806) to the IED attack of 28 October 2008. In addition, Amin Shir (ISN 3806) testified at his 2  
June 2010 DRB to having heard the IED explosion, but that he did not see the explosion.  
Nonetheless, he was able describe the explosion in detail – and a photograph of Amin Shir (ISN  
3806) was found within approximately 25 meters of the IED blast site. The DRB doubted Amin  
Shir's (ISN 3806) credibility and found him to be deceptive in his statements and answers. For  
example, he provided at least three different reasons to explain the explosive materials on his  
hands at the time of his 28 October 2008 capture; however, none of his explanations seemed  
credible. In addition, the number of disciplinary reports cited in Amin Shir's (ISN 3806) Theater  
Internment Facility Progress Report suggests that he continues to pose a threat to US and  
Coalition Forces. The DRB assessed Amin Shir (ISN 3806) to be a Provincial Threat to the  
Government of the Islamic Republic of Afghanistan.

3. (b)(1)1.4a, (b)(1)1.4c apprehended and detained Amin Shir (ISN  
3806) near the village of Urmul, Kamesh District, Nuristan Province outside Camp Keating  
where Coalition Forces were ambushed with small arms fire. An IED detonated on a foot bridge

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BAGRAM / CENTCOM /001503

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JTF-435-LO

SUBJECT: 2 June 2010 Detainee Review Board Recommendation for the Continued Internment of Amin Shir (ISN 3806)

severely injuring two US service members – one US service member subsequently died from his injuries; the other US service member was unable to return to duty because of the extent of his injuries. [REDACTED] discovered a photo of Amin Shir (ISN 3806) approximately 25 meters from the scene of the IED. [REDACTED]

Amin Shir (ISN 3806) [REDACTED]

(b)(1) 1.4a, (b)(1) 1.4c subsequent evidence exploitation implicated Amin Shir (ISN 3806) as the triggerman for the IED. An explosive residue test disclosed Amin Shir's (ISN 3806) hands to have been exposed to TNT at point of capture. No weapons or IED-related components were recovered at the time of Amin Shir's (ISN 3806) capture.

4. The capture and subsequent detention of Amin Shir (ISN 3806) stems solely from his suspected involvement in the 28 October 2008 IED attack that injured two US service members. While there is no HUMINT reporting or sensitive intelligence attributable to Amin Shir (ISN 3806), the circumstantial evidence recovered at the scene of the 28 October 2008 IED attack proved sufficient to detain him.

5. Under earlier interrogation and during his 2 June 2010 DRB, Amin Shir (ISN 3806) claimed to have been staying at the hotel at the end of the Paprowk Valley, Kamesh District, Nuristan Province in order to obtain an identification card. He claims to have traveled to Urmul to register to vote. He believes Coalition Forces may have rubbed explosive materials (TNT) on his hands thereby causing the positive test results at the time of his [REDACTED]. Amin Shir (ISN 3806) claimed to have inadvertently dropped a photograph of himself near to the scene of the 28 October 2008 IED blast as he was taking money out of the breast pocket of his shirt to pay for a pair of new shoes.

6. In making its recommendation the DRB considered the Recorder's unclassified and classified exhibits -- including a 28 May 2010 Behavioral Science Consultation Team (BSCT) evaluation assessing Amin Shir (ISN 3806) with a recidivism risk of [REDACTED] and a COIN amenability rating of [REDACTED]. (b)(1) 1.4a, (b)(1) 1.4c The 15 April 2010 Detainee Criminal Investigation Detachment Report of Investigation, and the Theater Internment Facility Progress Report. The Personal Representative submitted copies of Amin Shir's (ISN 3806) Initial Interview Checklist and Notification Worksheet. The Personal Representative introduced a February 2010 letter signed by 15 villagers who expressed their support of Amin Shir (ISN 3806). A second letter was also introduced from the Independent Administration of Local Organizations, Nuristan Province. The DRB considered also Amin Shir's (ISN 3806) testimony, as well as his responses to questions posed to him by all parties to the DRB.

7. No witnesses were called during Amin Shir's (ISN 3806) 2 June 2010 DRB.

8. In determining whether continued internment is necessary to mitigate the threat Amin Shir (ISN 3806) may pose, the DRB assessed his level of threat and weighed, among other things, his

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JTF-435-LO

SUBJECT: 2 June 2010 Detainee Review Board Recommendation for the Continued Internment of Amin Shir (ISN 3806)

potential for rehabilitation, reconciliation, and eventual reintegration into society. The DRB considered also Amin Shir's (ISN 3806) 28 May 2010 BSCT evaluation assessing him with a recidivism risk of 4.0 and a COIN amenability rating of 4.0. In sum, based upon the evidence and testimony presented during his 2 June 2010 DRB, the continued internment of Amin Shir (ISN 3806) is necessary to mitigate the threat he poses.

9. The point of contact for this review is MAJ (b)(3), (b)(6), Joint Task Force 435 at DSN (b)(2) or (b)(2), (b)(3), (b)(6)

(b)(3), (b)(6)

2 Encls.

1. DRB Voting Packet
2. Summarized Testimony with Exhibits

MAJ, IN  
President, Detainee Review Board

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(U//FOUO)

-003806

Amin ((S//IR)) s/o

POC:

DOC:

(S//REL USA, CGTF, ISAF, NATO) Capturing Unit:

(b)(1)1.4a, (b)(1)1.4c

(U//FOUO) POR Paprowk, Nuristan, Afghanistan Tribe/SubTribe Nuristani Primary Language Nuristani Interrogations/IRs

**Circumstances of Capture:** (S//NF) Amin Shir [redacted] outside of Camp Keating when [redacted] conducting a foot patrol. CF were ambushed by ACM with [redacted] and an IED on a foot bridge. The explosion from the IED resulted in 2 US service members severely injured (1 service member subsequently died from his injuries and the other was unable to return to duty due to the injuries he sustained). After discovering a photo of the detainee at the scene of the IED, [redacted] detained Amin Shir due to the PID made by his photo. [redacted] took custody of Amin Shir after more evidence was collected that implicated Amin Shir as the triggerman for the IED. The hotel in which Amin Shir was captured in was less than 100 meters away from the IED site.

**Internment Criteria:** (U//FOUO) Was a part of, or substantially supported, Taliban forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities in aid of such enemy armed forces.

**SSE:**

- (U//FOUO) Items found on the Detainee: voter registration card, photos, pocket litter, over 11,530 Pakistani Rupies.
- (U//FOUO) Items found 25 meters away from the IED site that are attributed to the detainee: photo of the detainee.

**Exploitation:**

- (U//FOUO) US sworn statement states that Amin Shir tested positive for TNT after an x-spray test was conducted

**Reporting:** (The reporting is on the hotel where Amin Shir was staying and where TB Commander in the area who uses the hotel as his safe house)

- (S//REL TO USA, NLD, PVEY) [redacted] J. Corroborating 28 October 2008 IED attack outside COP Keating, INS leader Mullah Abdul Rahman plans to make more bombs like the one used against CF on the bridge outside COP Keating. [redacted] stated that [redacted] is the leader of the insurgents based out of the hotel at the end of the Paprowk Valley, Kamesh District, Nuristan Province. He owns a dark colored pickup truck that he parks by the hotel. He is the only one of the insurgents who owns a truck. The hotel is used strictly by INS, no civilians enter the hotel. When [redacted] is not there, his deputy [redacted] takes over. [redacted]
- (S//REL TO USA, ISAF, NATO) The same report stated [redacted] is a TB commander based out of the hotel.
- (S//REL TO USA, ISAF, NATO) The same report stated that the Paprowk hotel is strictly used by insurgents.
- (S//REL TO USA, CGTF, ISAF, NATO) [redacted]

(S//REL USA, CGTF, ISAF, NATO)

**Organization & Role:**

TB Member

**Associated Personalities**

**Other Names/Alias**

BAGRAM / CENTCOM / 001506

SECRET//NOFORN

(U//FOUO)

-003806

Amin ((SHIR)) s/o [redacted]

POC: Urmul, Kamdesh, Nuristan, DOC: [redacted]

(C//REL USA, GCTF, ISAF, NATO) Capturing Unit [redacted]

SLIDE 2

**Detainee Statement:**

- (S//NF) Detainee used the edge of the table as visual aid to provide precise locations of where US soldiers, ANA and civilians were standing at the time of the blast in relation to the footbridge and LZ. [redacted]
- (S//NF) Stated that he came to Urmul to register to vote. [redacted]
- (S//NF) Stated that he was passing through to J'bad because his cousin was missing and he was going to help search for him. [redacted]
- (S//NF) Stated that CF soldiers rubbed TNT on his hands, which is why he tested positive for TNT. [redacted]
- (S//NF) Stated that he met [redacted] nearly a year ago in J'bad (NFI), but [redacted] says that he did not meet detainee until the day before the blast. Amin Shir claims that the money that was on him at time of capture was from a loan from Shams Ul-Rahman. (Sworn Statement Nicholas Welden)
- (S//NF) [redacted] claims that [redacted] was at the hotel the night before the blast with 3806. [redacted]
- (S//NF) Stated he had borrowed 140 rupees from [redacted] in order to have loose cash on hand, but had agreed to repay him in 9 months with 2 cows, as 3806 and his father have "too many animals" [redacted]
- (S//NF) Stated that the dropped photos from the scene of the IED fell out of his pocket when he was taking money out of his shirt breast pocket to pay for his new shoes. [redacted]
- (S//NF) Detainee was asked "Did the bomb come from Pakistan?" Amin Shir's response was "it didn't come from..." then he became quiet and refused to answer any other questions. [redacted]

**BSCT Assessment:**

- (S//NF) Risk Level: [redacted] COIN: [redacted]
- (S//NF) Prior BSCT Risk Level: [redacted] COIN: [redacted]

**DR/OR Summary:** (S//NF) See DFIP Progress Report.

BAGRAM / CENTCOM / 001507

SECRET//NOFORN

Detainee Review Board Report of Findings and Recommendations -- Final Board Result v.22 Feb 2010

<b>Date of Board</b> 2 Jun 10	<b>Detainee Name</b> Amin (Ishir)	<b>Detainee ISN</b> (b)(1)1.4a, (b)(1)1.4c 003800	(b)(1)1.4a, (b)(1)1.4c
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**STEP 1 (FINDINGS):** By a preponderance of the information presented, as a member of the Detainee Review Board (DRB), I find that:

The detainee DOES NOT MEET THE CRITERIA for internment and will be released. *Stop here and sign at the bottom.*

OR

The detainee listed above MEETS CRITERIA FOR INTERNMENT because he is a person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks; **(Continue to Step 2)** OR

The detainee listed above MEETS CRITERIA FOR INTERNMENT because he is a person who was part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces. **(Continue to Step 2)**

**STEP 2 (THREAT ASSESSMENT RECOMMENDATION):** After taking into account the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society, by a preponderance of the information, I find that continued internment:

Please circle the appropriate threat level (depending on which recommendation is made in STEP 2)

1. No longer poses a threat against the United States or its coalition partners.
2. Threatened threat to United States or coalition partners.
3. Significant threat to United States or coalition partners.
4. High and direct threat to United States or coalition partners.

IS NOT NECESSARY to mitigate the threat the detainee poses; **(Go to Step 3A)**

OR

IS NECESSARY to mitigate the threat the detainee poses (\* the detainee will remain at the Detention Facility in Parwan (DFIP) to ensure detention required to mitigate his threat) **(Go to Step 3B);**

Explain the facts presented at the DRB which led to your recommendation/ (Mandatory regardless of which threat assessment is made):

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**STEP 3A:** If your Recommendation in STEP 2 is that continued internment is not necessary to mitigate the threat the Detainee poses, then make one of the following recommendations: In light of the findings listed above, I recommend that the detainee be **(PICK ONLY 1)**:

- Released without conditions; or
- Transferred to Afghan authorities for their consideration of criminal prosecution.
- Transferred to Afghan authorities for participation in a reconciliation or reintegration program.
- (For non-Afghan and non-U.S. third-country national): Transferred to a third country for: criminal prosecution // participation in a reconciliation program // or release. *(circle one)*

**STEP 3B:** If your Recommendation in STEP 2 is that continued internment is necessary to mitigate the threat the Detainee poses, make the following further recommendation, and then Go to Step 4.

While the Detainee remains interned at the DFIP, he SHOULD / SHOULD NOT *(circle one)* be considered for Reintegration programs within the DFIP.

**STEP 4:**  The Detainee IS or IS NOT an Enduring Security Threat *(circle one)*.

(b)(3), (b)(6)

**Detainee Review Board Report of Findings and Recommendations**

v. 5 Feb 2010

<u>Date of Board</u> 2 JUNE 2010	<u>Detainee Name</u> AMIN (SHAR)	<u>Detainee ISN</u> 003 8000	4a, (b)(1)1.4c
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**STEP 1 (FINDINGS):** By a preponderance of the information presented, as a member of the Detainee Review Board (DRB), I find that:

The detainee DOES NOT MEET THE CRITERIA for internment and will be released. *Stop here and sign at the bottom.*

OR

The detainee listed above MEETS CRITERIA FOR INTERNMENT because he is a person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks; (*Continue to Step 2*)

OR

(b)(3), (b)(6) The detainee listed above MEETS CRITERIA FOR INTERNMENT because he is a person who was part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces. (*Continue to Step 2*)

**STEP 2 (THREAT ASSESSMENT RECOMMENDATION):** After taking into account the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society, by a preponderance of the information, I find that continued internment:

IS NOT NECESSARY to mitigate the threat the detainee poses; (*Go to Step 3A*)

OR

(b)(3), (b)(6) IS NECESSARY to mitigate the threat the detainee poses (\* the detainee will remain at the Detainees Facility in Parwan (DFIP) to ensure detention required to mitigate his threat) (*Go to Step 3B*);

Explain the facts presented at the DRB which led to your recommendation!  
(Mandatory regardless of which threat assessment is made):

(b)(1)1.4a, (b)(1)1.4c

UNDER QUESTIONING THAT HE ONLY HEARD THE EXPLOSION BECAUSE HE WAS BUYING SHOES IN THE STORE + DID NOT SEE THE EXPLOSION, YET HE WAS ABLE TO PROVIDE EXACT LOCATIONS OF US FORCES AT THE TIME OF THE EXPLOSION. PLUS BAD BEHAVIOR.

Please circle the appropriate threat level regardless of which recommendation is made in STEP 2:

- 5- Strategic threat to American and Coalition Forces and Citizens
- 4- National threat to American and Coalition Forces
- 3- Regional threat to US/Coal forces or authority
- 2- Provincial threat to US/Coal forces or authority
- 1- Threat to local village authorities
- 0- Is not a threat to his village or beyond

**STEP 3A:** If your Recommendation in STEP 2 is that continued internment is not necessary to mitigate the threat the Detainee poses, then make one of the following recommendations: In light of the findings listed above, I recommend that the detainee be:

- Released without conditions; or
- Transferred to Afghan authorities for their consideration of criminal prosecution.
- Transferred to Afghan authorities for participation in a reconciliation or reintegration program.
- (For non-Afghan and non-U.S. third-country national): Transferred to a third country for criminal prosecution // participation in a reconciliation program // or release. (*circle one*)

**STEP 3B:** If your Recommendation in STEP 2 is that continued internment is necessary to mitigate the threat the Detainee poses, make the following further recommendation, and then Go to Step 4.

While the Detainee remains interned at the DFIP, he SHOULD / SHOULD NOT (*circle one*) be considered for Reintegration programs within the DFIP.

**STEP 4: "Enduring Security Threat" Assessment:** \* Prior to completing your Enduring Security Threat Assessment, go to page 2 of this form and complete the EST Worksheet, paying particular attention to the *criteria and definitions*.

(b)(3), (b)(6) The Detainee IS / IS NOT an Enduring Security Threat (*circle one*).

(b)(3), (b)(6)

DRB Member Signature

MAJ. (b)(3), (b)(6) USMC

Page 10 redacted for the following reason:

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(b)(1)1.4a, (b)(1)1.4c

**Detainee Review Board Report of Findings and Recommendations**

v. 5 Feb 2010

<u>Date of Board</u> 02 Jun 10	<u>Detainee Name</u> Amin Shir	<u>Detainee ISN</u> (b)(1)1.4a, (b)(1)1.4c 00380114a, (b)(1)1.4c
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**STEP 1 (FINDINGS):** By a preponderance of the information presented, as a member of the Detainee Review Board (DRB), I find that:

The detainee DOES NOT MEET THE CRITERIA for internment and will be released. *Stop here and sign at the bottom.*

OR

The detainee listed above MEETS CRITERIA FOR INTERNMENT because he is a person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks: *(Continue to Step 2)*

The detainee listed above MEETS CRITERIA FOR INTERNMENT because he is a person who was part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces. *(Continue to Step 2)*

**STEP 2 (THREAT ASSESSMENT RECOMMENDATION):** After taking into account the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society, by a preponderance of the information, I find that continued internment:

IS NOT NECESSARY to mitigate the threat the detainee poses; (Go to Step 3A)

OR

IS NECESSARY to mitigate the threat the detainee poses (\* the detainee will remain at the Detention Facility in Parwan (DFIP) to ensure detention required to mitigate his threat) (Go to Step 3B);

Please circle the appropriate threat level regardless of which recommendation is made in STEP 2.

5- Strategic threat to American and Coalition Forces and Civilians

4- National threat to American and Coalition Forces

3- Regional threat to OJKA forces or authority

2- Provincial threat to CIRA forces or authority

1- Threat to local village authorities

0- Is not a threat to his village or beyond

**Explain the facts presented at the DRB which led to your recommendation/ (Mandatory regardless of which threat assessment is made):**

- Detainee described the events of the IED Attack during interrogation ~~is~~ indicates First hand knowledge
- Detainee ~~also~~ sought shelter in a known enemy location
- Detainee tested positive for explosive residue / photo found near blast seat of IED
- Detainees continued misbehavior in this Facility (DJTF) demonstrates his desire to continue to conduct operations against CF.

**STEP 3A:** If your Recommendation in STEP 2 is that continued internment is not necessary to mitigate the threat the Detainee poses, then make one of the following recommendations: In light of the findings listed above, I recommend that the detainee be:

- Released without conditions; or
- Transferred to Afghan authorities for their consideration of criminal prosecution.
- Transferred to Afghan authorities for participation in a reconciliation or reintegration program.
- (For non-Afghan and non-U.S. third-country national): Transferred to a third country for: criminal prosecution // participation in a reconciliation program // or release. *(circle one)*

**STEP 3B:** If your Recommendation in STEP 2 is that continued internment is necessary to mitigate the threat the Detainee poses, make the following further recommendation, and then Go to Step 4.

While the Detainee remains interned at the DFIP, he SHOULD / SHOULD NOT *(circle one)* be considered for Reintegration programs within the DFIP.

**STEP 4: "Enduring Security Threat" Assessment** — \* Prior to completing your Enduring Security Threat Assessment, go to page 2 of this form and complete the EST Worksheet, paying particular attention to the *criteria and definitions*.

The Detainee IS or IS NOT an Enduring Security Threat *(circle one)*.

(b)(3), (b)(6)

Page 12 redacted for the following reason:

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(b)(1)1.4a, (b)(1)1.4c

Detainee Review Board Report of Findings and Recommendations

v. 5 Feb 2010

Date of Board 2 JUN 10	Detainee Name AMIN SHAR	Detainee ISN (b)(1)1.4a, (b)(1)1.4c 003804 (b)(1)1.4a, (b)(1)1.4c
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STEP 1 (FINDINGS): By a preponderance of the information presented, as a member of the Detainee Review Board (DRB), I find that:

\_\_\_ The detainee DOES NOT MEET THE CRITERIA for internment and will be released. Stop here and sign at the bottom.

OR

\_\_\_ The detainee listed above MEETS CRITERIA FOR INTERNMENT because he is a person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks: (Continue to Step 2)

(b)(3), (b)(6) OR \_\_\_ The detainee listed above MEETS CRITERIA FOR INTERNMENT because he is a person who was part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces. (Continue to Step 2)

STEP 2 (THREAT ASSESSMENT RECOMMENDATION): After taking into account the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society, by a preponderance of the information, I find that continued internment:

\_\_\_ IS NOT NECESSARY to mitigate the threat the detainee poses; (Go to Step 3A)

OR

(b)(3), (b)(6) \_\_\_ IS NECESSARY to mitigate the threat the detainee poses (\* the detainee will remain at the Detention Facility in Parwan (DFIP) to ensure detention required to mitigate his threat) (Go to Step 3B):

Please circle the appropriate threat level regardless of which recommendation is made in STEP 2.

- 5- Strategic threat to American and Coalition Forces and Civilians
- 4- National threat to American and Coalition Forces
- 3- Regional threat to CIA/US forces or authority
- 2- Provincial threat to CIA/US forces or authority
- 1- Threat to local village authorities
- 0- Is not a threat to his village or beyond

Explain the facts presented at the DRB which led to your recommendation/

(Mandatory regardless of which threat assessment is made):

DECEPTIVE - DETAINEE TOLD WORDS HE DID NOT SOB BLAST YET DESCRIBED IN DETAIL THE BLAST. TESTED POSITIVE FOR TNT, PHOTO OVER 100M ROOM WHERE THE CARB HE BUNGHE SHOES AND HE SAID HIS PHOTO FELL OUT. PHOTO LOCATION WAS UPSTREAM. NUMEROUS BAD BEHAVIOR IN DFIP.

STEP 3A: If your Recommendation in STEP 2 is that continued internment is not necessary to mitigate the threat the Detainee poses, then make one of the following recommendations: In light of the findings listed above, I recommend that the detainee be:

- \_\_\_ Released without conditions; or
- \_\_\_ Transferred to Afghan authorities for their consideration of criminal prosecution.
- \_\_\_ Transferred to Afghan authorities for participation in a reconciliation or reintegration program.
- \_\_\_ (For non-Afghan and non-U.S. third-country national): Transferred to a third country for: criminal prosecution // participation in a reconciliation program // or release. (circle one)

STEP 3B: If your Recommendation in STEP 2 is that continued internment is necessary to mitigate the threat the Detainee poses, make the following further recommendation, and then Go to Step 4.

While the Detainee remains interned at the DFIP, he SHOULD / SHOULD NOT (circle one) be considered for Reintegration programs within the DFIP.

STEP 4: "Enduring Security Threat" Assessment --- \* Prior to completing your Enduring Security Threat Assessment, go to page 2 of this form and complete the EST Worksheet, paying particular attention to the criteria and definitions.

(b)(3), (b)(6) The Detainee IS or IS NOT an Enduring Security Threat (circle one).

(b)(3), (b)(6)

Page 14 redacted for the following reason:

-----  
(b)(1)1.4a, (b)(1)1.4c

~~SECRET//NOFORN~~

1 (U//FOUO) [ISN 1.4a, (b)(1) 3806 a, (b)(1) Amin Shir, entered the boardroom,  
2 took his seat in front of the board members, and the  
3 unclassified hearing was called to order at 0957, 2 June 2010.]  
4

5 (U) Persons Present:

6  
7 (U) MAJOR [REDACTED], PRESIDENT OF THE BOARD;  
8

9 (U) MAJOR [REDACTED], MEMBER ONE;

10  
11 (U) MAJOR [REDACTED], MEMBER TWO;

12  
13 (U) CAPTAIN [REDACTED], DETAINEE REVIEW BOARD  
14 RECORDER TWO;

15  
16 (U) LIEUTENANT [REDACTED], PERSONAL  
17 REPRESENTATIVE TWO;

18  
19 (U) MAJOR [REDACTED], LEGAL REPRESENTATIVE; and

20  
21 (U) SPECIALIST [REDACTED], PARALEGAL.  
22

23 (U) [The recorder was sworn.]  
24

25 (U) The detainee was advised by the president of how this board  
26 was not a criminal trial and how this board was to determine  
27 whether or not he met the criteria for further internment.  
28

29 (U) The president also notified the detainee that he may be  
30 present at all open sessions of the board permitting that he  
31 acted appropriately. ISN 3806 was also advised that he could  
32 testify under oath or unsworn if he wished to do so, that he had  
33 a personal representative who was present at the hearing, that  
34 he may present information at the hearing including the  
35 testimony of witnesses, and that he can examine documents  
36 presented to the board all of which the detainee understood.  
37

38 (U) Further, ISN 3806 was instructed that, at the conclusion of  
39 the board after the legal review, the board would determine  
40 whether he met the criteria for further internment at the  
41 Detention Facility in Parwan. The detainee understood the fact

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~~SECRET//NOFORN~~

1 that if he does not meet the criteria, he would be released as  
 2 soon as possible. However, if he did meet the criteria, then he  
 3 would be recommended for further internment, transferred to  
 4 Afghan authorities, or released without conditions.

5  
 6 (U) CAPTAIN (b)(3), (b)(6) presented the following unclassified  
 7 information to the board:

8  
 9 (U//~~FOUO~~) On 28 October 2008, Coalition Forces outside of  
 10 Camp Keating were conducting a foot patrol and were  
 11 ambushed by ACM with small arms fire and an IED on a foot  
 12 bridge. The explosion from the IED resulted in two US  
 13 service members severely injured, one of those soldiers  
 14 subsequently died, and the other was unable to return to  
 15 duty due to his injuries. At the scene of the IED a photo  
 16 was discovered. (b)(1)1.4a, (b)(1)1.4c detained Amin Shir  
 17 due to the PID made by this photo. (b)(1)1.4a, (b)(1)1.4c  
 18 of Amin Shir after more evidence was collected that  
 19 implicated Amin Shir as the triggerman for the IED.  
 20

21 There is a sworn statement from the capturing unit, which  
 22 states that after Amin Shir was captured the capturing unit  
 23 conducted an X-SPRAY test on Amin SHir. The test results  
 24 were positive for TNT.  
 25

26 Items found on the detainee were: voter registration card,  
 27 photos, pocket litter, over 11,000 Rupees.  
 28

29 He is assessed to be a member of the Taliban who conducts  
 30 IED missions.  
 31

32 Amin Shir stated that he was staying at the Paprowk Hotel.  
 33 Reports indicate that this Hotel is a safe house (b)(6), (b)(1)1.4a, (b)(1)1.4c  
 34 (b)(6), (b)(1)1.4a, (b)(1)1.4c Taliban Commander, and is exclusively used by  
 35 Taliban members. Detainee also stated that he knew (b)(6), (b)(1)1.4a, (b)(1)1.4c  
 36 (b)(6), (b)(1)1.4a, (b)(1)1.4c because they are from the same village.  
 37

38 The Detainee also had two storied as to why he was in  
 39 Urmul. The first is that he was in Urmul to register to  
 40 vote and the second was that he was passing through to

~~SECRET//NOFORN~~



~~SECRET//NOFORN~~

1 (U//~~FOUO~~) My name is Amir Shahid son of [b)(6), (b)(1)1.4a, (b)(1)1.4d]. I am  
2 from Nuristan.

3  
4 I went to Urmul to get my national ID card made. The person  
5 who makes the ID cards was not in the office so I was going  
6 to stay the night and go the next day but I was captured. I  
7 was staying at the [b)(1)1.4a, (b)(1)1.4c, (b)(6)] house. I went to the  
8 hotel to eat lunch. The Hotel is close to the bridge but I  
9 don't know the exact distance.

10  
11 (Unclassified Exhibit 5 was shown to the detainee) I  
12 recognize this photo it is a picture of the bridge and  
13 hotel. I don't know where the soldiers were because I was  
14 at the shoe store. The store is right next to the hotel.  
15 The soldiers told me to get in the hotel because they were  
16 going to search the whole area. I don't know where they  
17 found the picture.

18  
19 (Unclassified Exhibit 2 was shown to the detainee) I don't  
20 know where that is.

21  
22 (Unclassified Exhibit 7 was shown to the detainee) That is  
23 my photo.

24  
25 (Unclassified Exhibit 11 was the ID I was having made for  
26 me. I had it on me when I was captured. I received my ID  
27 about five minutes before my lunch. I bought my shoes  
28 before lunch about 1100. I was captured about the same  
29 time.

30  
31 I am a Sheppard and my family owns about 200 animals.

32  
33 (Unclassified Exhibit 6 was shown to the detainee) I got  
34 the money from [b)(6), (b)(1)1.4a, (b)(1)1.4c]. I got the money for food. I  
35 was going to repay him with some goats. For the 14,000 I  
36 was going to give him two cows.

37  
38 I know [b)(6), (b)(1)1.4a, (b)(1)1.4d] he is a fellow villager. I don't speak  
39 with him.

40

~~SECRET//NOFORN~~

SECRET//NOFORN

1 I don't know why I tested positive for TNT I don't deal  
2 with it. I have never mined with TNT. I don't know anyone  
3 who deals with TNT.

4  
5 I have never said I was going to go look for my cousin.

6  
7 I received the photo the day before for my ID card.

8  
9 (U) CROSS-EXAMINATION

10  
11 (U) LIEUTENANT [REDACTED] (b)(3), (b)(6) asked, in substance, the  
12 following questions:

13  
14 (U//~~FOUO~~) I am not a part of any anti Coalition groups. I  
15 have never been paid to fight the Coalition Forces. I am  
16 happy that the Coalition Forces are here. I have never  
17 emplaced an IED. I don't know why I was arrested but I am  
18 happy for it because I learned the Quran and how to read. I  
19 would like to learn some English also. If I was released I  
20 don't know what I would do probably go to the school.

21  
22 (U) EXAMINATION BY THE BOARD

23  
24 (U) Member 2 asked, in substance, the following questions:

25  
26 (U//~~FOUO~~) I don't know where my shoes are maybe you guys  
27 have them. When I bought the new shoes I was wearing them.  
28 I came to Urmul by vehicles. I never saw the IED explosion  
29 because I was buying the shoes. I heard the explosion and  
30 the store I was in shook.

31  
32 (U) The President of the Board asked, in substance, the  
33 following questions:

34  
35 (U//~~FOUO~~) (Unclassified Exhibit 11 was shown to the  
36 detainee)The ID card is dated November 2008.

37  
38 [President stated that the date on the ID card confirms the  
39 detainee's statement]

40  
SECRET//NOFORN

~~SECRET//NOFORN~~

1 (Unclassified Exhibit 4 was shown to the detainee) Closer  
2 to the hotel is where I bought my shoes.

3  
4 All I know is that my picture probably fell out by the  
5 store.

6  
7 I don't know why my hands tested positive. I have never  
8 touched any IEDs. I never said that American forces rubbed  
9 TNT on my hands. I was just there and the stuff happened.

10  
11 (U) The recorder did offer unclassified exhibits.

12  
13 (U) The personal representative did offer unclassified exhibits.

14  
15 (U) The recorder had no further unclassified information to  
16 offer the board and, per the recorders request, the president  
17 granted a closed hearing at the culmination of the unclassified  
18 hearing.

19  
20 (U) The president announced the conclusion of the unclassified  
21 hearing.

22  
23 (U) The president of the board instructed the detainee that he  
24 would be notified of the board's decision within a couple of  
25 weeks and that he would be released if the decision is made that  
26 further internment would not be required. However, if the board  
27 decided that further internment is required, he would be  
28 retained at the Detention Facility in Parwan, transferred to  
29 Afghan authorities for participation in a reconciliation  
30 program, or released transferred to his national country for  
31 participation in a reconciliation program. Furthermore, if  
32 continued internment was recommended, then an additional  
33 Detainee Review Board would be reconvened in 6 months.

34  
35 (U) The detainee made the following statement:

36  
37 (U//~~FOUO~~) I have been attending some of the classes  
38 provided. I am friends with my new cell guard and I never  
39 give him problems.

40  
~~SECRET//NOFORN~~

~~SECRET//NOFORN~~

1 (Interpreter read the two letters that the P.R. presented  
2 to detainee)

3  
4 (U) [The unclassified hearing adjourned at 1102, 2 June 2010.]

5  
6 (U) [The detainee withdrew from the boardroom.]

7  
8 (U) [The classified hearing was called to order at 1102, 2 June  
9 2010.]

10  
11 (U) CAPTAIN [REDACTED] presented the following information to  
12 the board:

13  
14 (U//~~FOUO~~) Today he gave the name Amin Shahid. His accent is  
15 really strong and his name often comes out as Shir. His  
16 statements today were consistent with his statements  
17 previously. The biggest issue is why his photo was found  
18 near the foot bridge. He claims that he never crossed the  
19 bridge. It is upstream from the shoe store. The second big  
20 issue is why did he fail his TNT test. It is common for  
21 detainees to accuse Americans for rub TNT on his hands  
22 because we spray liquid on their hands for the test and  
23 they sometimes believe that it is TNT. The hotel is  
24 reportedly used by Taliban but he stated that he was only  
25 eating there. He described during an interrogation that he  
26 knew where the ANP, US forces, and civilians were during  
27 the explosion which conflicts with his statement today.

28  
29 (U) LIEUTENANT [REDACTED] presented the following  
30 information to the board:

31  
32 (U//~~FOUO~~) I don't think we can prove he has constantly  
33 stayed at this hotel. I think that he was in town to  
34 receive his ID card and it may be possible that someone  
35 paid him to plant or detonate the IED. I don't think this  
36 22 year old at the time was an active member in any anti  
37 Coalition militia.

38  
39 (U) The recorder did offer classified exhibits.

40  
41 (U) The personal representative did offer classified exhibits.

~~SECRET//NOFORN~~

~~SECRET//NOFORN~~

1  
2  
3  
4  
5  
6  
7  
8  
9

(U) The president and members of the board voted on ISN 3806. The votes were then collected and handed to the legal representative.

(U) [The classified session adjourned at 1110, 2 June 2010.]

[END OF PAGE]

~~SECRET//NOFORN~~

UNCLASSIFIED WHEN SEPARATED FROM ATTACHMENTS



# STAFF SUMMARY ROUTING SHEET

## JTF 435/DCDO USFOR-A



**SUBJECT:** Status recommendation for ISN 3806 at the Detention Facility in Parwan (DFIP)

**DATE:** 2 June 2010

**PROBLEM OR REASON FOR ACTION:** To obtain DC JTF 435 approval or disapproval to change or validate the status of ISN 3806 to be continually interned at the DFIP.

**ACTION OFFICER NAME/SECTION/PHONE NUMBER:**  
 CAPT (b)(3), (b)(6) Director Legal Operations  
 DSN (b)(2)

**Office Primarily Responsible (OPR):** JTF 435 Dir Leg Ops  
**Office Supporting Response (OSR):**

**COORDINATION**

	TO	ACTION	SIGNATURE (SURNAME), GRADE AND DATE		TO	ACTION	SIGNATURE (SURNAME), GRADE AND DATE
1	DRB President	Review/Sign	(b)(3), (b)(6) <i>MAT 6/15/10</i>	5	DC JTF 435	Sign	
2	Recorder	Review	CAPT (b)(3), (b)(6) <i>14 Jun 2010</i>	6			
3	DRB Legal Advisor	Review/Sign	MAJ (b)(3), (b)(6) <i>MAT 5 June 2010</i>	7			
4	JTF 435 Director Legal Ops	Review	(b)(3), (b)(6) <i>Jun 2010</i>	8			

*- PTH FOR COORDINATION*

YES EST  
 PTH -  
 3-0 VOTE NO  
 NOW

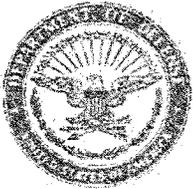
UNCLASSIFIED WHEN SEPARATED FROM ATTACHMENTS

SCJS TRACKING NUMBER

DATE Logged

# Exhibit G

~~UNCLASSIFIED//FOUO~~



REPLY TO  
ATTENTION OF:

DEPARTMENT OF DEFENSE  
DEPUTY COMMANDER - DETAINEE OPERATIONS  
JOINT TASK FORCE 435  
APO AE 09354



JTF-435-LO

JUN 29 2010

MEMORANDUM FOR Commander, Task Force Protector, Bagram Airfield, Afghanistan, APO AE 09354

SUBJECT: 2 June 2010 Detainee Review Board (DRB) Recommendation Vote for Release for ISN 4193

1. I reviewed the findings and recommendation of the DRB conducted on 2 June 2010 concerning the internment of Detainee ISN 4193. By a vote of 3 to 0, the board members found that ISN 4193 did not meet the criteria for internment. Pursuant to Deputy Secretary of Defense Policy Guidance on Review Procedures and Transfer and Release Authority at Bagram Theater Internment Facility dated 2 July 2009, I approve the DRB's finding and direct that ISN 4193 be released from the Detention Facility in Parwan.

2. The point of contact for this memorandum is CAPT (b)(3), (b)(6), Director of Legal Operations, JTF 435, at DSN (b)(2).

MARK S. MARTINS  
Brigadier General, U.S. Army  
Deputy Commander

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BAGRAM / CENTCOM /001563

UNCLASSIFIED//~~FOUO~~



REPLY TO  
ATTENTION OF:

**DEPARTMENT OF DEFENSE**  
DEPUTY COMMANDER – DETAINEE OPERATIONS  
US FORCES AFGHANISTAN  
JOINT TASK FORCE 435  
APO AE 09356



JTF-435-LO

2 June 2010

MEMORANDUM FOR Deputy Commander, Joint Task Force 435, Kabul, Afghanistan, APO AE 09356

SUBJECT: 2 June 2010 Detainee Review Board Legal Review: Khan Zahid (ISN 4193)

1. I reviewed Enclosure 1, the findings and recommendations of Khan Zahid's (ISN 4193) 2 June 2010 Detainee Review Board (DRB), and find them to be legally sufficient.
2. The DRB found that Khan Zahid (ISN 4193) does not meet the criteria for internment for reasons stated in Enclosures 1 and 2.
3. The DRB recommended that Khan Zahid (ISN 4193), be released without conditions. The DRB further determined that internment is not necessary to mitigate the threat posed by Khan Zahid (ISN 4193).
4. The point of contact for this review is MAJ [redacted (b)(3), (b)(6)], Joint Task Force 435 at DSN [redacted (b)(2)] or [redacted (b)(2), (b)(3), (b)(6)].

[redacted (b)(3), (b)(6)]

- 3 Encls.
1. DRB Recommendation Memorandum
  2. DRB Voting Packet
  3. Summarized Testimony with Exhibits

MAJ, JA  
Legal Advisor, Detainee Review Board

UNCLASSIFIED//~~FOUO~~

BAGRAM / CENTCOM /001564

~~SECRET//NOFORN~~

REPLY TO  
ATTENTION OF:

**DEPARTMENT OF DEFENSE**  
DEPUTY COMMANDER – DETAINEE OPERATIONS  
US FORCES AFGHANISTAN  
JOINT TASK FORCE 435  
APO AE 09356



JTF-435-LO

2 June 2010

MEMORANDUM FOR Deputy Commander, Joint Task Force 435, Kabul, Afghanistan, APO AE 09356

SUBJECT: 2 June 2010 Detainee Review Board Recommendation for the Release of Khan Zahid (ISN 4193)

1. The Detainee Review Board (DRB) met on 2 June 2010 and made the following findings and recommendations concerning the internment of Khan Zahid (ISN 4193):

a. Khan Zahid (ISN 4193) does not meet the criteria for internment.

b. Khan Zahid (ISN 4193) should be considered for Reintegration programs within the Detention Facility in Parwan.

c. Khan Zahid (ISN 4193) is not Enduring Security Threat.

2. In arriving at its recommendation, the DRB found a lack of credible evidence to support the internment of Khan Zahid (ISN 4193). Despite the fact that the (b)(1)1.4a, (b)(1)1.4c operation was triggered based upon sensitive intelligence, there is no evidence linking Khan Zahid (ISN 4139) to the sensitive intelligence referenced in the (b)(1)1.4a, (b)(1)1.4c Detainee Transfer Request. The phone of interest was recovered, but the only apparent evidence of this is to be found in an Evidence/Property Custody Document (DA Form 4137). Khan Zahid (ISN 4139) was detained along with nine other males on the night of the (b)(1)1.4a, (b)(1)1.4c operation – he was the only detained male transferred to the Bagram Theater Internment Facility. The absence of a positive voice identification linking Khan Zahid (ISN 4139) to the phone of interest raises the possibility that the phone of interest could have belonged to any one of the other nine males detained on (b)(1)1.4a, (b)(1)1.4c but later released. There is little if any evidence linking Khan Zahid (ISN 4139) to the phone of interest. Khan Zahid (ISN 4139) denied ownership of the phone of interest during his 2 June 2010 DRB. Testimony from three Afghan witnesses seemed to corroborate Khan Zahid's (ISN 4139) own testimony. In addition, their testimony confirmed Khan Zahid's (ISN 4139) activities in Saudi Arabia, where he worked as a day laborer, and confirmed his recent return to Afghanistan -- approximately three to four months before his (b)(1)1.4a, (b)(1)1.4c. The HUMINT reporting references events attributable to Khan Zahid (ISN 4139), but they would have occurred while he was in Saudi Arabia, and before his return to Afghanistan in May 2009. Evidence culled from his passport – entry/exit stamps and visas – corroborated Khan Zahid's (ISN 4139) testimony

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BAGRAM / CENTCOM /001565

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JTF-435-LO

SUBJECT: 2 June 2010 Detainee Review Board Recommendation for the Release of Khan Zahid (ISN 4193)

concerning his travels to Saudi Arabia and return to Afghanistan. Moreover, the evidence culled from his passport discredited three of the five sources of HUMINT reporting. In sum, there is no credible evidence linking Khan Zahid (ISN 4139) to the phone of interest, or to the HUMINT reporting. The DRB assessed Khan Zahid (ISN 4193) to pose no threat to Coalition Forces or the Government of the Islamic Republic of Afghanistan.

3. [redacted] (b)(1)1.4a, (b)(1)1.4c) and members of the [redacted] (b)(1)1.4a, (b)(1)1.4c captured Khan Zahid (ISN 4193) at his residential compound in Chawni village, Gardez District, Paktya Province on [redacted] (b)(1)1.4a, (b)(1)1.4c. At point of capture, Khan Zahid (ISN 4193) identified himself initially as Mohammad Ali Jan. After being confronted with his passport, in which his picture appears with the name Zahid, Khan Zahid (ISN 4193) claimed ownership of the passport. Evidence seized at the time of Khan Zahid's (ISN 4193) [redacted] (b)(1)1.4a, (b)(1)1.4c capture includes two passports, a driver's license, a phone book, and Nokia mobile cellular phone. Subsequent exploitation of the Nokia cellular phone disclosed several pictures and videos of interest, including several videos of a martyr and two videos of military age males with weapons at what appears to be an insurgent meeting.

4. The capture and subsequent detention of Khan Zahid (ISN 4193) stems largely from eight HUMINT reports from five sources of undetermined reliability. This HUMINT reporting alleges that Khan Zahid (ISN 4193) may have been involved in an attack against an Afghan National Army checkpoint in Zormat District on 11 August 2009. In addition, Khan Zahid (ISN 4193) led an ambush against the Afghan National Police in Chawni village, Zormat District with approximately ten Taliban fighters. A HUMINT source alleges that in the months leading up to his [redacted] (b)(1)1.4a, (b)(1)1.4c, identifies Khan Zahid (ISN 4193) and six fighters emplaced four pressure plate IEDs on the road west from Alijankhel, Zormat District on the night of 9 June 2009. Khan Zahid (ISN 4193) is identified as a Taliban who, along with other Taliban commanders, met with five suicide bombers at the home of [redacted] (b)(6), (b)(1)1.4a, (b)(1)1.4c to plan simultaneous attacks in Gardez City at the bazaar, election office, and local office of the Afghan National Directorate of Security.

5. Under earlier interrogation and during his 2 June 2010 DRB, Khan Zahid (ISN 4193) denied knowing anything about Taliban or anti-Coalition personalities because he had recently returned from the Kingdom of Saudi Arabia. Khan Zahid (ISN 4193) claimed to have lived in Saudi Arabia and Kuwait, but returned to Afghanistan approximately three months before his [redacted] (b)(1)1.4a, (b)(1)1.4c. He denied ever meeting with suicide bombers or having any part of suicide bombing. Khan Zahid (ISN 4193) admitted that his first passport had a false name; his name is in fact Mohammad Ali Jon, although his passport is under the name Zahidullah Khan. He claimed his cousin helped him get a job in Saudi Arabia driving a truck at a farm in Medina. He denied knowing of any suicide bombers.

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JTF-435-LO

SUBJECT: 2 June 2010 Detainee Review Board Recommendation for the Release of Khan Zahid (ISN 4193)

6. In making its recommendation the DRB considered the Recorder's unclassified and classified exhibits -- including a 28 May 2010 Behavioral Science Consultation Team (BSCT) evaluation assessing Khan Zahid (ISN 4193) with a recidivism risk of (b)(4a), (b)(4a) and a COIN amenability rating of (b)(4a), (b)(4a). The 23 April 2010 Detainee Criminal Investigation Detachment Report of Investigation, and the Theater Internment Facility Progress Report. The Personal Representative submitted copies of Khan Zahid's (ISN 4193) Initial Interview Checklist and Notification Worksheet. The Recorder introduced a letter from 1LT (b)(3), (b)(6) 3<sup>rd</sup> Battalion, 172<sup>nd</sup> Infantry (Mountain) Battalion, in which the Battle Space Owner urged the continued internment of Khan Zahid (ISN 4193). 1LT (b)(3), (b)(6) serves as the S2 Liaison Officer for the FOB Salerno Fusion Cell. Included among the Recorder's unclassified exhibits are the following letters expressing support for Mohammad Ali Jan (Khan Zahid) (ISN 4193): an affidavit from the Elders of Paktiya Province and signed by General Juma Khan Hamdard; a second letter of support from District Elders and addressed to the Governor of Paktiya Province; and a third letter from his brothers (b)(6), (b)(1)1.4a, (b)(1)1.4c, (b)(1)1.4a, (b)(1)1.4c testified also in the open session during Khan Zahid's (ISN 4193) 2 June 2010 DRB. The Personal Representative introduced a letter from Village Elders, Council members, and relatives expressing their support for Mohammad Alijan (Khan Zahid) (ISN 4193). A second letter was also introduced from twelve Village Elders expressing similar support for Mohammad Alijan (Khan Zahid) (ISN 4193). The DRB considered also Khan Zahid's (ISN 4193) testimony, as well as his responses to questions posed to him by all parties to the DRB.

7. The Personal Representative called the following three witnesses, all of whom testified in the open session and in presence of Khan Zahid (ISN 4193):

(b)(6), (b)(1)1.4a, (b)(1)1.4c testified that he is a Village Elder from Qaraye Arjakhel and knows Mohammad Ali Jan (Khan Zahid) (ISN 4193) as a fellow villager. (b)(6), (b)(1)1.4a, (b)(1)1.4c testified that Mohammad Ali Jan (Khan Zahid) (ISN 4193) has traveled to Saudi Arabia for work, but returned to his family approximately three to four months before his (b)(1)1.4a, (b)(1)1.4c in an effort to re-build his home. (b)(6), (b)(1)1.4a, (b)(1)1.4c identified Mohammad Ali Jan (Khan Zahid) (ISN 4193) as a poor family man, a laborer, but he is not a mullah. Mohammad Ali Jan (Khan Zahid) (ISN 4193) has never been involved in Taliban or insurgent activities, nor has he ever been arrested or detained before his (b)(1)1.4a, (b)(1)1.4c (b)(6), (b)(1)1.4a, (b)(1)1.4c assured the members of the DRB that as an Elder, he would vouch for Mohammad Ali Jan's (Khan Zahid) (ISN 4193) good character and reintegration into Afghan society should he be released.

(b)(6), (b)(1)1.4a, (b)(1)1.4c testified that he is a Village Elder from Qaraye Arjakhel. He is also Mohammad Ali Jan's (Khan Zahid) (ISN 4193) cousin. (b)(6), (b)(1)1.4a, (b)(1)1.4c testified that Mohammad Ali Jan (Khan Zahid) (ISN 4193) has worked as a day laborer in Saudi Arabia for many years. Mohammad Ali Jan (Khan Zahid) (ISN 4193) returned to Afghanistan approximately three months before his (b)(1)1.4a, (b)(1)1.4c (b)(6), (b)(1)1.4a, (b)(1)1.4c assured the members of the DRB that

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SUBJECT: 2 June 2010 Detainee Review Board Recommendation for the Release of Khan Zahid (ISN 4193)

as his cousin and as a Village Elder, he would vouch for Mohammad Ali Jan's (Khan Zahid) (ISN 4193) good character and reintegration into Afghan society should he be released.

(b)(6), (b)(1)1.4a, (b)(1)1.4c testified that he is Mohammad Ali Jan's (Khan Zahid) (ISN 4193) brother.  
(b)(6), (b)(1)1.4a, (b)(1)1.4c testified that Mohammad Ali Jan (Khan Zahid) (ISN 4193) has worked as a day laborer in Saudi Arabia for many years, and would return infrequently to Afghanistan. Mohammad Ali Jan (Khan Zahid) (ISN 4193) returned to Afghanistan approximately three months before his (b)(1)1.4a, (b)(1)1.4c  
(b)(1)1.4a, (b)(1)1.4c, (b)(6) (b)(1)1.4a, (b)(1)1.4c testified that his brother may own a phone, but (b)(1)1.4a, (b)(1)1.4c could not elaborate on this matter, nor could he recall his brother's telephone number. His brother is not associated with Taliban, nor has he ever been involved ant-Coalition or insurgent activity.

8. In determining whether continued internment is necessary to mitigate the threat Khan Zahid (ISN 4193) may pose, the DRB assessed his level of threat and weighed, among other things, his potential for rehabilitation, reconciliation, and eventual reintegration into society. The DRB considered also Khan Zahid's (ISN 4193) 28 May 2010 BSCIT evaluation assessing him with a recidivism risk of (b)(1)1.4a, (b)(1)1.4c and a COIN amenability rating of (b)(1)1.4a, (b)(1)1.4c. Based upon the absence of credible evidence, the DRB found no support for the internment of Khan Zahid (ISN 4139). Therefore, the DRB found that Khan Zahid (ISN 4139) does not meet the criteria for internment and should be released.

9. The point of contact for this review is MAJ (b)(3), (b)(6) Joint Task Force 435 at DSN (b)(2) OR (b)(2), (b)(3), (b)(6).

(b)(3), (b)(6)

2 Encls.

1. DRB Voting Packet

2. Summarized Testimony with Exhibits

MAJ, IN

President, Detainee Review Board

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(U//FOUO) [redacted] -004193 [redacted]

Khan ((ZAHID)) s/o [redacted]

POC: Chawni, Gardez, Paktya, DOC: [redacted]

~~(C//REL USA, GCTF, ISAF, NATO)~~ Capturing Unit: [redacted]

(U//FOUO) POB/POR: Chawni, Gardez, Paktya Tribe/SubTribe: [redacted] Subtribe: [redacted] Primary Language: Pashtu (S//NF) Interrogations/TIRs: [redacted]

Circumstances of Capture: (S//NF) Khan Zahid, [redacted] -004193 [redacted], was captured [redacted] on [redacted] [redacted]

**Internment Criteria:** (U//FOUO) Was a part of, or substantially supported, Taliban forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities in aid of such enemy armed forces.

**SSE:** (U//FOUO) Cell phone, 2 passports, phone book, license, leather wallet.

**Exploitation:**

- (U//FOUO) Nokia phone contained audio files, pictures, and videos original to the phone, including video of men shooting other men whose hands were tied and an insurgent meeting.
- (S//NF) Latent print examination of prints from a document stapled to the passport were positively identified as the detainee's.
- ~~(S//REL USA, AUS, CAN, GBR, NZL)~~ [redacted]

**Reporting:** 8 reports from 5 sources of unknown reliability

- (U//FOUO) Detainee identified himself as Mohamad Ali Jan during the initial questioning. A passport with the name "Zahid" was found during the SSE, and when detainee was asked who the passport belonged to, detainee stated it belonged to him and confirmed his name was ZAHID. (Sworn Statements US service members).
- (S//REL to USA, ISAF, NATO) [redacted] reports that TB fighter "Zahid" who is commanded by [redacted] had emplaced two IEDs in the road between Chawni village and Dinar Kheyil village.
- (S//NF) [redacted] reports that Haji Wali bribed the [redacted] to let insurgent fighter [redacted] out of ANP custody. [redacted] where they discussed that [redacted] district TB would not target ANP so long as ANP did not target TB.
- (S//REL to USA, ISAF, NATO) [redacted] reports that TB fighter [redacted] set and detonated an IED on the ANA and CF and filmed it with his cellphone to use as propaganda in PK.
- (S//REL to USA, ISAF, NATO) [redacted] reports that Zahid and six fighters emplaced four IEDs on the road west from Aljandhel, Zormat. The IEDs were spread along a two kilometer section of road, one 300 meters west of a small bridge. All four were placed the night of 9 June 2009 and were pressure plate activated.
- (S//REL USA, ISAF, NATO) [redacted] reports that three [redacted] met in Gorja village, Zormat with five suicide bombers at the home of Haji Abdul Nazir. They planned attacks in Gardez City at the bazaar, election office, and NDS office. The attacks were to occur simultaneously. [redacted]
- (S//REL to USA, ISAF, NATO) [redacted] reports that six TB fighters led by Zahid gathered in Chawni at the residence of Baqi Jan. (HCT15-OMT01 DOI: 10 Jun 2009).
- (S//REL to USA, ISAF, NATO) [redacted] reports that as of 1145, insurgent commanders [redacted] Zahid, and [redacted] and five other insurgents were leading an attack on the ANA Zow checkpoint.

~~(C//REL USA, GCTF, ISAF, NATO)~~

**Organization & Role:**

Taliban Member  
DRB Hearing Date: 2 June 2010

~~(S//REL USA, ISAF, NATO)~~

**Associated Personalities**

[redacted]

(U//FOUO)

**Other Names/Alias**

Mohammad Ali Jan, Mullah Zahid, Zahidullah Khan

~~SECRET//NOFORN~~

BAGRAM / CENTCOM /001569

~~SECRET//NOFORN~~

(U//FOUO)

-004193

Khan ((ZAHID)) s/o [redacted]

POC: Chawni, Gardez, Paktya, DOC [redacted]

(C//REL USA, GCTF, ISAF, NATO) Capturing Unit: [redacted]

SLIDE #2

Detainee Statement: (S//NF) Detainee provided information on names in his cell phone that were consistent with information he had previously provided on his cell phone. [redacted] Detainee denied knowing anything about his village or ACM personalities because he had recently returned from KSA. He knows [redacted] and [redacted] but states they are not ACM. He has heard about an IED attack near his village but provided limited details. He admitted to knowing the location of the Zay checkpoint. [redacted] Detainee said he has lived in KSA and Kuwait. He comes back to AF to bring money he has saved home. [redacted] Detainee denied ever meeting with suicide bombers or having any part of suicide bombing. [redacted] Detainee admitted to traveling to PK to obtain a fake passport. He admitted his first passport had a false name. He says his name is Mohammad Ali Jon s/o [redacted], but his passport is under the name Zahidullah Khan s/o Amal Khan. His cousin helped him get a job in KSA driving a truck at a farm in Medina. He would send money home with his brother, another Afghan, or via hawala. [redacted] He was in KSA when the only IED he has heard of in his village detonated a year ago. [redacted] Detainee denied ever hearing of Chawni village but knew one called Chamblai. He said he had not heard of any ACM or IED activities in Chawni. [redacted] Detainee denied knowing any suicide bombers. He said Chawni is an hour walk from his home and he does not know anyone there. He said he had only been there once many years ago. [redacted]

BSCT Assessment: (S//NF) Risk Level: [redacted], COIN: [redacted] (Confidence: [redacted]) prior assessment Risk Level: [redacted] COIN: [redacted] (Confidence: [redacted])

DR/OR Summary: (S//NF) See DFIP Progress Report [redacted]

BAGRAM / CENTCOM / 001570

~~SECRET//NOFORN~~

Detainee Review Board Report of Findings and Recommendations – Final Board Result v.22 Feb 2010

<u>Date of Board</u> 2 Jun 10	<u>Detainee Name</u> Khan ((Zahid))	<u>Detainee ISN</u> (b)(1)1.4a, (b)(1)1.4c 00419 (b)(1)1.4a, (b)(1)1.4c
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STEP 1 (FINDINGS): By a preponderance of the information presented, as a member of the Detainee Review Board (DRB), I find that:

The detainee DOES NOT MEET THE CRITERIA for internment and will be released. *Stop here and sign at the bottom.*

OR

The detainee listed above MEETS CRITERIA FOR INTERNMENT because he is a person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks; (*Continue to Step 2*) OR

The detainee listed above MEETS CRITERIA FOR INTERNMENT because he is a person who was part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces. (*Continue to Step 2*)

STEP 2 (THREAT ASSESSMENT RECOMMENDATION): After taking into account the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society, by a preponderance of the information, I find that continued internment:

IS NOT NECESSARY to mitigate the threat the detainee poses; (*Go to Step 3A*)

OR

IS NECESSARY to mitigate the threat the detainee poses (\* the detainee will remain at the Detention Facility in Parwan (DFIP) to ensure detention required to mitigate his threat) (*Go to Step 3B*);

Explain the facts presented at the DRB which led to your recommendation/  
(Mandatory regardless of which threat assessment is made):

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Please circle the appropriate threat level regardless of which recommendation is made in STEP 2.

1. Strategic threat to United States and coalition forces
2. Operational threat to United States and coalition forces
3. Informational threat to United States and coalition forces
4. Potential threat to United States and coalition forces
5. No longer a threat to United States and coalition forces
6. No longer a threat to United States and coalition forces

STEP 3A: If your Recommendation in STEP 2 is that continued internment is not necessary to mitigate the threat the Detainee poses, then make one of the following recommendations: In light of the findings listed above, I recommend that the detainee be (PICK ONLY 1):

- Released without conditions; or
- Transferred to Afghan authorities for their consideration of criminal prosecution.
- Transferred to Afghan authorities for participation in a reconciliation or reintegration program.
- (For non-Afghan and non-U.S. third-country national): Transferred to a third country for: criminal prosecution // participation in a reconciliation program // or release. (*circle one*)

STEP 3B: If your Recommendation in STEP 2 is that continued internment is necessary to mitigate the threat the Detainee poses, make the following further recommendation, and then Go to Step 4.

While the Detainee remains interned at the DFIP, he SHOULD / SHOULD NOT (*circle one*) be considered for Reintegration programs within the DFIP.

STEP 4:  The Detainee IS or IS NOT an Enduring Security Threat (*circle one*).

(b)(3), (b)(6)

Detainee Review Board Report of Findings and Recommendations

v. 5 Feb 2010

Date of Board 2 JUN 10	Detainee Name KINAW ZAHID	Detainee ISN (b) 1.4a, (b)(1) 1.4e 00411931.4a, (b)(1) 1.4c
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STEP 1 (FINDINGS): By a preponderance of the information presented, as a member of the Detainee Review Board (DRB), I find that:

(b)(3), (b)(6) The detainee DOES NOT MEET THE CRITERIA for internment and will be released. Stop here and sign at the bottom.

OR

The detainee listed above MEETS CRITERIA FOR INTERNMENT because he is a person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks: (Continue to Step 2)

The detainee listed above MEETS CRITERIA FOR INTERNMENT because he is a person who was part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces. (Continue to Step 2)

STEP 2 (THREAT ASSESSMENT RECOMMENDATION): After taking into account the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society, by a preponderance of the information, I find that continued internment:

IS NOT NECESSARY to mitigate the threat the detainee poses; (Go to Step 3A)

OR

IS NECESSARY to mitigate the threat the detainee poses (\* the detainee will remain at the Detention Facility in Parwan (DFIP) to ensure detention required to mitigate his threat) (Go to Step 3B):

Explain the facts presented at the DRB which led to your recommendation/

(Mandatory regardless of which threat assessment is made):

NO CREDIBLE INFORMATION LINKING THE PHONO TO THE DOWAZEB. PASSPORT IN VALUATES 3 OF 5 SOURCE REPORTS.

Please circle the appropriate threat level regardless of which recommendation is made in STEP 2.

- 5- Strategic threat to American and Coalition Forces and Civilians
- 4- National threat to American and Coalition Forces
- 3- Regional threat to GILGA forces or authority
- 2- Provincial threat to GILGA forces or authority
- 1- Threat to local village authorities
- 0- is not a threat to his village or beyond

STEP 3A: If your Recommendation in STEP 2 is that continued internment is not necessary to mitigate the threat the Detainee poses, then make one of the following recommendations: In light of the findings listed above, I recommend that the detainee be:

- Released without conditions; or
- Transferred to Afghan authorities for their consideration of criminal prosecution.
- Transferred to Afghan authorities for participation in a reconciliation or reintegration program.
- (For non-Afghan and non-U.S. third-country national): Transferred to a third country for: criminal prosecution // participation in a reconciliation program // or release. (circle one)

STEP 3B: If your Recommendation in STEP 2 is that continued internment is necessary to mitigate the threat the Detainee poses, make the following further recommendation, and then Go to Step 4.

While the Detainee remains interned at the DFIP, he SHOULD / SHOULD NOT (circle one) be considered for Reintegration programs within the DFIP.

STEP 4: "Enduring Security Threat" Assessment --- \* Prior to completing your Enduring Security Threat Assessment, go to page 2 of this form and complete the EST Worksheet, paying particular attention to the criteria and definitions.

The Detainee IS or IS NOT an Enduring Security Threat (circle one).

(b)(3), (b)(6)

**Note:** “BAGRAM / CENTCOM / 001573” has been omitted from this PDF because it is the subject of pending litigation.

**Detainee Review Board Report of Findings and Recommendations**

v. 5 Feb 2010

Date of Board	Detainee Name	Detainee ISN
02 June 10	Khan Zahid	(b)(1)1.4a, (b)(1)1.4e (b)(3)1.4a, (b)(1)1.4c

**STEP 1 (FINDINGS):** By a preponderance of the information presented, as a member of the Detainee Review Board (DRB), I find that:

The detainee DOES NOT MEET THE CRITERIA for internment and will be released. *Stop here and sign at the bottom.*  
OR

The detainee listed above MEETS CRITERIA FOR INTERNMENT because he is a person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks; *(Continue to Step 2)*  
OR

The detainee listed above MEETS CRITERIA FOR INTERNMENT because he is a person who was part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces. *(Continue to Step 2)*

**STEP 2 (THREAT ASSESSMENT RECOMMENDATION):** After taking into account the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society, by a preponderance of the information, I find that continued internment:

IS NOT NECESSARY to mitigate the threat the detainee poses; *(Go to Step 3A)*  
OR

IS NECESSARY to mitigate the threat the detainee poses (\* the detainee will remain at the Detention Facility in Parwan (DFIP) to ensure detention required to mitigate his threat) *(Go to Step 3B)*

Explain the facts presented at the DRB which led to your recommendation/  
*(Mandatory regardless of which threat assessment is made):*

- NO ~~was~~ voice PID of TLET
- Loss of custody of phone

(b)(1)1.4a, (b)(1)1.4c

Please circle the appropriate threat level regardless of which recommendation is made in STEP 2.

- 5- Strategic threat to American and Coalition Forces and Civilians
- 4- National threat to American and Coalition Forces
- 3- Regional threat to GILFIA forces or authority
- 2- Provincial threat to GILFIA forces or authority
- 1- Threat to local village authorities
- 0- Is not a threat to his village or beyond

**STEP 3A:** If your Recommendation in STEP 2 is that continued internment is not necessary to mitigate the threat the Detainee poses, then make one of the following recommendations: In light of the findings listed above, I recommend that the detainee be:

- Released without conditions; or
- Transferred to Afghan authorities for their consideration of criminal prosecution.
- Transferred to Afghan authorities for participation in a reconciliation or reintegration program.
- (For non-Afghan and non-U.S. third-country national):* Transferred to a third country for: criminal prosecution // participation in a reconciliation program // or release. *(circle one)*

**STEP 3B:** If your Recommendation in STEP 2 is that continued internment is necessary to mitigate the threat the Detainee poses, make the following further recommendation, and then Go to Step 4.

While the Detainee remains interned at the DFIP, he SHOULD / SHOULD NOT *(circle one)* be considered for Reintegration programs within the DFIP.

**STEP 4: "Enduring Security Threat" Assessment** --- \* Prior to completing your Enduring Security Threat Assessment, go to page 2 of this form and complete the EST Worksheet, paying particular attention to the *criteria and definitions*.

The Detainee IS or IS NOT an Enduring Security Threat *(circle one)*.

(b)(3), (b)(6)

Page 13 redacted for the following reason:

-----  
(b)(1)1.4a, (b)(1)1.4c

**Detainee Review Board Report of Findings and Recommendations**

v. 5 Feb 2010

<b>Date of Board</b> 2 JUN 10	<b>Detainee Name</b> KHAN (ZAFID)	<b>Detainee ISN</b> 004198	(b)(1)1.4a, (b)(1)1.4c
----------------------------------	--------------------------------------	-------------------------------	------------------------

**STEP 1 (FINDINGS):** By a preponderance of the information presented, as a member of the Detainee Review Board (DRB), I find that:

(b)(3), (b)(6) X The detainee DOES NOT MEET THE CRITERIA for internment and will be released. *Stop here and sign at the bottom.*

OR

The detainee listed above MEETS CRITERIA FOR INTERNMENT because he is a person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks; *(Continue to Step 2)*  
OR

The detainee listed above MEETS CRITERIA FOR INTERNMENT because he is a person who was part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces. *(Continue to Step 2)*

**STEP 2 (THREAT ASSESSMENT RECOMMENDATION):** After taking into account the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society, by a preponderance of the information, I find that continued internment:

IS NOT NECESSARY to mitigate the threat the detainee poses; *(Go to Step 3A)*

OR

IS NECESSARY to mitigate the threat the detainee poses (\* the detainee will remain at the Detention Facility in Parwan (DFIP) to ensure detention required to mitigate his threat) *(Go to Step 3B;*

Explain the facts presented at the DRB which led to your recommendation/

*(Mandatory regardless of which threat assessment is made):*

HIS PASSPORT SAID THAT HE DIDNT RETURN FROM SAUDI ARABIA BACK TO AFGHANISTAN UNTIL MAY 2009

(b)(1)1.4a, (b)(1)1.4c

THAT LINKS him TO THE CELL PHONE IN QUESTION AND THERE WERE 9 OTHER INDIVIDUALS WHO COULD HAVE OWNED THAT PHONE,

Please circle the appropriate threat level regardless of which recommendation is made in STEP 2.

- 5- Strategic threat to American and Coalition Forces and Civilians
- 4- National threat to American and Coalition Forces
- 3- Regional threat to US/Coal forces or authority
- 2- Provincial threat to US/Coal forces or authority
- 1- Threat to local village authorities
- 0- Is not a threat to his village or beyond

0 NO HARD EVIDENCE

(b)(1)1.4a, (b)(1)1.4c

**STEP 3A:** If your Recommendation in STEP 2 is that continued internment is not necessary to mitigate the threat the Detainee poses, then make one of the following recommendations: In light of the findings listed above, I recommend that the detainee be:

- Released without conditions; or
- Transferred to Afghan authorities for their consideration of criminal prosecution.
- Transferred to Afghan authorities for participation in a reconciliation or reintegration program.
- (For non-Afghan and non-U.S. third-country national):* Transferred to a third country for: criminal prosecution // participation in a reconciliation program // or release. *(circle one)*

**STEP 3B:** If your Recommendation in STEP 2 is that continued internment is necessary to mitigate the threat the Detainee poses, make the following further recommendation, and then Go to Step 4.

While the Detainee remains interned at the DFIP, he SHOULD / SHOULD NOT *(circle one)* be considered for Reintegration programs within the DFIP.

**STEP 4: "Enduring Security Threat" Assessment** — \* Prior to completing your Enduring Security Threat Assessment, go to page 2 of this form and complete the EST Worksheet, paying particular attention to the *criteria and definitions*.

The Detainee IS or IS NOT an Enduring Security Threat *(circle one)*.

(b)(3), (b)(6)

DRB Member Signature

MAJ (b)(3), (b)(6) USMC

**Note:** “BAGRAM / CENTCOM / 001577” has been omitted from this PDF because it is the subject of pending litigation.

~~SECRET//NOFORN~~

1 (U//FOUO) [ISN (b)(1) 4004193 (b)(1) Khan Zahid, entered the  
 2 boardroom, took his seat in front of the board members, and the  
 3 unclassified hearing was called to order at 1335, 2 June 2010.]  
 4

5 (U) Persons Present:

6  
 7 (U) MAJOR (b)(3),(b)(6), PRESIDENT OF THE BOARD;

8  
 9 (U) MAJOR (b)(3),(b)(6), MEMBER ONE;

10  
 11 (U) MAJOR (b)(3),(b)(6), MEMBER TWO;

12  
 13 (U) CAPTAIN (b)(3),(b)(6), DETAINEE REVIEW BOARD  
 14 RECORDER THREE;

15  
 16 (U) LIEUTENANT JUNIOR GRADE (b)(3),(b)(6), PERSONAL  
 17 REPRESENTATIVE THREE;

18  
 19 (U) MAJOR (b)(3),(b)(6), LEGAL REPRESENTATIVE; and

20  
 21 (U) SPECIALIST (b)(3),(b)(6), PARALEGAL.

22  
 23 (U) [The recorder was sworn.]  
 24

25 (U) The detainee was advised by the president of how this board  
 26 was not a criminal trial and how this board was to determine  
 27 whether or not he met the criteria for further internment.  
 28

29 (U) The president also notified the detainee that he may be  
 30 present at all open sessions of the board permitting that he  
 31 acted appropriately. ISN 4193 was also advised that he could  
 32 testify under oath or unsworn if he wished to do so, that he had  
 33 a personal representative who was present at the hearing, that  
 34 he may present information at the hearing including the  
 35 testimony of witnesses, and that he can examine documents  
 36 presented to the board all of which the detainee understood.  
 37

38 (U) Further, ISN 4193 was instructed that, at the conclusion of  
 39 the board after the legal review, the board would determine  
 40 whether he met the criteria for further internment at the  
 41 Detention Facility in Parwan. The detainee understood the fact

~~SECRET//NOFORN~~

~~SECRET//NOFORN~~

1 that if he does not meet the criteria, he would be released as  
2 soon as possible. However, if he did meet the criteria, then he  
3 would be recommended for further internment, transferred to  
4 Afghan authorities, or released without conditions.

5  
6 (U) CAPTAIN (b)(3),(b)(6) presented the following unclassified  
7 information to the board:

8  
9 (U//~~FOUO~~) Khan Zahid, ISN 004193, was captured (b)(1)1.4a, (b)(1)1.4c  
10 (b)(1)1.4a, (b)(1)1.4c. At capture,  
11 he initially identified himself as Mohammad Ali Jan. After  
12 being confronted with a passport of his picture with the  
13 name Zahid, he identified the passport as his.

14  
15 Zahid was captured with two passports, a driver's license,  
16 a phone book, and a Nokia cell phone. The phone contains  
17 several pictures and videos, including a video of a bridge,  
18 several videos of a martyr, and two videos of adult males  
19 with weapons at what appear to be an insurgent meeting. The  
20 phone also contains a video of MAM's shooting other men  
21 whose hands were tied. The videos were original to the  
22 phone.

23  
24 Zahid allegedly emplaced IEDs on multiple occasions. He is  
25 assessed to be a Taliban sub-commander with fighters under  
26 him and commanders over him. He has allegedly helped plan  
27 suicide attacks.

28  
29 The elders of Paktia have written letters claiming the  
30 detainee's innocence. Loose papers found with the detainee  
31 did have the name Mohammad Ali Jan on them. The detainee's  
32 fingerprints were found on paper stapled to the passport.

33  
34 Zahid denies being an anti Coalition militia member. He has  
35 admitted to having knowledge of the Zow checkpoint. He  
36 denied ever hearing of Chawni village or any attacks there,  
37 but then said it was an hour from his home and he had been  
38 there once years ago. He says he recently returned from  
39 Saudi Arabia. He says his name is Mohammad Ali Jan but his  
40 passport is under the name Zahidullah Khan.

~~SECRET//NOFORN~~

~~SECRET // NOFORN~~

1 Detainee meets the Internment Criteria IF this board  
 2 determines he was a part of or substantially supported  
 3 Taliban or associated forces that are engaged in  
 4 hostilities against the US or it Coalition partners,  
 5 including any person who has committed a belligerent act or  
 6 who has directly supported hostilities in aid of such enemy  
 7 armed forces.

8  
 9 (U) The detainee, ISN 4193, made the following statements to the  
 10 board:

11  
 12 (U//~~FOUO~~) My real name is Ali Mohammad Jan. In the passport  
 13 my name is Zahidullah Khan. The reason my name was  
 14 different in my passport was because I got that passport in  
 15 Pakistan during the Russian Regime. Later I wanted to  
 16 change to an Afghani passport but they told me that I could  
 17 not change my name. As I was going back and forth to Saudi  
 18 Arabia I had to use Pakistan but now Afghanistan has an  
 19 airport. I have a wife and five daughters. I don't have any  
 20 sons that can take care of my family. There was no cell  
 21 phone captured with me. I was sitting in my home with my  
 22 wife and when the airplane came they came in my house and  
 23 captured me. They asked me why I had a different name in  
 24 the passport and I told them what I just said. I was in  
 25 Saudi Arabia for about 29 months and all I did when I got  
 26 back was try to build my house. I was not involved with any  
 27 attacks. My capture is unfortunate because people told me  
 28 that there was peace and stability in my country. If this  
 29 is not true tell me where I can take my family to where  
 30 they would be safe. There is a story saying that I am a  
 31 commander and that is all a lie. I am not involved with  
 32 anything against the Afghan government or Coalition forces.  
 33 That is all I did. I had the one paper with me because I  
 34 had some kidney problems.

35  
 36 (U) DETAINEE TESTIMONY

37  
 38 (U//~~FOUO~~) Khan Zahid ~~(b)(1), (b)(4), (b)(193), (b)(1)~~ was called for the board  
 39 and testified, in substance, as follows:

40  
 41 (U) DIRECT EXAMINATION

~~SECRET // NOFORN~~

SECRET//NOFORN

1  
2 (U) CAPTAIN (b)(3), (b)(6) asked, in substance, the following  
3 questions:

4  
5 (U//FOUO) I am from Gardez district.

6  
7 I spent all of my life outside of my country. If I was  
8 never in here how could I be a Taliban? I have never helped  
9 the Taliban in anyway. I am not involved with the Taliban.  
10 I never helped plan a suicide attack, I've just seen them  
11 on TV. I have never planned or participated in an attack  
12 with an IED. I have no right to hurt another human being  
13 because I would have to answer to my god.

14  
15 I was living in Afghanistan for about 3 months before my  
16 capture. You can check my date in my passport and see when  
17 I came here. It is unfortunate that I am being detained  
18 here without any evidence.

19  
20 (Unclassified Exhibit 7 was shown on paper close to the  
21 detainee) Yes that is my passport.

22  
23 (Unclassified Exhibit 8 was shown to the detainee) I can't  
24 read so I don't know what it says. I might have been here  
25 in March 2009 if the stamp says I was. I think it was one  
26 month of Ramadan and three other months so maybe 4 months.  
27 I came back maybe in May or whenever the wheat was ready.  
28 The weather was hot in Kabul so it is impossible that it  
29 was only March (the wheat season was explained to be in  
30 late March and the detainee was confused on what date he  
31 came back he was saying May but he was also saying he came  
32 back during the wheat season).

33  
34 That is not true about my cell phone. Show me my cell  
35 phone.

36  
37 (Unclassified Exhibit 25 was shown to the detainee) I can't  
38 see these pictures (detainee's glasses were retrieved). I  
39 don't know these people. I stated before that the phone is  
40 not mine so why are you telling me about these pictures. I

SECRET//NOFORN

~~SECRET // NOFORN~~

1 have no telephone and I am not involved in taking any of  
2 those pictures or anything like that.

3  
4 [The location of the phone was discussed. The recorder  
5 informed the board that she looked in the DFIP property  
6 locker and contacted the Joint Document Exploitation  
7 detachment at (b)(1)1.4a, (b)(1)1.4c, who could not find the phone. No  
8 picture of the phone could be provided.]

9  
10 I know (b)(6), (b)(1)1.4a, (b)(1)1.4c he is my brother. He is not involved in  
11 anything he is a poor person.

12  
13 I don't know anyone named (b)(6), (b)(1)1.4a, (b)(1)1.4c.

14  
15 I told the people that I don't know if any anti Coalition  
16 forces are there but I know that there is a checkpoint  
17 there in Zow.

18  
19 I was in Chawni about three or four years before. I never  
20 helped conduct any attacks in that village. There is no  
21 reason for me to attack that village.

22  
23 I have been to Zormat but not since the last time I was in  
24 Afghanistan. It was maybe five years before my capture.

25  
26 If I were released I would live in my own village and I  
27 would be a farmer. I would not support the Taliban. I would  
28 support the Coalition Forces. I have been treated very well  
29 since being detained here. Since a lot of my people have  
30 shops in the bazaar we are supportive of our government. My  
31 brother also has a shop.

32  
33 During the Nawroz I was in Saudi Arabia.

34  
35 (Unclassified Exhibit 27 was shown to the detainee) The  
36 bottom picture is the only one of me.

37  
38 (U) CROSS-EXAMINATION

39  
40 (U) LIEUTENANT JUNIOR GRADE (b)(3), (b)(6) asked, in substance,  
41 the following questions:

~~SECRET // NOFORN~~

~~SECRET // NOFORN~~

1  
2 (U//FOUO) It was probably about 34 years ago that I went to  
3 Saudi Arabia for the first time. I started doing  
4 construction and eventually got my license and started  
5 doing driving for my friend. I don't know how many times I  
6 came back to Afghanistan but my passport has the dates I  
7 came back. I would sometimes come every three or four years  
8 and stay about six months. I was planning on going back to  
9 Saudi Arabia the last time I was in Afghanistan. If I was  
10 released I couldn't go to Saudi Arabia because I lost my  
11 visa and my passport. I have some land I could work on or I  
12 could work in a shop. Since I have been here my family has  
13 been living with my brother.

14  
15 [P.R. exhibits (letters from brother and elders) were read  
16 to the detainee]

17  
18 (U) EXAMINATION BY THE BOARD

19  
20 (U) Member 2 asked, in substance, the following questions:

21  
22 (U//FOUO) I was captured in my home. My wife and daughters  
23 live with me in my home. My brother also lives in the other  
24 rooms. My brother has a telephone he uses for his shop. My  
25 brother's son has a telephone also. In Saudi Arabia I had a  
26 telephone but I don't have one here. I know what a SIM card  
27 is. The name I made up was Zahidullah Khan not Khan Zahid.  
28 I used a fake ID card from Pakistan so I could get a  
29 Pakistan passport. I have five daughters. Some of my  
30 daughters are already married, my brother wasn't counting  
31 them when he said I have two. My nephew works in a base and  
32 another works construction and they all have phones. There  
33 is just one phone in the house that is my nephew's and the  
34 others have a phone at their work. I had a phone book but  
35 it was only of people in Saudi Arabia. I have never been  
36 detained or arrested before this.

37  
38 (U) The President of the Board asked, in substance, the  
39 following questions:

40  
~~SECRET // NOFORN~~

~~SECRET//NOFORN~~

1 (U//FOUO) My nephew has a telephone. My brother who has the  
 2 shop is named (b)(6), (b)(1)1.4a, (b)(1)1.4c I was living in Saudi Arabia for  
 3 about 28 or 29 months. I was driving a car in Saudi Arabia.  
 4 I was driving a dump truck. I might have stayed two more  
 5 months in Afghanistan before I would go back to Saudi  
 6 Arabia. My nephew was also captured with me. My nephew is  
 7 studying in the Madrassa; he is 24 or 25 years old.

8  
 9 [The interpreters established the stamp on the passport on  
 10 Exhibit 11 says May 22]

11  
 12 WITNESS TESTIMONY

13  
 14 (U//FOUO) (b)(6), (b)(1)1.4a, (b)(1)1.4c Village Elder, was called as a witness  
 15 for the board, entered the boardroom, and testified, in  
 16 substance, as follows:

17  
 18 (U) DIRECT EXAMINATION

19  
 20 (U) LIEUTENANT JUNIOR GRADE (b)(6), (b)(3) CAPTAIN (b)(3), (b)(6)  
 21 asked, in substance, the following questions:

22  
 23 (U//FOUO) I am from Gardez district. He did have to go by a  
 24 different name so he could get a passport in Pakistan so he  
 25 could go to Saudi Arabia to support his family. He is not  
 26 involved in any activities and he is innocent. I know he  
 27 was doing whatever work he could find like driving truck.  
 28 He was in Saudi Arabia for more than ten years. He just  
 29 wanted a better house for his family.

30  
 31 I am here to vouch for him. I am a leader of my village and  
 32 I will watch for wrong doing in the future. Since he has a  
 33 wife and small children at home I am willing to do that.

34  
 35 (U) CROSS-EXAMINATION

36  
 37 (U) CAPTAIN (b)(3), (b)(6) asked, in substance, the following  
 38 questions:

39  
 40 (U//FOUO) He was in Afghanistan for three or four months  
 41 before his capture. He was not here for Nawroz. There are

~~SECRET//NOFORN~~

~~SECRET // NOFORN~~

1 not Taliban in my village. They show up do something wrong  
2 and then run away. He has never helped the Taliban. He is a  
3 poor man he has to take care of his kids.  
4

5 (U) EXAMINATION BY THE BOARD  
6

7 (U) Member 2 asked, in substance, the following questions:  
8

9 (U//FOUO) I don't know anything about him owning a  
10 telephone. He has never been arrested in Afghanistan  
11 before. He has never been called Mullah. It is common to  
12 get a passport in Pakistan with a different name. During  
13 that time you had to get a fake ID card from Pakistan to  
14 retrieve a passport from Pakistan.  
15

16 (U) [The witness withdrew from the boardroom.]  
17

18 WITNESS TESTIMONY  
19

20 (U//FOUO) (b)(6), (b)(1)1.4a, (b)(1)1.4 Detainee's Cousin, was called as a witness  
21 for the board, entered the boardroom, and testified, in  
22 substance, as follows:  
23

24 (U) DIRECT EXAMINATION  
25

26 (U) LIEUTENANT JUNIOR GRADE (b)(3), (b)(6) asked, in substance,  
27 the following questions:  
28

29 (U//FOUO) His name is Mohammad Ali Jan and he is my cousin.  
30 I help settle disputes in my village. He was working as a  
31 laborer in Saudi Arabia. I think Zahidzullah was the name  
32 on the passport. He probably lived in Saudi Arabia for  
33 eight or ten years. He had permission to live here for 10  
34 months but was only here for maybe three months. He was  
35 only here to build a house. If he was released he would  
36 probably farm and take care of his family because he  
37 doesn't have any sons taking care of them now.  
38

39 (U) CROSS-EXAMINATION  
40

~~SECRET // NOFORN~~

~~SECRET // NOFORN~~

1 (U) CAPTAIN [REDACTED] (b)(3), (b)(6) asked, in substance, the following  
2 questions:

3

4 (U//FOUO) He came back maybe two or three times in the  
5 eight or ten years he lived in Saudi Arabia. There aren't  
6 any Taliban in our village we just have a bazaar and  
7 students going to the Madrassa.

8

9 (U) EXAMINATION BY THE BOARD

10

11 (U) The President of the Board asked, in substance, the  
12 following questions:

13

14 (U//FOUO) There was a little gathering to celebrate his  
15 return but a small group. Chawni is about 9 or 10  
16 kilometers away. I don't know (b)(6), (b)(1)1.4a, (b)(1)1.4c

17

18 (U) [The witness withdrew from the boardroom.]

19

20

WITNESS TESTIMONY

21

22 (U//FOUO) (b)(6), (b)(1)1.4a, (b)(1)1.4c Detainee's Brother, was called as a  
23 witness for the board, entered the boardroom, and testified, in  
24 substance, as follows:

25

26

(U) DIRECT EXAMINATION

27

28 (U) LIEUTENANT JUNIOR GRADE [REDACTED] (b)(3), (b)(6) asked, in substance,  
29 the following questions:

30

31 (U//FOUO) My brother's name is Mohammad Ali Jan. He was  
32 living and working in Saudi Arabia for about 15 or 20  
33 years. I don't know why he was captured and brought here;  
34 he is an innocent man. He might have been here for maybe  
35 two months but I am uneducated and don't know. If my  
36 brother is guilty of anything then you can keep him as long  
37 as you want. I am really certain that he is not guilty. The  
38 night my brother was captured I was not home. They did not  
39 find anything in my home. He was always living in Saudi  
40 Arabia and had nothing to do with the activities here in  
41 Afghanistan. I don't know who gave him the wrong

~~SECRET // NOFORN~~

~~SECRET//NOFORN~~

1 information but he can't be involved in Taliban activities  
2 because he was always living in Saudi Arabia. He had a  
3 telephone. I don't know what happened to his telephone. He  
4 might have had a telephone.

5  
6 (U) CROSS-EXAMINATION

7  
8 (U) CAPTAIN (b)(3), (b)(6) asked, in substance, the following  
9 questions:

10  
11 (U//~~FOUO~~) (b)(1), (b)(1).4a, (b)(1) is my son and he was captured with my  
12 brother. He would come home maybe once every two or three  
13 years. We are not involved with the Taliban. He is not  
14 involved with attacks on Coalition Forces. There are not  
15 any Taliban in my village. There is a lot of bases and  
16 Afghan forces so there aren't any Taliban in our area.

17  
18 (U) EXAMINATION BY THE BOARD

19  
20 (U) Member 2 asked, in substance, the following questions:

21  
22 (U//~~FOUO~~) I live in the same Qalat as my brother. I own a  
23 telephone.

24  
25 (U) The President of the Board asked, in substance, the  
26 following questions:

27  
28 (U//~~FOUO~~) I only know how to answer the telephone. My son  
29 has a telephone but I don't know the number.

30  
31 (U) [The witness withdrew from the boardroom.]

32  
33 (U) The recorder did offer unclassified exhibits.

34  
35 (U) The personal representative did offer unclassified exhibits.

36  
37 (U) The recorder had no further unclassified information to  
38 offer the board and, per the recorders request, the president  
39 granted a closed hearing at the culmination of the unclassified  
40 hearing.

41  
~~SECRET//NOFORN~~

SECRET//NOFORN

1 (U) The president announced the conclusion of the unclassified  
2 hearing.

3 (U) The president of the board instructed the detainee that he  
4 would be notified of the board's decision within a couple of  
5 weeks and that he would be released if the decision is made that  
6 further internment would not be required. However, if the board  
7 decided that further internment is required, he would be  
8 retained at the Detention Facility in Parwan, transferred to  
9 Afghan authorities for participation in a reconciliation  
10 program, or released transferred to his national country for  
11 participation in a reconciliation program. Furthermore, if  
12 continued internment was recommended, then an additional  
13 Detainee Review Board would be reconvened in 6 months.

14

15 (U) The detainee made the following statement:

16 (U//~~FOUO~~) (No statement was made)

17

18 (U) [The unclassified hearing adjourned at 1603, 2 June 2010.]

19 (U) [The detainee withdrew from the boardroom.]

20 (U) [The classified hearing was called to order at 1608, 2 June  
21 2010.]

22

23 ~~(S)~~ CAPTAIN [redacted] (b)(3), (b)(6) presented the following information to  
24 the board:

25

26 ~~(S//NF)~~ He was captured after [redacted] (b)(1)1.4a, (b)(1)1.4c

27 [redacted] (b)(1)1.4a, (b)(1)1.4c. He was

28 found with a cell phone, two passports, a phone book, a  
29 license, and a leather wallet. There was some confusion on  
30 what was found on him. The 4137 does state that a cell  
31 phone was found at the [redacted] (b)(1)1.4a, (b)(1)1.4c. We searched for the phone  
32 but could not find it. The videos and pictures are  
33 important because they are original to the phone. The  
34 capturing unit assesses the phone to be his. He does talk  
35 about the phone in his interrogation but there is no  
36 admission from him claiming the phone to be his. We have  
37 eight reports from five sources of unreliability. We were  
38 asking about the New Year because the New Year was in March  
39 in 2009 and he said he was in Saudi Arabia during that. He  
40 denied knowing his associated personalities. One of the  
41 reports ties him to emplacing an IED at a bridge so that is

SECRET//NOFORN

~~SECRET//NOFORN~~

1 why I asked if he recognized the bridge photo. 1LT (b)(3), (b)(6)  
2 gave a very detailed memo of the detainee describing his  
3 risk. There is a presence of Taliban in Gardez and in  
4 Paktia and the government is assessed to be very corrupt.

5  
6 ~~(S)~~ WITNESS TESTIMONY

7  
8 ~~(S//NF)~~ Lieutenant (b)(3), (b)(6), Battle Space Owner, was called  
9 telephonically as a witness for the board, and testified, in  
10 substance, as follows:

11  
12 ~~(S)~~ DIRECT EXAMINATION

13  
14 ~~(S)~~ CAPTAIN (b)(3), (b)(6) asked, in substance, the following  
15 questions:

16  
17 ~~(S//NF)~~ (Witness was not reasonably available)

18  
19 ~~(S)~~ LIEUTENANT JUNIOR GRADE (b)(3), (b)(6) presented the  
20 following information to the board:

21  
22 ~~(S//NF)~~ (b)(1)1.4a, (b)(1)1.4c

23  
24  
25 (b)(1)1.4a, (b)(1)1.4c  
26  
27

28  
29 ~~(S)~~ The recorder did offer classified exhibits.

30  
31 ~~(S)~~ The personal representative did not offer classified  
32 exhibits.

33  
34 ~~(S)~~ The president and members of the board voted on ISN 4193.  
35 The votes were then collected and handed to the legal  
36 representative.

37  
38 ~~(S)~~ [The classified session adjourned at 1632, 2 June 2010.]

39  
40 [END OF PAGE]

41  
~~SECRET//NOFORN~~



## STAFF SUMMARY ROUTING SHEET

### JTF 435/DCDO USFOR-A



**SUBJECT:** Status recommendation for ISN 4193 to be released from the Detention Facility in Parwan (DFIP).

**DATE:** 2 June 2010

**PROBLEM OR REASON FOR ACTION:** To obtain DC JTF 435 approval or disapproval to change or validate the status of ISN 4193 to be released without conditions from the DFIP.

**ACTION OFFICER NAME/SECTION/PHONE NUMBER:**  
 CAPT (b)(3), (b)(6) Director Legal Operations  
 DSN (b)(2)

**Office Primarily Responsible (OPR):** JTF 435 Dir Legal  
**Office Supporting Response (OSR):**

#### COORDINATION

TO	ACTION	SIGNATURE (SURNAME), GRADE AND DATE		TO	ACTION	SIGNATURE (SURNAME), GRADE AND DATE
1	DRB President	(b)(3), (b)(6)	6	DC JTF 435	Sign	
2	DRB Recorder		7			
4	DRB Legal Advisor		9			
5	JTF 435 Director Legal Operations		10			

*\* Former EST - DNMC*

*YES EST*

(b)(1)1.4a, (b)(1)1.4c

*- Out of country most of year in SA.*

UNCLASSIFIED WHEN SEPARATED FROM ATTACHMENTS

SCJS TRACKING NUMBER

DATE Logged

BAGRAM / CENTCOM /001590

# Exhibit H

LEGAL DEPARTMENT



April 23, 2009

Information Officer  
Office of Freedom of Information and Security Review  
Directorate for Executive Services and Communications  
FOIA/Privacy Branch  
1155 Defense Pentagon, Room 2C757  
Washington, D.C. 20301-1155

FOIA/PA Mail Referral Unit  
Department of Justice  
Room 115  
LOC Building  
Washington, D.C. 20530-0001

Information and Privacy Coordinator  
Central Intelligence Agency  
Washington, D.C. 20505

Office of Information Programs and Services  
A/ISS/IPS/RL  
U.S. Department of State  
Washington, D.C. 20522-8100

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
LEGAL DEPARTMENT  
NATIONAL OFFICE  
125 BROAD STREET, 18TH FL.  
NEW YORK, NY 10004-2400  
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OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

RICHARD ZACKS  
TREASURER

Re: **REQUEST UNDER FREEDOM OF INFORMATION ACT/  
Expedited Processing Requested**

To Whom it May Concern:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the Department of Defense implementing regulations, 32 C.F.R. § 286.1 *et seq.*, the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.*, the Department of State implementing regulations, 22 C.F.R. § 171.1 *et seq.*, and the Central Intelligence Agency implementing regulations, 32 C.F.R. § 1900.01 *et seq.* The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the "ACLU").<sup>1</sup>

<sup>1</sup> The American Civil Liberties Union is a national organization that works to protect civil rights and civil liberties. Among other things, the ACLU advocates for national security policies that are consistent with the Constitution, the rule of law, and

This Request seeks records pertaining to the detention and treatment of prisoners held at the Bagram Theater Internment Facility at Bagram Airfield in Afghanistan (“Bagram”), including records concerning the process afforded these prisoners to challenge their detention and designation as “enemy combatants.”

Recent news reports suggest that the U.S. government is detaining more than 600 individuals at Bagram. *See, e.g.,* Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009 (“The United States government is holding about 600 people at Bagram without charges and in spartan conditions.”). The Bagram prison population includes not only Afghan citizens captured in Afghanistan but also an unknown number of foreign nationals captured outside of Afghanistan but held at Bagram as suspected terrorists or “enemy combatants.” *See* R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009. Some of these prisoners have been detained for as long as six years. *See* James Vicini, *Judge Rules Afghan Detainees Can Sue in U.S. Court*, Reuters, Apr. 2, 2009. Bagram prisoners are not permitted any access to counsel, *see* Warren Richey, *Terror Suspects Held in Afghanistan May Challenge Their Detention*, Christian Science Monitor, Apr. 3, 2009, and only recently have been permitted any contact with their family, *see* Fisnik Abrashi, *U.S. Allows First Family Visits to Afghan Prison*, Assoc. Press, Sept. 23, 2008; Carlotta Gall, *Video Link Plucks Afghan Detainees From Black Hole of Isolation*, N.Y. Times, Apr. 13, 2008.

Bagram prisoners reportedly receive an even less robust and meaningful process for challenging their detention and designation as “enemy combatants” than the process afforded prisoners at the U.S. Naval Base at Guantanamo Bay (“Guantanamo”) – a process the U.S. Supreme Court declared unconstitutional last year. *See* Daphne Eviatar, *Judge Rules Bagram Detainees Can Appeal to U.S. Courts*, Wash. Independent, Apr. 3, 2009. Indeed, a federal judge recently observed that the “process at Bagram falls well short of what the Supreme Court found inadequate at Guantanamo.” *Al Maqaleh v. Gates*, --- F.Supp.2d ----, 2009 WL 863657, \* 19 (D.D.C. Apr. 2, 2009). Moreover, there is public concern that the U.S. government is holding many prisoners at Bagram, rather than at Guantanamo, specifically to avoid any judicial review of their detentions in U.S. courts. Editorial, *The Next Guantanamo*, N.Y. Times, Apr. 12, 2009 (“the evidence suggests it was the prospect that Guantánamo

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fundamental human rights. The ACLU also educates the public about U.S. national security policies and practices, including those pertaining to the detention, treatment, and process afforded suspected terrorists and alleged “enemy combatants” held in U.S. custody since the 9/11 terrorist attacks.

detentions might be subject to judicial oversight that caused the military to divert captives to Bagram instead”).

Media reports suggest that the conditions of confinement at Bagram are primitive and that abuse and mistreatment of prisoners was once, and may still be, widespread. *See, e.g.,* Daphne Eviatar, *Judge Rules Bagram Detainees Can Appeal to U.S. Courts*, Wash. Independent, Apr. 3, 2009; William Fischer, *Afghan Prison Looks Like Another Guantanamo*, Inter Press Service, Jan. 14, 2008 (“a recent confidential report from the International Committee of the Red Cross (ICRC) has reportedly complained about continued mistreatment of prisoners . . . massive overcrowding, ‘harsh’ conditions, lack of clarity about the legal basis for detention, prisoners held ‘incommunicado’, in ‘a previously undisclosed warren of isolation cells,’ and ‘sometimes subjected to cruel treatment’”). At least two Bagram prisoners have died while in U.S. custody; Army investigators concluded that these deaths were homicides. *See* Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths*, N.Y. Times, May 20, 2005.

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The U.S. government’s Bagram detention facility has been the focus of widespread media attention and public concern for many years. Despite that attention, however, very little information about the facility – or the prisoners held there – has been made public. *See, e.g.,* Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009 (“United States officials have never provided a full accounting of the prison population”); R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009 (“The government has not said publicly how many of the approximately 600 people detained there are non-Afghans”); William Fisher, *U.S. Judge Gives Bagram Prisoners Right to Appeal*, Inter Press Service, Apr. 3, 2009 (“the U.S. has not released details of who is held there”); Tim Golden and Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantánamo*, N.Y. Times, Feb. 26, 2006 (“Bagram has operated in rigorous secrecy since it opened in 2002”). The American public remains ill-informed about even the most basic facts about Bagram, including, for example, many of the policies and rules that govern the U.S. government’s detention of hundreds of people there; who precisely is being detained there, for how long, and on what basis; where and under what circumstances these prisoners were captured; whether the prisoners have a meaningful opportunity for challenging their (often prolonged) detention; whether that process meets the standards required by international, domestic, and military law; and whether any prisoners have successfully challenged their detentions through the existing status determination process.

Public attention to Bagram has recently intensified significantly. Earlier this month, a federal judge ruled that some prisoners at Bagram can challenge their detention in U.S. courts. *See* Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009. This ruling has led to renewed scrutiny of the U.S. government's actions at Bagram and fierce speculation about whether the Obama Administration will deviate from Bush Administration policies and practices at Bagram. *See, e.g.*, R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009; *Obama to Appeal Detainee Ruling*, N.Y. Times, Apr. 10, 2009; David G. Savage, *Some Prisoners at Bagram Air Base Can Challenge Detentions, Judge Rules*, L.A. Times, Apr. 3, 2009 ("The prison at the Afghan base was being expanded during the last year of the Bush administration, leading some to predict that the Pentagon would resolve its Guantanamo problem by sending more inmates to Bagram . . . a spokesman said the [Obama] administration was taking 180 days to decide on its prison policy.").

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In short, there is renewed public concern that Bagram has become, in effect, the new Guantanamo. *See, e.g.*, Editorial, *The Next Guantanamo*, N.Y. Times, Apr. 12, 2009.

#### Requested Records

1. All records, including logs, charts, or lists, pertaining to the number of people currently detained at Bagram.
2. All records, including logs, charts, or lists, pertaining to the names of individuals currently detained at Bagram.
3. All records, including logs, charts, or lists, pertaining to the citizenship of individuals currently detained at Bagram.
4. All records, including logs, charts, or lists, pertaining to date of capture and length of detention of individuals currently detained at Bagram.
5. All records, including logs, charts, or lists, pertaining to the places and circumstances of capture of individuals currently detained at Bagram.
6. All records created after September 11, 2001, pertaining to the rendition and/or transfer of individuals captured outside Afghanistan to Bagram, including memoranda, correspondence, procedures, policies, directives, guidance, or guidelines concerning when, why, and under what circumstances prisoners seized outside Afghanistan should be detained at Bagram rather than being brought to the United States, handed over to another country, or detained by the United States at

Guantanamo Bay or some other detention facility outside of Afghanistan.

7. All records created after September 11, 2001, including memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines, as well as agreements, accords, contracts, correspondence, and memoranda, between the U.S. the and Afghan government, pertaining to the detention at Bagram of individuals captured in Afghanistan, and when, how, and why the determination is made by the United States to detain Afghan citizens at Bagram rather than at prisons or other facilities operated or controlled by the Afghan government.
8. All records created after September 11, 2001, pertaining to the process for determining and reviewing Bagram prisoners' status, the process for determining whether their detention is appropriate, and the process for determining who should be released, including but not limited to:
  - A. Any memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines concerning the development and operation of the status review process, as well as changes to that process over time.
  - B. Any memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines concerning whether prisoners should be given access to or denied access to counsel or another representative.
  - C. Any memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines concerning: the provision or withholding of notice to prisoners of the basis for their detention; the composition of the Unlawful Enemy Combatant Review Board ("UECRB"); the convening of or decision not to convene an UECRB; the kinds of evidence to be reviewed by the UECRB; the standard employed to determine whether detention is appropriate; the prisoner's opportunity to submit written statements or other evidence to the UECRB; the prisoner's opportunity to rebut the government's evidence or question government witnesses; the presentation or consideration of exculpatory evidence; the prisoner's opportunity to attend any UECRB hearing; the prisoner's access to any written decisions, determinations, or rulings by the UECRB; the use of or access to interpreters at any UECRB hearing and access to translations of any written evidence or written decisions, determinations, or rulings of the UECRB; any appeal or higher-level review of UECRB

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determinations or the final determinations of the final decision-maker; any annual or periodic review of the prisoners' status after the initial determination is made.

- D. Any written notices provided to prisoners at Bagram regarding the basis for their detention.
  - E. Any transcripts of UECRB proceedings or any other proceeding that occurs during the status determination and review process.
  - F. Any evidence considered in UECRB proceedings or any other proceeding that occurs during the status determination and review process including written statements provided by the detainees and unclassified summaries of the government's evidence.
  - G. Any written decisions, determinations, or rulings issued by the UECRB, the commanding officer, or the final decision-maker.
  - H. Any written decisions, determinations, or rulings issued in the course of any appeal process or in the course of periodic reviews of the initial UECRB determination.
9. All records, including agreements, accords, contracts, correspondence, memoranda, policies, guidelines, or directives between U.S. and Afghan government officials created after September 11, 2001, pertaining to the transfer of Afghan prisoners detained at Bagram to Afghan facilities or Afghan custody; and the release of Afghan prisoners to the Afghan government, into Afghan reconciliation programs, or back into Afghan society.
10. All records created after September 11, 2001, pertaining to the treatment of and conditions of confinement for prisoners detained at Bagram, including but not limited to memoranda, correspondence, procedures, policies, directives, guidance, or guidelines, investigatory records, disciplinary records, medical records, and autopsy reports.<sup>2</sup>

## II. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d); 32 C.F.R. § 286.4(d)(3); and 32 C.F.R. § 1900.34(c). There is a "compelling need"

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<sup>2</sup> To the extent that records responsive to this Request have already been processed in response to ACLU FOIA requests submitted on October 7, 2003 and May, 25, 2004, the ACLU is not seeking those records here.

for these records because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). In addition, the records sought relate to a “breaking news story of general public interest.” 22 C.F.R. § 171.12(b)(2)(i); 32 C.F.R. § 286.4(d)(3)(ii)(A); *see also* 28 C.F.R. § 16.5(d)(1)(iv) (providing for expedited processing in relation to a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence”).

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information” (internal citation omitted)). Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU also disseminates information through its heavily visited website, [www.aclu.org](http://www.aclu.org). The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused.

The ACLU website specifically includes features on information obtained through the FOIA. *See, e.g.*, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia); <http://www.aclu.org/olcmemos/>; <http://www.aclu.org/safefree/torture/csrtfoia.html>; <http://www.aclu.org/natsec/foia/search.html>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; [www.aclu.org/patriotfoia](http://www.aclu.org/patriotfoia); [www.aclu.org/spyfiles](http://www.aclu.org/spyfiles); <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>; [www.aclu.org/exclusion](http://www.aclu.org/exclusion). For example, the ACLU’s “Torture FOIA” webpage, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia), contains commentary about the ACLU’s FOIA request, press releases, analysis of the FOIA documents, an advanced search engine permitting webpage visitors to search the

documents obtained through the FOIA, and advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA. Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007). The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. Finally, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through the FOIA. The ACLU plans to analyze, and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the Requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.<sup>3</sup>

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Furthermore, the records sought directly relate to a breaking news story of general public interest that concerns actual or alleged Federal government activity; specifically, the records sought relate the U.S. government's detention and treatment of suspected terrorists and alleged "enemy combatants" at Bagram, as well as their transfer or rendition to Bagram from other countries. The records sought also relate to the process the U.S. government affords Bagram prisoners to challenge the basis for their detention and designation as "enemy combatants" including whether that process is meaningful, and whether it departs in any way from the process typically required by the Geneva Conventions and Army Regulation 190-8. *See* 22 C.F.R. 171.12(b)(2)(i); 32 C.F.R. § 286.4(d)(3)(ii)(A); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 1900.34(c)(2). For the same reasons, the records sought also relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

A recent court ruling that some prisoners at Bagram can challenge their detention in U.S. courts has sparked widespread media interest in and public concern about the U.S. government's practices at Bagram. *See, e.g.,* Andy Worthington, *Justice Extends to Bagram, Guantanamo's Dark Mirror*, Counterpunch.org, Apr. 6, 2009; Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009; David G. Savage, *Some Prisoners at Bagram Air Base Can Challenge Detentions, Judge Rules*, L.A. Times, Apr. 3, 2009; Nina Totenberg, *Ruling: Afghan Detainees Granted Habeas Corpus*, Nat'l Pub.

<sup>3</sup> In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University Library.

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Radio, Apr. 3, 2009; Daphne Eviatar, *Judge Rules Bagram Detainees Can Appeal to U.S. Courts*, Wash. Independent, Apr. 3, 2009; Kim Landers, *Terrorism Suspects 'Can Challenge Afghan Detention'*, ABCNews.com, Apr. 3, 2009; William Fisher, *U.S. Judge Gives Bagram Prisoners Right to Appeal*, Inter Press Service, Apr. 3, 2009; Bill Mears, *Terror Suspects in Afghanistan Can Sue in U.S. Courts, Judge Rules*, CNN.com, Apr. 2, 2009; Ari Shapiro, *Terror Suspects to Gain Access to U.S. Courts*, Nat'l Pub. Radio, Apr. 2, 2009; Warren Richey, *Terror Suspects Held in Afghanistan May Challenge Their Detention*, Christian Sci. Monitor, Apr. 3, 2009; *Judge: 3 Can Challenge Detention at Bagram*, United Press Int'l, Apr. 2, 2009; James Vicini, *Judge Rules Afghan Detainees Can Sue in U.S. Court*, Reuters, Apr. 2, 2009; Daphne Eviatar, *Bagram Ruling Portends More Challenges to Obama Detention Policy in Afghanistan*, Wash. Independent, Apr. 2, 2009; *Inmates at Afghan Prison Can Challenge Detention*, AFP, Apr. 2, 2009; Nedra Pickler, *Judge: Bagram Prisoners Can Challenge Detention*, Assoc. Press, Apr. 2, 2009; Josh Gerstein, *Judge OKs Suits by Some Held by U.S. in Afghanistan*, Politico.com, Apr. 2, 2009; Marc Ambinder, *Judge: The Great Writ May Apply at Bagram*, TheAtlantic.com, Apr. 2, 2009; Lyle Denniston, *Major Extension of Boumediene*, Scotusblog.com, Apr. 2, 2009.

Public interest in Bagram has also recently intensified significantly due to speculation about what the Obama administration will do with the hundreds of people imprisoned there and whether it will craft new policies to govern Bagram detentions. See, e.g., Michael Scherer, *Civil Liberties Advocates Dismayed at Obama's Recent Moves*, Time, Apr. 21, 2009; Josh Gerstein, *Legal Left Cools Toward Obama*, Politico.com, Apr. 14, 2009; Glenn Greenwald, *An Emerging Progressive Consensus on Obama's Executive Power and Secrecy Abuses*, Salon.com, Apr. 13, 2009; *The Rachel Maddow Show* (MSNBC television broadcast Apr. 13, 2009) (transcript available at <http://www.msnbc.msn.com/id/30210708/>); Glenn Greenwald, *Obama and Habeas Corpus – Then and Now*, Salon.com, Apr. 11, 2009; Stuart Taylor Jr., *A Judicial Decision That Plagues Obama*, Nat'l Journal, Apr. 11, 2009; Del Quentin Wilber, *A Plea to Obama from Father of Detainee*, Wash. Post, Apr. 9, 2009; Bruce Fein, *Czar Obama: The President's Incredibly Imperialist Wielding of Executive Power*, Slate.com, Apr. 9, 2009; Andy Worthington, *Justice Extends to Bagram, Guantanamo's Dark Mirror*, Counterpunch.org, Apr. 6, 2009; Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009; David G. Savage, *Some Prisoners at Bagram Air Base Can Challenge Detentions, Judge Rules*, L.A. Times, Apr. 3, 2009; Bill Mears, *Terror Suspects in Afghanistan Can Sue in U.S. Courts, Judge Rules*, CNN.com, Apr. 2, 2009; Daphne Eviatar, *Bagram Ruling Portends More Challenges to Obama Detention Policy in Afghanistan*, Wash. Independent, Apr. 2, 2009; see also William Fisher, *U.S. Judge Gives Bagram Prisoners Right to Appeal*, Inter Press Service,

Apr. 3, 2009 (“Some critics of Obama administration detention policy have begun calling Bagram ‘Obama’s GITMO,’ charging that the new president is shipping detainees to the Afghan prison to evade the Supreme Court’s ruling giving habeas corpus rights to prisoners at Guantanamo.”).

In the past few weeks, numerous editorial boards have called for change on Bagram policy. *See* Editorial, *The Next Guantanamo*, N.Y. Times, Apr. 13, 2009; Editorial, *Obama Should Define Rights of Suspected Terrorists Held by U.S. Abroad*, L.A. Times, Apr. 9, 2009; Editorial, *The Constitution’s Reach*, Wash. Post, Apr. 7, 2009; *see also* Marie Cocco, *The Father of Guantanamo*, Truthdig.com, Apr. 8, 2009; Editorial, *A Reckoning at Bagram*, Wash. Post, Mar. 7, 2009; Editorial, *Overreach at Bagram*, Wash. Post, Jan. 7, 2009. Some editorial boards have criticized Judge Bates’ ruling. *See, e.g.*, Editorial, *Off Base on Terror*, N.Y. Daily News, Apr. 4, 2009; Editorial, *Imperial Judiciary Goes Global*, Nat’l Review, Apr. 3, 2009.

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The Obama administration’s recent decision to quickly appeal the Bagram ruling sparked another round of intense media coverage. *See, e.g.*, Daphne Eviatar, *Obama Bungles Bagram*, Wash. Independent, Apr. 13, 2009; Josh Gerstein, *DOJ: Courts Could Harm Afghan Effort*, Politico.com, Apr. 12, 2009; R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009; *Obama Sticks to Bush Detainee Policy*, United Press Int’l, Apr. 11, 2009; Marc Ambinder, *Obama Appeals Bagram Detainee Ruling*, TheAtlantic.com, Apr. 11, 2009; Glenn Greenwald, *Obama and Habeas Corpus – Then and Now*, Salon.com, Apr. 11, 2009; Lyle Denniston, *U.S. Resists Rights at Bagram*, Scotusblog.com, Apr. 11, 2009; *Obama to Appeal Detainee Ruling*, N.Y. Times, Apr. 10, 2009. Public speculation about whether the Obama administration will alter Bagram policy continues despite the decision to appeal the Bagram ruling. *See, e.g.*, R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009 (“officials said that [appeal] did not foreclose a change of heart after the completion in July of a comprehensive review of detainee policy”); Lyle Denniston, *U.S. Resists Rights at Bagram*, Scotusblog.com, Apr. 11, 2009 (“The future of Bagram detainees is one of the issues now being reviewed by a task force studying detainee policy worldwide.”).

Indeed, the U.S. government’s Bagram detention facility has been the focus of widespread and consistent media attention and public concern for many years. *See, e.g.*, Charlie Savage, *Obama Upholds Detainee Policy in Afghanistan*, N.Y. Times, Feb. 21, 2009; Eric Schmitt, *Afghan Prison Poses Problem in Overhaul of Detainee Policy*, N.Y. Times, Jan. 26, 2009; Dan Efron, *The Gitmo Dilemma - Four Reasons Obama Won’t Close the Controversial Prison Soon*, Newsweek, Nov. 7, 2008; *How Bagram Destroyed Me*, BBC News, Sept. 25, 2008; Fisnik Abrashi, *U.S.*

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*Allows First Family Visits to Afghan Prison*, Assoc. Press, Sept. 23, 2008; Suzanne Goldenberg and Saeed Shah, *Mystery of 'Ghost of Bagram' - Victim of Torture or Captured in a Shootout?*, The Guardian, Aug. 6, 2008; Eric Schmitt, *Pakistani Suspected of Qaeda Ties Is Held*, N.Y. Times, Aug. 5, 2008; Del Quentin Wilber, *In Courts, Afghanistan Air Base May Become Next Guantanamo*, Wash. Post, June 29, 2008; Katie Paul, *The Road From Gitmo: Alternative Ways of Handling Suspects in the War on Terror*, Newsweek, June 27, 2008; Eric Schmitt and Tim Golden, *U.S. Planning Big New Prison in Afghanistan*, N.Y. Times, May 17, 2008; Fisnik Abrashi, *Red Cross Faults Afghan Prison*, Assoc. Press, Apr. 15, 2008; Carlotta Gall, *Video Link Plucks Afghan Detainees From Black Hole of Isolation*, N.Y. Times, Apr. 13, 2008; Candance Rondeaux, Josh White, and Julie Tate, *Afghan Detainees Sent Home to Face Closed-Door Trials*, Wash. Post, Apr. 13, 2008; Tim Golden and David Rohde, *Afghans Hold Secret Trials for Men That U.S. Detained*, N.Y. Times, Apr. 10, 2008; Ian Austin, *Canadian TV Network Seeks Release of Afghan*, N.Y. Times, Feb. 21, 2008; William Fisher, *Afghan Prison Looks Like Another Guantanamo*, Inter Press Service, Jan. 14, 2008; Andrew Gumbel, *Bagram Detention Center Now Twice the Size of Guantanamo*, The Independent, Jan. 8, 2008; Tim Golden, *Foiling U.S. Plan, Prison Expands in Afghanistan*, N.Y. Times, Jan. 7, 2008; *U.S. Expands Afghan Base at Bagram*, Assoc. Press, Oct. 6, 2007; Richard Leiby, *Down a Dark Road*, Wash. Post, Apr. 27, 2007; Matthew Pennington, *Inmates Detail U.S. Prison Near Kabul*, Assoc. Press, Oct. 2, 2006; Eliza Griswold, *American Gulag: Prisoners' Tales from the War on Terror*, Harpers, Sept. 1, 2006; Carlotta Gall and Ruhullah Khapalwak, *Some Afghans Freed from Bagram Cite Harsh Conditions*, N.Y. Times, June 8, 2006; William Fisher, *Bagram - 'Son of Guantanamo'*, Inter Press Service, Feb. 28, 2006; Tim Golden and Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantanamo*, N.Y. Times, Feb. 26, 2006; Tim Golden, *Years After 2 Afghans Died, Abuse Case Falter*, N.Y. Times, Feb. 13, 2006; Tim Golden, *Case Dropped Against U.S. Officer in Beating Deaths of Afghan Inmates*, N.Y. Times, Jan. 8, 2006; Tim Golden, *Abuse Cases Open Command Issues at Army Prison*, N.Y. Times, Aug. 8, 2005; Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. Times, May 20, 2005; Emily Bazelon, *From Bagram to Abu Ghraib*, Mother Jones, March/April 2005; Stephanie Hanes, *Two Groups Detail Abuse of Afghan Prisoners*, Baltimore Sun, May 5, 2004; Pamela Constable, *An Afghan boy's Life in U.S. Custody: Camp in Cuba Was Welcome Change After Harsh Regime at Bagram*, Wash. Post, Feb. 12, 2004.

More generally, questions regarding the legal process afforded suspected terrorists and alleged "enemy combatants" held in U.S. custody has been the subject of continuous and sustained public interest. See, e.g., Jackie Northam, *Tapes Provide First Glimpse of Secret Gitmo Panels*, Nat'l Pub. Radio, Apr. 10, 2009 (reporting on the release of taped

recordings of the “combatant status review tribunals” of six detainees); Andy Worthington, *Bad News, Good News for the Guantanamo Uighurs*, Huffington Post, Feb. 19, 2009; Jane Perlez, Raymond Bonner and Salman Masood, *An Ex-Detainee of the U.S. Describes a 6-Year Ordeal*, N.Y. Times, Jan. 5, 2009; Jeffrey Toobin, *Camp Justice*, The New Yorker, Apr. 14, 2008; Scott Horton, *Military Lawyers and the Gitmo Commissions*, Harpers, Oct. 30, 2007; *Army Officer: Guantanamo Hearings are Flawed*, MSNBC.com, Aug. 6, 2007; Andrew C. McCarthy, *The Profession v. Gitmo*, Nat’l Review, June 25, 2007; Jeffrey Toobin, *Killing Habeas Corpus*, The New Yorker, Dec. 4, 2006; Daniel Eisenberg and Timothy J. Burger, *What’s Going On at Gitmo?*, Time, May 29, 2005; Carol D. Leonnig, *Judge Rules Detainee Tribunals Illegal*, Wash. Post, Feb. 1, 2005. In particular, the Supreme Court’s June 2008 ruling that Guantanamo Bay detainees had a constitutional right to *habeas* was the subject of significant public attention and media interest. See, e.g., Kevin Drum, *Boumediene v. Bush*, CBS News, June 22, 2008; Robyn E. Blumner, *Supreme Court Preserves a Razor-Thin Redemption*, St. Petersburg Times, June 22, 2008; Richard Epstein, *How To Complicate Habeas Corpus*, N.Y. Times, June 21, 2008; Jack Balkin, *Two Takes: With ‘Boumediene,’ the Court Reaffirmed a Basic Principle*, U.S. News & World Report, June 19, 2008; David Stout, *Justices Rule Terror Suspects Can Appeal in Civilian Courts*, N.Y. Times, June 13, 2008; Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantánamo*, N.Y. Times, June 13, 2008. Furthermore, the military commission proceedings held at Guantanamo in 2008 also generated substantial public interest. See William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. Times, Aug. 7, 2008; Editorial, *A Mixed Verdict on Hamdan*, L.A. Times, Aug. 7, 2008; Scott Shane and William Glaberson, *Judge Clears Way for Trial of Bin Laden’s Driver*, N.Y. Times, July 17, 2008; Joanne Mariner, *Arresting the 9/11 Suspects, Guantánamo-Style*, Salon.com, June 7, 2008; Jackie Northam, *Sept. 11 Suspects Arraigned at Guantanamo Bay*, Nat’l Pub. Radio, June 6, 2008; Adam Zagorin, *U.S. Justice on Trial at Gitmo*, Time, June 4, 2008; *Gitmo’s Courtroom Wrangling Begins*, Time, Apr. 25, 2008.

More broadly, there has been continued public interest in the treatment of suspected terrorists detained by the United States ever since allegations of abuse and mistreatment first surfaced in December 2002. Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, Wash. Post, Dec. 26, 2002; see also Emily Bourke, *Red Cross Finds Doctors Present During CIA Torture*, ABC News, Apr. 8, 2009; Scott Shane, *Report Outlines Medical Workers’ Role in Torture*, N.Y. Times, Apr. 6, 2009; *Guantanamo Guard Admits Prisoner Abuse, ACLU Demands ‘Top to Bottom’ Review*, FoxNews.com, Dec. 18, 2008; *Detainee Abuse Linked to Bush Administration*, Assoc. Press, Dec. 12, 2008; *What FBI Agents Saw During U.S. Interrogations*, Int’l Herald

Tribune, May 22, 2008; Carrie Johnson & Josh White, *Audit Finds FBI Reports of Detainee Abuse Ignored*, Wash. Post, May 21, 2008; Scott Shane, David Johnston and James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007; Jane Mayer, *The Black Sites*, The New Yorker, Aug. 13, 2007; Dana Priest, *Detainees Accuse Female Interrogators; Pentagon Inquiry Is Said to Confirm Muslims' Accounts of Sexual Tactics at Guantanamo*, Wash. Post, Feb. 10, 2005; R. Jeffrey Smith and Dan Eggen, *New Papers Suggest Detainee Abuse Was Widespread*, Wash. Post, Dec. 22, 2004; Neil Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. Times, Nov. 30, 2004; Neil Lewis, *Broad Use of Harsh Tactics is Described at Cuba Base*, N.Y. Times, Oct. 17, 2004; Dana Priest, *CIA Puts Harsh Tactics on Hold; Memo on Methods of Interrogation Had Wide Review*, Wash. Post, Jun. 27, 2004; Dana Priest and Bradley Graham, *Guantanamo List Details Approved Interrogation Methods*, Wash. Post, June 10, 2004; Dana Priest and Joe Stephens, *Pentagon Approved Tougher Interrogations*, Wash. Post, May 9, 2004.

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The release of documents concerning the treatment of suspected terrorists detained by the U.S. has generated significant public interest and media attention. See, e.g., Brian Knowlton, *Report Gives New Detail on Approval of Brutal Techniques*, N.Y. Times, Apr. 22, 2009; Joby Warrick and Peter Finn, *Harsh Tactics Readied Before Their Approval: Senate Report Describes Secret Memos*, Wash. Post, Apr. 22, 2009; Jonathan S. Landay, *Report Says Abusive Tactics Used to Link Iraq to Al Qaeda*, Miami Herald, Apr. 22, 2009; Jess Bravin, *Interrogation Views Spread with Help of Bush Aides*, Wall St. J., Apr. 22, 2009; Julian E. Barnes, *Military Helped With CIA Interrogation Tactics, Report Says*, L.A. Times, Apr. 22, 2009; Robert Baer, *Why Obama Needs to Reveal Even More on Torture*, Time.com, Apr. 20, 2009; Dan Froomkin, *How Many Others Were Tortured?*, Wash. Post, Apr. 7, 2009; Scott Shane, *Report Outlines Medical Workers' Role in Torture*, N.Y. Times, Apr. 6, 2009; Joby Warwick and Julie Tate, *Report Calls CIA Detainee Treatment 'Inhuman'*, Wash. Post, Apr. 6, 2009; Editorial, *The Tortured Memos*, N.Y. Times, Mar. 4, 2009; Devlin Barrett, *Officials: CIA Destroyed 92 Detainee Tapes*, Chicago Tribune, Mar. 3, 2009; David Johnston & Scott Shane, *Memo Sheds New Light on Torture Issue*, N.Y. Times, Apr. 3, 2008; White House *Denies Torture Assertion*, USA Today, Oct. 4, 2007; Jane Mayer, *The Memo*, The New Yorker, Feb. 27, 2006; Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq; Practice is Called Serious Breach of Geneva Conventions*, Wash. Post, Oct. 24, 2004; Dana Priest and Bradley Graham, *U.S. Struggled Over How Far to Push Tactics*, Wash. Post, June 24, 2004; Dana Priest and R. Jeffrey Smith, *Memo Offered Justification for Use of Torture; Justice Dept. Gave Advice in 2002*, Wash. Post, June 8, 2004.

Indeed, the release of documents pursuant to the ACLU's past requests for records relating to the treatment of suspected terrorists in U.S. custody has been the subject of substantial and continuing public interest. To date, the ACLU has received over 100,000 pages of documents in response to its October 2003 request for such records, generating widespread attention from the public and the media. *See, e.g.*, Mark Mazzetti and Scott Shane, *In Adopting Harsh Tactics, No Inquiry Into Their Past Use*, N.Y. Times, Apr. 22, 2009; Ben Feller, *Obama Open to Torture Memos Probe, Prosecution*, Wash. Post, Apr. 22, 2009; Sheryl Gay Stolberg, *Obama Won't Bar Inquiry, Or Penalty, On Interrogators*, N.Y. Times, Apr. 22, 2009; Michael Sniffen, *3 Lawyers Face Scrutiny for Torture Advice*, Wash. Post, Apr. 22, 2009; Peter Baker and Scott Shane, *Pressure Grows to Investigate Interrogations*, N.Y. Times, Apr. 21, 2009; *In CIA Visit, Obama Defends Interrogation Memo Release*, CNN.com, Apr. 20, 2009; *Sept. 11 Planner Waterboarded 183 Times*, Reuters, Apr. 20, 2009; Michael Scherer and Bobby Ghosh, *How Waterboarding Got Out of Control*, Time.com, Apr. 20, 2009; *Memo: Two al Qaeda Leaders Waterboarded 266 Times*, CNN.com, Apr. 20, 2009; Scott Shane, *2 Suspects Waterboarded 266 Times*, N.Y. Times, Apr. 20, 2009; Joshua Brustein, *Former C.I.A. Director Defends Interrogation*, N.Y. Times, Apr. 19, 2009; R. Jeffrey Smith, *Justice Dept. Memos' Careful Legalese Obscured Harsh Reality*, Apr. 19, 2009; Editorial, *The Torturers' Manifesto*, N.Y. Times, Apr. 18, 2009; John Hendren, *Ex-CIA Official: 'This Was Torture'*, ABC News, Apr. 18, 2009; Greg Miller, *Did Waterboarding Work?*, Chicago Tribune, Apr. 18, 2009; Dana Priest, *White House Releases Torture Memos, Won't Pursue Prosecutions*, Wash. Post, Apr. 17, 2009; Editorial, *Dealing With a Disgrace*, Wash. Post, Apr. 17, 2009; Editorial, *Close the Torture Loophole*, L.A. Times, Apr. 17, 2009; Mark Mazzetti, *C.I.A. Memos Could Bring More Disclosures*, N.Y. Times, Apr. 17, 2009; Greg Miller and Josh Meyer, *Memos Reveal Harsh CIA Interrogation Methods*, L.A. Times, Apr. 17, 2009; Matt Apuzzo, *Memos Describe CIA's Harsh Interrogation Program*, Assoc. Press, Apr. 17, 2009; Carrie Johnson and Julie Tate, *New Interrogation Details Emerge*, Wash. Post, Apr. 17, 2009; Justin Vogt, *Zubaydah's Sanity, Bybee's Clarity*, New Yorker, Apr. 17, 2009; Glenn Greenwald, *The Significance of Obama's Decision to Release the Torture Memos*, Salon.com, Apr. 17, 2009; Mark Mazzetti and Scott Shane, *Interrogation Memos Detail Harsh Tactics by the C.I.A.*, N.Y. Times, Apr. 16, 2009; Ariane de Vogue, *DOJ Releases Controversial Torture Memos*, ABC News.com, Apr. 16, 2009; Michael Scherer, *Bush Approved Use of Insects*, Time.com, Apr. 16, 2009; Mark Mazzetti, *Obama Releases Interrogation Memos, Says CIA Operatives Won't Be Prosecuted*, N.Y. Times, Apr. 16, 2009; Terry Frieden, *More Delays in Release of 'Torture' Documents*, CNN.com, Apr. 2, 2009; Scott Shane, *Administration is Debating Release of Interrogation Memos*, N.Y. Times, Mar. 31, 2009; *New York Judge Orders Release of CIA 'Torture' Documents*,

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FoxNews.com, Mar. 28, 2009; Scott Shane, *Documents Laid Out Interrogation Procedures*, N.Y. Times, July 25, 2008; Mark Mazzetti, '03 U.S. Memo Approved Harsh Interrogations, N.Y. Times, Apr. 2, 2008; Dan Eggen and Josh White, *Memo: Laws Didn't Apply to Interrogators*, Wash. Post, Apr. 2, 2008; Evan Perez, *U.S. 2003 Memo Allowed 'Enhanced' Interrogation*, Wall St. J., Apr. 2, 2008; Lara Jakes Jordan, *Pentagon Releases Memo on Harsh Tactics*, FoxNews.com, Apr. 1, 2008; *FBI Records: Detainees Allege Quran Abuse; ACLU Releases Hundreds of Documents Obtained in a Lawsuit*, CNN.com, May 26, 2005; *Harsh Tactics Were Allowed, General Told Jailers in Iraq*, N.Y. Times, Mar. 30, 2005; *U.S. Memo Shows Iraq Jail Methods*, BBC News, Mar. 30, 2005; Neil Lewis & Douglas Jehl, *Files Show New Abuse Cases in Afghan and Iraqi Prisons*, N.Y. Times, Feb. 18, 2005; Nat Hentoff, *What Did Rumsfeld Know? ACLU Releases Documents of U.S. Torture of Detainees by More than 'A Few Bad Apples'*, Village Voice, Dec. 28, 2004; Thomas Ricks, *Detainee Abuse by Marines is Detailed*, Wash. Post, Dec. 15, 2004; Paisley Dodds, *Unsealed Navy Documents Show More Prisoner Abuse*, Phila. Enquirer, Dec. 15, 2004; Richard A. Serrano, *Marines Burned, Shocked Prisoners, Documents Revealed*, Seattle Times, Dec. 15, 2004; *ACLU: Records Show Marines Tortured Iraqi Prisoners*, CNN.com, Dec. 15, 2004.

In addition, the records that the ACLU seeks include records relating to the "rendition" of suspected terrorists from their place of capture outside of Afghanistan to detention at Bagram Air Base. Rendition is an issue that is independently the subject of extensive public and media attention. See, e.g., Ariel David, *Italian Court Deals Prosecution a Blow in CIA Rendition Case*, San Jose Mercury News, Mar. 12, 2009; Julie Sell, *U.N. Report Says U.S. Led 'Black Site' Renditions in War on Terrorism*, Miami Herald, Mar. 11, 2009; Kevin Sullivan, *Former Guantanamo Prisoner Alleges Torture*, Wash. Post, Mar. 8, 2009; Paisley Dodds, *British Official Acknowledges Rendition Role*, Chicago Tribune, Feb. 27, 2009; Desmond Butler, *Alleged CIA Torture Victim Speaks Out*, FoxNews.com, Nov. 29, 2006; Jane Mayer, *The CIA's Travel Agent*, The New Yorker, Oct. 30, 2006; Jerry Markon, *Lawsuit Against CIA is Dismissed; Mistaken Identity Led to Detention*, Wash. Post, May 19, 2006; Scott Shane, *German Sues Over Abduction Said to Be at Hands of CIA*, N.Y. Times, Dec. 6, 2005; *German Claims Torture in Suing CIA's Ex-Director*, USA Today, Dec. 6, 2005; *Lawsuit Claims CIA Kidnapped, Tortured German Man*, CNN.com, Dec. 6, 2005; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake; German Citizen Released After Months in 'Rendition'*, Wash. Post, Dec. 4, 2005; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, Wash. Post, Nov. 2, 2005; Scott Shane, *The Costs of Outsourcing Interrogation: A Canadian Muslim's Long Ordeal in Syria*, N.Y. Times, May 29, 2005;

Michael Hirsh, Mark Hosenball and John Barry, *Aboard Air CIA*, Newsweek, Feb. 28, 2005; Jane Mayer, *Outsourcing Torture*, The New Yorker, Feb. 14, 2005; DeNeen L. Brown and Dana Priest, *Deported Terror Suspect Details Torture in Syria; Canadian's Case Called "Typical" of CIA*, Wash. Post, Nov. 5, 2003.

### III. Application for Waiver or Limitation of Fees

We request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest because it "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 22 C.F.R. § 171.17(a); *see also* 28 C.F.R. § 16.11(k)(1); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2).

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As discussed above, numerous news accounts reflect the considerable public interest in the records we seek. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will significantly contribute to public understanding of the operations and activities of the Departments of Defense, Justice, State, and the Central Intelligence Agency with regard to the detention and treatment of prisoners at Bagram. *See* 22 C.F.R. § 171.17(a)(1)(ii); 28 C.F.R. § 16.11(k)(1)(i); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2)(ii). Moreover, disclosure is not in the ACLU's commercial interest. Any information disclosed by the ACLU as a result of this Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" (citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act").

We also request a waiver of search and review fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii); 28 C.F.R. § 16.11(d). Accordingly, fees associated with the processing of the Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 32 C.F.R. § 286.28(e)(7); 28 C.F.R. § 16.11(d) (search and review fees shall not be charged to "representatives of the news media").

The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep’t of Justice*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.” *See Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of FOIA); *see supra*, section II.<sup>4</sup>

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\* \* \*

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d)(4); 32 C.F.R. § 286.4(d)(3); 32 C.F.R. § 1900.21(d).

If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

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<sup>4</sup> On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the United States Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request submitted that month regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

Thank you for your prompt attention to this matter. Please furnish all applicable records to:

Melissa Goodman, Staff Attorney, National Security Project  
American Civil Liberties Union  
125 Broad Street, 18th Floor  
New York, NY 10004

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Sincerely,

A handwritten signature in black ink, appearing to read "Melissa Goodman", written over a horizontal line.

Melissa Goodman  
American Civil Liberties Union Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004  
Tel: (212) 549-2622

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# Exhibit I

**Hina Shamsi**

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**From:** Hina Shamsi  
**Sent:** Wednesday, May 25, 2011 7:11 PM  
**To:** 'Barnea, Jean-David (USANYS)'  
**Cc:** Jonathan Manes  
**Subject:** RE: Bagram FOIA production

J.D.,

I understand from Jonathan that you called and asked for the return of the form. I'd like to understand precisely what you're asking us to do, and why. Let me state at the outset that, of course, it is not our intent to do anything to jeopardize national security. That said, we do not believe the form contains any information that could in any way threaten national security. If DOD believes otherwise, we would be happy to meet with you and/or DOD personnel to hear the specific reasons for that position.

Even if we were to return the form, though, we already know its contents. Are you asking us not to discuss publicly what we know? That would put us in a very difficult position given that we communicate often with other counsel for Bagram detainees and are also often asked by the media about our views on detention procedures at Bagram.

Hina

---

**From:** Barnea, Jean-David (USANYS) [mailto:Jean-David.Barnea@usdoj.gov]  
**Sent:** Wednesday, May 25, 2011 4:31 PM  
**To:** Hina Shamsi  
**Cc:** Jonathan Manes  
**Subject:** RE: Bagram FOIA production

Hina—

Thank you for bringing this to my attention. I'm in communications with DoD about the issue right now, and it's possible there was a miscommunication about these documents. I will get back to you ASAP as to how to proceed.

We very much appreciate your cooperation in this regard.

--J.D.

---

**From:** Hina Shamsi [mailto:hshamsi@aclu.org]  
**Sent:** Tuesday, May 24, 2011 2:35 PM  
**To:** Barnea, Jean-David (USANYS)  
**Cc:** Jonathan Manes  
**Subject:** Bagram FOIA production

Dear J.D.,

In reviewing the documents last produced to us, we have identified two pages (BAGRAM-CENTCOM-1573 and 1577) that contain an Enduring Security Threat Assessment form. There appears to be an error here. We believe the error is that DOD has withheld such forms in other

7/25/2011

instances in its production; there is nothing in the form that should not be made public. Your client may, however, believe that production is inadvertent. We propose that the best way forward is for DOD to move expeditiously to declassify the form. We would like to post the documents we have received on our website this week. Please let us know how you would like to proceed.

Thanks,

Hina

---

Hina Shamsi

Director, National Security Project

American Civil Liberties Union

125 Broad St., 17th Floor | New York, NY 10004

(ph) 212 284 7321 | (fax) 212 549 2654

This message may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply E-mail that this message has been inadvertently transmitted to you and delete this E-mail from your system.

# Exhibit J

HINA SHAMSI  
DIRECTOR  
NATIONAL SECURITY PROJECT



June 3, 2011

VIA EMAIL

Jean-David Barnea, Esq.  
Assistant United States Attorney  
Southern District of New York  
86 Chambers Street, 3rd floor  
New York, NY 10007

Re: American Civil Liberties Union ("ACLU") vs. Department of  
Defense ("DOD"), 09 Civ. 8071 (BSJ) (FM)

Dear J.D.:

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
NATIONAL OFFICE  
125 BROAD STREET, 18TH FL.  
NEW YORK, NY 10004-2400  
T/212.549.2500  
WWW.ACLU.ORG

OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

I am writing to follow up on our conversation on Friday, May 27th, in which we discussed my May 24th notification to you that, in a production of documents made to the ACLU pursuant to a court-ordered stipulation in this case, DOD had disclosed two identical, blank worksheets that contain the criteria and definitions for Bagram Detainee Review Boards' Enduring Security Threat Assessment (the "EST Form") for Bagram detainees.

As you know, the term "secret" that appears on the top of the two EST Forms has been crossed out, a normal protocol indicating that the document is no longer classified. You nevertheless stated during our May 27th conversation that the EST Form is classified, and that the two versions of it were produced in error. You also requested that the ACLU return the documents and refrain from discussing their contents publicly.

As I told you, and as the ACLU continues to believe, the EST Form is not properly subject to classification (and thus not exempt under the Freedom of Information Act), and the proposed gag on ACLU attorneys is improper and unreasonable. Like you, we prefer to resolve the issues raised by DOD's production of the EST Form without litigation. I reiterate again, therefore, what I have repeatedly urged as the best path forward: DOD should declassify the EST Form expeditiously because there is no information in the Form that could in any way threaten national security, or that could cause harm if disclosed. As you know, the ACLU has repeatedly taken the position that the United States may not detain individuals based on secret legal criteria.

If DOD declassifies the EST Form, it would avoid litigation of the deeply troubling and extreme position that it would be taking if it seeks to gag ACLU attorneys who have seen the Form – which we obtained lawfully – from discussing its contents. The EST Form's content is critically important to the public debate over prolonged, and possibly indefinite, detention at Bagram. As

a general matter, the government may not suppress, gag, prevent or punish the publication of such true and lawfully-obtained information about a matter of public significance. *Bartnicki v. Vopper*, 532 U.S. 514, 527-28 (2001); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975). The Supreme Court has repeatedly warned that prior restraints on speech are presumptively unconstitutional and are “the most serious and least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stewart*, 427 U.S. 539, 559 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

Declassification would also avoid litigation over the uniquely difficult ethical position into which DOD’s production of the Form has put ACLU attorneys who also represent clients in Bagram *habeas* litigation. A key question in the ACLU’s on-going litigation over U.S. courts’ *habeas* jurisdiction over Bagram detainees is how, and with what consequences, a detainee may be determined an “enduring security threat.”

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

During our conversation on May 27th, you and I agreed, as an interim measure pending the parties’ resolution of this matter, that the ACLU would not release the EST Form publicly, and ACLU attorneys would not publicly discuss its contents. Since then, we have heard nothing in response to our request that DOD declassify the EST Form. Should DOD decide not to declassify the EST Form, and should it continue to seek the return of the documents and to enforce a gag on ACLU attorneys, it will be necessary for the government to seek a court order, which we will vigorously oppose. Please let us know by the end of next week if this is how the government intends to proceed, so that we can jointly seek a status conference and propose a briefing schedule to the Court.

Sincerely yours,



Hina Shamsi

# Exhibit K

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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 AMERICAN CIVIL LIBERTIES UNION, et al.,

4 Plaintiffs,

5 v.

09 CV 8071(BSJ)

6 DEPARTMENT OF DEFENSE, et al.,

7 Defendants.

8 -----x

New York, N.Y.  
October 12, 2011  
3:05 p.m.

10 Before:

11 HON. BARBARA S. JONES

12 District Judge

13 APPEARANCES

14 AMERICAN CIVIL LIBERTIES UNION FOUNDATION

15 Attorneys for Plaintiffs

15 BY: HINA SHAMSI  
16 NATHAN WESSLER

17 PREET BHARARA

18 United States Attorney for the  
19 Southern District of New York

19 BY: JEAN-DAVID BARNEA  
20 Assistant United States Attorney

21  
22  
23  
24  
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1 THE DEPUTY CLERK: American Civil Liberties Union and  
2 all others versus the Department of Defense and all others, 09  
3 Civ. 8071.

4 Plaintiffs, are you ready?

5 MS. SHAMSI: We are.

6 THE DEPUTY CLERK: Please state your name for the  
7 record.

8 MS. SHAMSI: Hina Shamsi of the American Civil  
9 Liberties Union.

10 Your Honor, my colleague here is Nathan Wessler, who  
11 has just recently joined the ACLU. He is in the process of  
12 seeking admission to the Southern District, and with your  
13 permission, I would like to have him join me at counsel table.

14 THE COURT: That's fine.

15 I'm sorry, I just didn't hear the gentleman's name?

16 MS. SHAMSI: It is Nathan Wessler, your Honor.

17 THE COURT: Mr. Wessler, you are welcome.

18 MR. WESSLER: Thank you, your Honor.

19 THE DEPUTY CLERK: For the defendants?

20 MR. BARNEA: Jean-David Barnea for the government.

21 THE COURT: Good afternoon.

22 First, my apologies for having adjourned this a couple  
23 of times, but we are here now.

24 I wanted to begin by saying that I have arranged to  
25 have a document provided to me, the document in question, and I

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1 have read it, just so that you have that foreknowledge as we  
2 get to argument.

3 We are here upon the objections of the ACLU to an  
4 order of Magistrate Judge Maas dated July 28, 2011.

5 And I will hear from you, Ms. Shamsi.

6 MS. SHAMSI: Thank you, your Honor.

7 THE COURT: Would you like to speak from the podium so  
8 that you could be closer to the microphone?

9 MS. SHAMSI: Sure.

10 THE COURT: Plus, I can hear.

11 Go ahead.

12 MS. SHAMSI: Thank you again, your Honor.

13 Your Honor, the issue that is before you today is  
14 critically important but exceedingly narrow, and that is  
15 whether the plaintiffs can provide the Court with our fullest  
16 arguments under seal and using security procedures followed by  
17 the government itself for you to make a fully informed decision  
18 about the issues that are before you on summary judgment.

19 THE COURT: Let me ask you this. If I had the  
20 document in front of me as I am reading your argument, doesn't  
21 the government's interpretation of Magistrate Judge Maas' order  
22 give you everything that you need?

23 MS. SHAMSI: It doesn't, your Honor, and there are a  
24 couple of reasons why. Magistrate Judge Maas' order leaves us  
25 actually much worse off than we were if we had not seen the

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1 document. Our brief goes into detail about some of the reasons  
2 why -- and I am happy to expound on them -- but what the issue  
3 essentially comes down to is, before we had seen the document,  
4 we would have made a series of arguments about classification  
5 and harm that we now know to be true.

6 THE COURT: You can make those arguments again,  
7 correct?

8 MS. SHAMSI: Your Honor, Magistrate Judge Maas' order  
9 prevents us from relying on the document, and that  
10 prohibition --

11 THE COURT: I think that the government -- and the  
12 government will correct me if I am wrong -- essentially, and I  
13 think one of your issues with the order is that it is a little  
14 vague so it is hard to know what you can and cannot do, and the  
15 government's interpretation seems to be that if you can direct  
16 me, for instance, and I take this as an example, to any  
17 putative official disclosures of DoD of the EST criteria,  
18 without stating whether the documents that they cite contains  
19 information that matches the content of the document -- we know  
20 what that is for our purposes of the hearing today. That's  
21 one.

22 The government also talks about and, again, their  
23 interpretation of the order, they say there is nothing in the  
24 order that stops you from citing the detainee statements in  
25 your brief, which I know is another argument that you are going

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1 to make, as long as you make no comment on whether the  
2 statements match specific portions of the document.

3 It sounds like, to generalize, you can make all the  
4 arguments you want to make. And what the government does not  
5 want you to do is then draw a comparison to the document which  
6 you have in your possession. And that seems to me to be  
7 narrower than what one might interpret Judge Maas' ruling to  
8 be.

9 MS. SHAMSI: That is in fact the government's  
10 interpretation, your Honor, but there are a couple of problems  
11 with that. One is that, as the government has explicitly  
12 acknowledged in the arguments that it has made to you, it would  
13 be practically impossible for us not to rely upon our knowledge  
14 of the document that we already have in presenting our  
15 arguments to you.

16 THE COURT: It depends on what you mean by "rely."

17 They are saying, don't compare the document with these  
18 various arguments you are going to make and statements, for  
19 instance, or the evidence about what the detainees know. They  
20 are not saying you can't make the argument or tell me  
21 everything I should consider. Is it so much to ask then what  
22 would be the harm?

23 Maybe you can explain something to me that I am not  
24 going to understand if you don't cite to the document, which I  
25 think is all they are asking.

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1 MS. SHAMSI: It is exactly that, your Honor, and that  
2 is the key point from which the chill and the harm to us  
3 emanates, as well as the result that you will be deprived --  
4 and we are not talking about the public record here, we are  
5 talking about filed under seal --

6 THE COURT: I think everyone is in agreement that  
7 these will be sealed, at least initially until it can be  
8 determined what needs to be redacted for public filing. That,  
9 we are all in agreement on.

10 I will say this much too. I have already resolved,  
11 having read everything, that I see absolutely no reason for you  
12 to have to turn your brief over to the government first before  
13 I see it.

14 You have behaved as an officer of the court should,  
15 totally honorably in this situation. You advised the  
16 government that you had this document. And I would expect that  
17 whatever order I give you, you will follow. So I am not going  
18 to order you to turn it over to the government for their  
19 review. I will order you to file it sealed. The government  
20 will certainly file their papers sealed. And if part of their  
21 sealing is a motion to strike, I will deal with it.

22 But I interrupted you. Go ahead.

23 MS. SHAMSI: Your Honor, let me try to address your  
24 question very, very concretely.

25 THE COURT: OK.

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1 MS. SHAMSI: As we say in our briefs, we have three  
2 arguments that we would make about why this document is not  
3 properly classified and why it should not be withheld.

4 One of those arguments is a doctrinally complex area  
5 of the law, but it goes to the heart of what the government is  
6 saying is the reason for the classification, which is the  
7 government's determination that this document concerns a  
8 discretionary assessment made by the government alone about who  
9 can be detained at one time or a longer term.

10 THE COURT: And your argument is going to be that it  
11 is actually legal criteria?

12 MS. SHAMSI: That's correct.

13 THE COURT: You want to make that argument to me. You  
14 know, it is interesting, of all of the arguments that you  
15 mentioned you want to make that one, to me -- and maybe I just  
16 don't understand -- it seems to be one was more a matter of law  
17 and could be applied to this quite simply with my ability to  
18 review the document.

19 Explain why you have selected that one, so tell me.

20 MS. SHAMSI: Because, your Honor, as the government  
21 admits, its ability to detain individuals at Bagram is  
22 constrained by international law.

23 What we had planned to do and proposed to do before we  
24 had ever seen the document was present to you fully the  
25 arguments under international law, that we guessed that the

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1 security threat criteria constituted a constraint on the  
2 government that it itself was applying, i.e., the kind of  
3 secret law that the Second Circuit has warned against.

4 Now that we have actually seen the document and we  
5 know its contents, we would be able to present to you arguments  
6 about exactly how it is that this document constitutes secret  
7 law by constraining the government in accordance with  
8 international law principles, that the government itself has  
9 acknowledged apply. These are arguments that we are very well  
10 positioned to be able to present. We think that they would be  
11 useful to assist the Court. And the government has no  
12 legitimate interest in preventing us from presenting those  
13 arguments.

14 THE COURT: I still don't know why you can't present  
15 them without citing the document.

16 Let me stop you for a minute.

17 I am assuming, just to try to think ahead here a  
18 little, that as a practical matter -- and we have not even  
19 reached the issue -- and I know what the government's concern  
20 is here but, frankly, you did not do anything unlawful when you  
21 received the document. You received it because of an  
22 inadvertent disclosure. You behaved honorably but,  
23 nonetheless, you are in possession of a document that you are  
24 not authorized to have.

25 But leaving that aside for the moment, I am assuming

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1 that what the government is concerned about, aside from the  
2 fact that you would be citing to a document you are not  
3 authorized to have, is that their response or reply or whatever  
4 they did might be termed to be or deemed to be some sort of  
5 acknowledgment of what is in your brief.

6 And this whole case -- and I am sure this has not  
7 escaped your attention as litigants here -- is sort of a  
8 cart-and-a-horse situation. But I am still not persuaded that  
9 I couldn't figure out what your argument was to its fullest  
10 without you having to cite to this document.

11 MS. SHAMSI: Your Honor, I think part of my difficulty  
12 here is to present an argument based on things that I can't  
13 talk about.

14 THE COURT: Exactly. I understand.

15 MS. SHAMSI: That really goes to the heart of the  
16 issue that we have before you, which is, with the ability to  
17 fully brief this issue and to tell you exactly why what is in  
18 the document itself constrains the government's detention  
19 authority and contradicts the position that it has taken, we  
20 are not able to present our fullest arguments to you, arguments  
21 that you are, respectfully, obliged to consider under FOIA and  
22 under the First Amendment here.

23 And the government has asserted, as you have  
24 acknowledged, a security interest in the document. We have, as  
25 you have noted, respected that and worked with the government,

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1 but it has no legitimate interest in preventing you from  
2 hearing those full arguments and from preventing us from  
3 presenting those arguments to you in an artificially  
4 constrained manner.

5 We have combed through, your Honor, the FOIA and the  
6 First Amendment case law to look for any support and found none  
7 for the argument that the government wants you to accept which  
8 is that you should, in essence, put your hands over your ears  
9 and refuse to hear from both sides about arguments that both  
10 sides are lawfully possessed of.

11 THE COURT: I know you disagree or believe it is  
12 distinguishable the Ninth Circuit case where that court said,  
13 look, you cannot rely on this, you cannot use it. There the  
14 district court said give them back the document, whether you  
15 still remember what's in it, go ahead and make your arguments.

16 How do you distinguish that?

17 MS. SHAMSI: On two grounds, your Honor.

18 First of all, in that case -- and this is how that  
19 case is distinguished from Judge Maas' order -- the litigants  
20 were seeking to use the information for another purpose, as  
21 evidence in another --

22 THE COURT: Here you want to use it in the same case  
23 with respect to the very issue that basically surrounds the  
24 document, but I don't know why that is different if the  
25 principle here is that you are not authorized to have access to

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1 this document.

2 MS. SHAMSI: First of all, your Honor, a couple of  
3 things. It is, of course, the government's position that we  
4 are not authorized to have this document.

5 THE COURT: Well, they certainly couldn't have  
6 authorized you through an inadvertent disclosure.

7 MS. SHAMSI: That's correct, your Honor. But our  
8 possession of the document is lawful and we have done nothing  
9 unlawful here.

10 THE COURT: I agree.

11 MS. SHAMSI: And the government has cited no authority  
12 for the position that our possession is unlawful, but also that  
13 our briefing these issues to you under seal would be improper  
14 or unlawful in any way.

15 And in the Al-Haramain case that you are talking  
16 about, the district court in that case issued an order at the  
17 outset permitting the plaintiffs to file that document under  
18 seal even though it is labeled "top secret." The document at  
19 issue here --

20 THE COURT: I'm sorry. I just missed your last few  
21 words.

22 MS. SHAMSI: The district court in that case issued an  
23 order at the outset permitting plaintiffs to file that document  
24 with the court under seal even though it was labeled "top  
25 secret." And the court took the contents of that document into

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1 consideration. The issue of whether it could be relied on was  
2 an issue that went to whether it could be relied on as  
3 substantive evidence in another context. That is very, very  
4 different from what is at stake here, your Honor, where we are  
5 just seeking to rely on the document to explain to you fully  
6 why we do not believe it is properly classified and that harm  
7 could not result from its disclosure.

8 THE COURT: Well, we are back to the cart and the  
9 horse. If I decide it is properly classified, then we have  
10 classified information being cited to in a sealed document.

11 MS. SHAMSI: And that process, your Honor, preserves  
12 the government's interest in secrecy. It is a process that has  
13 been followed in the line of cases that we believe is more  
14 persuasive in this unusual context, which is what does a court  
15 do when both parties have access to classified information.  
16 And in both the Doe line of cases as well as in the  
17 prepublication review cases, courts have held that parties are  
18 able to submit briefing to the court under seal, preserving the  
19 government's security interest and especially where, as here,  
20 First Amendment interests are at stake, that the court is  
21 actually obliged to consider both parties' fullest arguments.

22 And that is an issue, your Honor -- this isn't an  
23 unusual case only because both parties have equal access to the  
24 knowledge. It is also an unusual case because the government  
25 has asked you to order the return of the document, an issue

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1 that we believe -- and as it has been briefed by the government  
2 so far -- you would only reach if you were to decide that the  
3 document is properly classified.

4 THE COURT: It is my understanding that the government  
5 is really not asking me to order you to return it until I  
6 decide it is classified.

7 MS. SHAMSI: That is correct, your Honor. But the way  
8 it has proceeded so far is that briefing on these issues, both  
9 of these issues is proceeding concurrently, the cart and the  
10 horse are trotting along together. But because you are going  
11 to and possibly may have to decide that issue, the courts in  
12 the prepublication review context have understood that where  
13 First Amendment rights are at stake, presumption of regularity,  
14 the government's argument doesn't apply and the courts apply a  
15 higher standard of scrutiny and review, and that party should  
16 be able to submit fullest briefing because First Amendment  
17 rights are at stake. And that's really what is also at issue  
18 here.

19 I am not arguing to you now that this is something  
20 that I would like to do with fullest briefing to you about what  
21 the standard of scrutiny is that you should apply, but as the  
22 Supreme Court has instructed in case after case, where  
23 information has been lawfully obtained, the presumption is that  
24 a party is allowed to publish it. And the Second Circuit has  
25 narrowly cabined exceptions to that, to the discovery context.

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1 THE COURT: There is not a single case where there has  
2 been an inadvertent disclosure, right, of a document that the  
3 government says and has support for is properly classified?

4 MS. SHAMSI: We have found none, your Honor, in which  
5 this issue has been litigated before the courts but, again, I  
6 think that the simplest answer is often the one that is the  
7 right answer. And the simple and right answer here, both under  
8 the law and the facts is that we should be able to present to  
9 you, in accordance with security procedures that are narrowly  
10 tailored and that the government itself uses, arguments that  
11 allow you to consider both the FOIA issues and the First  
12 Amendment issues and in a way that doesn't artificially  
13 constrain or hobble or blind or deafen you or us.

14 THE COURT: All right. Thank you, Ms. Shamsi.

15 And I may ask you to come up again, but let me hear  
16 from the government.

17 MS. SHAMSI: Of course.

18 THE COURT: So, Mr. Barnea, what is the harm?

19 MR. BARNEA: The harm is that classified information  
20 is to be maintained by the government.

21 THE COURT: I'm going to have to ask you to speak up  
22 too.

23 MR. BARNEA: I can move the microphone.

24 THE COURT: You are a little farther from the  
25 microphone than Ms. Shamsi.

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1 MR. BARNEA: The harm here is almost definitional.

2 The executive order that permits the classification of  
3 information defines the document classified at a secret level  
4 as a document that the public release of which would cause harm  
5 to national security. That's the harm that we are talking  
6 about. It is not myself who made that determination but very  
7 senior officials at the Defense Department, including the  
8 declaration that you have already received.

9 So the harm is, there's already been inadvertent  
10 disclosure of this document, due to circumstances that have  
11 been described in the briefing. And that harm is only  
12 compounded by further discussion of the document, by further  
13 writings about the document in settings where that is not  
14 supposed to happen.

15 The classified information is protected in a number of  
16 ways and the most important way it is protected is that it is  
17 limited in its distribution and people are only authorized to  
18 use it under very strict criteria when we have signed  
19 non-disclosure agreements -- of course, the ACLU has not done  
20 in this case, but when they received security clearance from  
21 the government and when there is a determination that they have  
22 a need to know that information. None of those criteria is  
23 present here. So to compound what has already, unfortunately,  
24 happened here, to make even more disclosure of this document is  
25 necessarily harmful.

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1 THE COURT: Let me ask you this. When you realized  
2 you had made inadvertent disclosure, I know you asked the ACLU  
3 to return the document. Why didn't you come to me at that  
4 point and ask me to order it under the general case law  
5 concerning inadvertent disclosures in discovery, for instance?

6 MR. BARNEA: Your Honor, there is general case law  
7 regarding inadvertent disclosures in discovery but, as you have  
8 just noted, it is limited to discovery. So we didn't believe  
9 that that was the authority that we had to invoke to ask the  
10 Court to order the document returned. As our brief on summary  
11 judgment motion explains, we believe that your authority to  
12 order the return of the document comes from the Court's  
13 inherent authority rather than its authority under the Rules of  
14 Civil Procedure because the documents were produced outside --

15 THE COURT: Right. But I gather you didn't even ask  
16 me then. You are asking me now, but only after I make a  
17 determination of whether the document is classified or not,  
18 correct, or am I missing something here? You can tell me I am  
19 missing something.

20 MR. BARNEA: The two determinations go hand in hand  
21 because if the document is not in fact classified as the ACLU  
22 posits, then there is no reason to order its return.

23 After discussing it with plaintiffs' counsel and when  
24 we realized that the document had been inadvertently released,  
25 we first asked for them to return the document voluntarily. We

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1 had several discussions in an effort to try to secure the  
2 return of the document. Unfortunately, we were not able to  
3 reach an agreement on that.

4 We had, however, reached an agreement, in the interim,  
5 until we could approach the Court, there would be certain  
6 security measures put into place at the ACLU, which we are very  
7 happy that the ACLU agreed to and that we are able to trust  
8 them to maintain the document in confidence until the Court  
9 can resolve this issue.

10 However, once that was in place, we had to come to the  
11 Court to ask the Court to order to return the document.  
12 Talking about the cart and the horse here, there is really no  
13 way for us to ask you to simply order the document returned if,  
14 as we anticipated, plaintiffs wanted to argue that the document  
15 was not properly classified --

16 THE COURT: Let me ask you the same question again.

17 The ACLU has seen the document. They still have the  
18 document. They are employing security measures that you have  
19 asked them to, and now they want to rely on it -- I won't use  
20 that term, let me use the more specific one. She has said they  
21 are not going to forget what is in the document that is right  
22 before them or fail to take advantage of that knowledge in  
23 their briefing. You don't want them to cite to it. If it is  
24 going to be under seal and portions can be redacted from the  
25 public record, what goal are we satisfying here by restricting

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1 their ability to cite to the document?

2 MR. BARNEA: There are several goals, your Honor.

3 First, as your Honor is most likely aware, there is a  
4 very big difference from filing documents under seal with the  
5 court -- which is done in a variety of cases, filing classified  
6 documents with the court. There are much stricter procedures  
7 that are required to file classified documents with the court.  
8 And we don't believe that the ACLU has the capability of  
9 following those types of procedures -- there are a lot of  
10 technological issues and things like that.

11 However, the more important thing is that the security  
12 procedures that we have in place right now for the ACLU, which  
13 is that they were going to keep the document in a locked  
14 cabinet and not discuss it outside the small group of lawyers  
15 working on this case, that preserves the physical integrity of  
16 the document, but to start writing about the document in a  
17 computer file, that's starts to allow the document to get out  
18 into the world.

19 As the Second Circuit recognized in the Doe v. CIA  
20 case, a court should only permit a party to file a brief or  
21 prepare a brief or prepare court filings that include  
22 classified documents in very extraordinary circumstances. And  
23 in that Doe case --

24 THE COURT: I'm sorry. Which case?

25 MR. BARNEA: Doe v. CIA, it is a Second Circuit case  
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1 from 2009. I believe that we cited it in our brief.

2 THE COURT: I'm sure you did. I just didn't hear you.

3 MR. BARNEA: In that case, a former CIA employee and  
4 his family wanted to sue the CIA due to -- well, the decision  
5 was very vague because a lot of it concerns material that is  
6 redacted from the public record, but some kind of circumstances  
7 that resulted from the former employee's termination from the  
8 CIA or relocation, I think, to a third party after the  
9 conclusion of his employment. So those plaintiffs were  
10 certainly cognizant of their own situation, of where they were  
11 and why they were there and why they thought that the CIA had  
12 wronged them and wanted to sue the CIA to ask for redress.

13 And the Second Circuit, knowing full well that these  
14 plaintiffs had knowledge of all the relevant circumstances and  
15 wanted to follow whatever security protocols the court would  
16 prescribe, forbade them from filing any such brief, dismissed  
17 the case under, among other things, the state secrets doctrine,  
18 but the relevant portion which I quoted in our brief was that,  
19 even when private parties try to follow security protocols,  
20 there are always risks with inadvertent disclosure. And to  
21 permit parties that are not authorized and are not constrained  
22 by non-disclosure agreements and security clearances and the  
23 like from getting into that field is extremely dangerous and is  
24 only to be done in the narrowest of circumstances. That's why,  
25 as your Honor is probably aware, there are such elaborate

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1 procedures when criminal defense counsel, for example, are  
2 cleared to view classified information when it is relevant to a  
3 criminal prosecution.

4 THE COURT: I interrupted your argument, asking that  
5 question.

6 MR. BARNEA: I will try to pick up from where I was.  
7 I think we have covered some of what I wanted to say.  
8 I think, to respond to a few points from Ms. Shamsi's  
9 argument, it seemed like she was saying that an argument that  
10 the ACLU was planning to focus on in their briefing was the  
11 issue of whether the order constitutes secret law.

12 Ms. Shamsi said, I believe, even before they had seen  
13 the document -- excuse me, they had done some research on  
14 international law and they believed that legal standards of  
15 international law may -- I am not sure if I understand the  
16 argument completely, but it may constrain the government's  
17 ability to use the criteria in some way, and then when they  
18 actually saw the document, their views were actually sharpened  
19 by the knowledge of what is actually in the document.

20 So I believe that, just as with the other argument  
21 that the ACLU would like to make, the government does not wish  
22 to stand in the way of their ability to make those arguments  
23 and believe that those arguments should be made so that the  
24 Court can rule on them. And I don't see the real handicap in  
25 having to say, here are the international legal standards that

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1 are involved, here are the reasons why the U.S. Defense  
2 Department is or isn't allowed to detain people, here are the  
3 permissible criteria that the Defense Department or any  
4 military is allowed to use, here is the criteria that they are  
5 not allowed to use and make whatever argument they want. Sort  
6 of the last link of the argument that they can't say is, this  
7 particular criterion referenced in international law matches  
8 this particular criterion on the document.

9 As your Honor has seen, the document is relatively  
10 short and straightforward, so I cannot imagine that it would be  
11 very difficult for your Honor to conduct that comparison  
12 yourself, to place the criterion that they are discussing in  
13 the context of the contents of the document.

14 So I think here we are talking about a very minor  
15 incursion on plaintiffs' ability to not make whole arguments  
16 but really just make an argument in a certain way that  
17 specifically reveals the contents of the document. So as Ms.  
18 Shamsi, I believe, began, this is a very narrow issue and we  
19 are glad that it is a narrow issue. We don't want to interfere  
20 with plaintiffs' ability to make an argument.

21 I believe the reference to First Amendment rights is  
22 interesting in that regard as well because the cases they cite,  
23 to the extent that they stand for the proposition that a party  
24 has a First Amendment right to make particular legal  
25 argument -- and we have some questions about exactly how far

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1 that First Amendment right, if one exists, should go, we don't  
2 believe that there is any case that stands for the proposition  
3 that you have a First Amendment right to make any legal  
4 argument in any manner you want to make.

5 Certainly courts impose any number of restrictions on  
6 how parties may make arguments. Of course, some of those are  
7 trivial -- page limits, some rules about citing unpublished  
8 opinions. If you are making an argument in court, a judge  
9 might tell you that your time is up and that you can't make any  
10 further arguments -- and on and on. If a court has excluded  
11 you, told you that they don't want to hear an argument or that  
12 an argument is irrelevant or they don't want the jury to hear  
13 something, parties must obey those rulings. They can challenge  
14 them on appeal if they like.

15 But I think the Mezibov case, the Sixth Circuit case  
16 that both parties cite in their briefs -- which is actually  
17 about something else entirely, but has a lot of dicta that  
18 seems to be resonant in our case -- while the court seems to be  
19 a beacon of First Amendment rights for the public, it is hardly  
20 a place where every person has unfettered First Amendment  
21 rights, you know, people speak only when given permission to  
22 speak by the court and are under all manner of restriction.

23 Just to conclude, the plaintiffs haven't cited any  
24 cases in which a party that was not authorized to possess  
25 classified information -- and I mean that in the narrow

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1 sense -- authorized to possess classified information as  
2 opposed to even if they had possession of that classified  
3 information, has ever been allowed to file a brief with the  
4 court that contains that classified information.

5 So while this particular circumstance may not have  
6 arisen, in the past there have been cases including the  
7 September 11th Terrorist Attack case and the Al-Haramain case  
8 where plaintiffs received, through no one's fault and without  
9 accusing anyone of doing anything wrong, they happened to  
10 receive classified information and wanted to use them in the  
11 course of their litigation, and courts have uniformly rejected  
12 that proposition. And the government urges the Court to do the  
13 same here.

14 THE COURT: Thank you, Mr. Barnea.

15 Ms. Shamsi, would you like the last word?

16 MS. SHAMSI: I would, your Honor.

17 Your Honor, I think I am going to take another stab at  
18 trying to explain, given the constraints, just the harm that is  
19 going to result if we are unable to refer to the document. And  
20 it really goes to some of the arguments that Mr. Barnea was  
21 making and the government made in its brief -- just how  
22 artificial and unnecessary those constraints are. The  
23 government says that we can make the arguments, if I understand  
24 the government's position correctly, that we want to make, we  
25 simply can't refer to or compare to the exact document itself.

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1 THE COURT: In a way that would disclose what is in  
2 the document. That's the point.

3 MS. SHAMSI: And I understand that part, your Honor.

4 So, for example, one of the things that we want to be  
5 able to show is that some or some portion of the EST criteria  
6 has been officially acknowledged elsewhere by our pointing to  
7 official acknowledgment in a filing that is public, surely, the  
8 government's interest is in insuring their disclosure that is  
9 made there -- and I understand that their interest is in  
10 official authorities, that you see how artificial this  
11 procedure is and how unnecessarily artificial it is for us to  
12 cite to documents that we know are out there. Do we then cite  
13 to other documents that may or may not contain the criteria in  
14 order to avoid disclosure --

15 THE COURT: I don't take the government's position to  
16 be that. I think the government is saying, make your argument  
17 about public statements, public disclosures and argue that I  
18 should consider that in determining whether or not there have  
19 been public disclosures of some of or all of the documents.

20 Mr. Barnea, is that the government's position?

21 MR. BARNEA: Yes, I think it is.

22 THE COURT: I am having trouble grappling too here  
23 with, one, I suppose in some ways, why does this, a very  
24 reasonable position -- it doesn't seem to me to constrain any  
25 of your arguments. And while it may be that someone reading it

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1 could glean what might be in the document, it avoids a citation  
2 to the document which would confirm it. And that seems to me  
3 where the government is at. That is the line that they are on.

4 Mr. Barnea.

5 MR. BARNEA: Yes, your Honor. If there are public  
6 statements in the public record about what these criteria are,  
7 we are happy to look at them and we are happy for the Court to  
8 look at them. We just don't want exactly that explicit  
9 comparison to say each and every one of the criteria in this  
10 document or some of the criteria in this document actually  
11 matches what is in the document at issue.

12 MS. SHAMSI: Your Honor, I still believe that that  
13 would be an artificial constraint in each one of the three  
14 areas that we are talking about. That, again, just limits you  
15 from having conclusion and really does still leave us with a  
16 chain effect of not knowing what specific arguments we can make  
17 unless you were to decide, your Honor, and unless it is the  
18 government's position now, that the part of Judge Maas' order  
19 that prohibits us from relying on the document is unworkably  
20 vague and that the only thing that we would be prohibited from  
21 doing is actually citing to the document itself.

22 THE COURT: Clearly, the government's position is that  
23 they don't want you citing to the document. And it is also my  
24 understanding that the government doesn't want you to say --  
25 let me put it this way because I see a slight divergence here

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1 in what you are both proposing or suggesting.

2 Let's take the public statements argument. The  
3 government is "happy" -- I think, was Mr. Barnea's word -- to  
4 have you argue that the judge will hear all of the public  
5 statements we wish you to consider. I know why you want to  
6 consider public statements because you want to see whether or  
7 not there has been a public disclosure of any or all of the  
8 criteria in the document.

9 I think what Ms. Shamsi wants to say is, I guess she  
10 wants to make the argument, she wants to say, and, Judge, if  
11 you look at the statements that we are proposing, you will  
12 conclude that some or all of the criteria in the document have  
13 been publicly disclosed.

14 Is that your question, whether you can say that in the  
15 brief?

16 MS. SHAMSI: Say that but also, your Honor, refer you  
17 to public documents, public statutes that track --

18 THE COURT: The statements argument about what public  
19 officials have said?

20 MS. SHAMSI: There are three arguments that we want to  
21 make. One is the official statements.

22 THE COURT: And the statements could also be in  
23 documents, etc. Is that what you are saying?

24 MS. SHAMSI: That is correct.

25 And the third is presenting to you arguments in full

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1 about why the contents of the document act as legal factors  
2 that constrain the government's discretion to detain and the  
3 scope of its detention authority.

4 Again, what we are talking about may seem like here a  
5 dot on the head of a pin, but it is unnecessary --

6 THE COURT: Frankly, Ms. Shamsi, there is an important  
7 interest in not disclosing this document, if in fact it does  
8 contain classified information. And I know that we are all at  
9 the stage where I can't decide that until I see your briefing.

10 I think there ought to be, and you, through no fault  
11 of your own, have obtained this document inadvertently, so you  
12 know what is in it. If anything, I suppose that I would  
13 certainly expect that to be a help in terms of focusing your  
14 arguments to a Court that you know has the document in front of  
15 her.

16 So I am having a little trouble understanding the real  
17 harm to you, which is a factor that you have asked me to  
18 consider and I will. But I still have to go back to the fact  
19 that we are talking about a document that was classified at one  
20 point. And I guess at this stage of the game your argument is,  
21 well, it is not properly classified anymore.

22 MS. SHAMSI: Your Honor, we are talking about two  
23 possible very narrowly tailored alternatives, I hope. One is  
24 for you to -- as the government is saying and we are trying to  
25 figure out how we can make it work because that really is what

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1 I am struggling with here, how can we make a brief work when we  
2 know what the contents of the document are and we are reading  
3 the classification of that document itself.

4 THE COURT: The government is not arguing that you  
5 cannot rely on it, so to that extent you are ahead of the game.

6 As far as I am concerned, the only question is  
7 precisely what can you not do, and you cannot cite to it. We  
8 are all in agreement on that.

9 And if you want to list everything you believe is a  
10 public statement that is relevant to those criteria, the  
11 government is not opposed to that, just to take one argument as  
12 an example. And the argument, presumably to me which I don't  
13 think that the government is objecting to, would be, Judge, if  
14 you read these public statements and then look at the document,  
15 you are going to see that it is some or all of this has been  
16 disclosed.

17 Do you disagree that they cannot say that?

18 MR. BARNEA: I would hope that in saying that last  
19 sentence, they would be a little more circumspect but, again, I  
20 think, ultimately, they can say something very close to that,  
21 which is, here are all of the public statements about the  
22 documents that have been made or here is all of the information  
23 we have about what Bagram detainees know, and we ask the Court  
24 to look at those statements, and in light of the contents of  
25 the document, make a determination whether or not there has

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1 been official disclosure.

2 THE COURT: Well, that was many more words, but it was  
3 great, Mr. Barnea.

4 That one seems easy to me.

5 MS. SHAMSI: And we are trying, I understand, to  
6 narrow but what I was also going to say is that the narrow  
7 tailored procedures that we have proposed would entirely take  
8 care of the government's security interests and account for  
9 that interest. And it is that narrowly tailored set of  
10 procedures that would stop us from having to engage in these  
11 kinds of artificial pretzel-like arguments and protect the  
12 government's interest at the same time.

13 THE COURT: If all that they want you to do is not  
14 cite to it or do a direct comparison, you may call it  
15 artificial. They believe it is an important interest. As I  
16 said, I think it is quite possible for you to write a brief  
17 that will not stray from those two constraints -- which I think  
18 are really the constraints here -- and there would still be a  
19 full argument.

20 MS. SHAMSI: If I may, your Honor, in the section of  
21 our argument that we wanted to talk about secret law, we would  
22 not be prevented from presenting our fullest argument about why  
23 we believe that the criteria constitute secret law, relying on  
24 the contents of this criteria without citing to them -- as we  
25 are trying to narrowly tailor what we are permitted to do.

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1 THE COURT: It is hard for me, without seeing the  
2 text, I guess, to know.

3 Is there some way that we can work this out?

4 I guess if I direct you to brief this without citing  
5 to the document and without making a direct comparison, you are  
6 telling me that that is not specific enough, at least with  
7 respect to the secret law, for lack of a better way to put it,  
8 that argument?

9 MS. SHAMSI: I am saying that, while we will make our  
10 best good faith efforts -- as we have throughout this  
11 litigation -- that may be a very difficult proposition. So if  
12 that is the way that you are heading, your Honor, despite all  
13 of the other arguments that we have made about why you should  
14 under FOIA and First Amendment see these briefs fully and our  
15 arguments fully, but if that's the way that you are heading, we  
16 could certainly make a good faith effort to try but then also  
17 be able to come back to you and perhaps make arguments to you  
18 in camera about what we want to be able to say -- to have a  
19 process where we are not censored --

20 THE COURT: I have already ruled that I don't intend  
21 to have you submit your brief to the government in advance.  
22 That is done.

23 I do have to decide exactly how I am restricting you  
24 with respect to exactly what you are saying in your brief, and  
25 I would expect you to follow that and you would do it in good

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1 faith. That is the way I am leaning.

2 Let me hear from you, Mr. Barnea. Is that essentially  
3 it, can't cite to it and no direct comparison?

4 MR. BARNEA: Yes. And that's pretty much what Judge  
5 Maas said.

6 THE COURT: I think that we just need to take the word  
7 "rely" out of there.

8 MR. BARNEA: Well, the word "rely" can be read very  
9 broadly, and I don't think anyone is trying to read it that way  
10 here. Obviously, we are not asking anyone to undergo memory  
11 erasure.

12 The point is, if the plaintiffs don't cite or quote  
13 from the document and they don't make any comparisons between  
14 any public sources that they cite, whether they are principles  
15 of international law, public statements or anything else that  
16 tie with the document, then that's all the government is asking  
17 for.

18 And just to remind the Court, I believe that's the  
19 same exact brief that the plaintiffs could have written had  
20 they never received the document except now, as your Honor  
21 pointed out, they are slightly pointed in the right direction  
22 because they know which public disclosures they might want to  
23 focus on and which ones might fall by the wayside.

24 THE COURT: I am going to then direct you -- I think  
25 that I am persuaded that this is the way to go. There is not a

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1 case out there where there has been an inadvertent disclosure.  
2 Most of the cases people are citing, it was authorized to have  
3 the document in some instances. And this document appears at  
4 least to have been classified and secret at one point, and  
5 there is not much of a dispute that one can make about that, so  
6 I am really engaged here in an inquiry as to whether or not it  
7 remains properly classified. It is an odd situation where we  
8 need to use the document that is potentially classified with  
9 secret information that could affect the security of the  
10 country in order to make a determination of whether it is  
11 classified.

12 I think this is a compromise that is correct. I think  
13 it is a realistic position by the government that they know  
14 that you are not going to forget what was in the document. You  
15 still have it. By the same token, you shouldn't be entitled to  
16 actually cite to it or make those direct comparisons.

17 And I think that I will be able to, I hope, make a  
18 fair decision on just seeing your arguments and comparing it  
19 with the document myself. So that's what I am going to order.

20 And as I have indicated I think now for the third  
21 time, there won't be any Creedy review by me, by the  
22 government.

23 The briefs will be filed under seal.

24 If you have any question about the direction, I will  
25 just state it again.

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1           You may make all of your arguments, you simply may not  
2 cite to the document and you cannot do any direct comparison.

3           The government, once it sees your brief, will be  
4 permitted, obviously, not only to oppose it but to ask that  
5 portions of it be stricken if they believe that there are some  
6 problems.

7           It is not because I don't like everyone here but,  
8 hopefully I won't see you again on this. You will get your  
9 briefing done and I will be able to make a decision on this  
10 document. I guess I am affirming the magistrate judge's order  
11 in part and modifying it in part.

12           MS. SHAMSI: Your Honor, may I ask for a  
13 clarification?

14           THE COURT: Sure.

15           MS. SHAMSI: We would, of course, eventually want  
16 these briefs to be public, so I just wanted to be clear about  
17 the process that would be able to be followed.

18           THE COURT: They will be filed under seal initially.  
19 The government will respond under seal. We don't have a reply.  
20 I don't know if there will be additional argument that you may  
21 want to make, as you alluded to, about trying to convince me  
22 that you needed to make a further argument citing to or  
23 comparing the document, but if you do, that will be something  
24 else that will probably be under seal. I don't know. But,  
25 yes, once the briefing is fully submitted, unless there is a

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1 dispute, we will file publicly whatever can be filed publicly,  
2 and perhaps it will be the entire briefing.

3 MS. SHAMSI: Right. Your Honor, I just wanted to be  
4 clear because now that we are not citing to the document, the  
5 government is saying that security interests will be made by  
6 the proceeding that you have outlined, there really should be  
7 no reason for the briefs not to be filed publicly.

8 THE COURT: In the first instance you mean?

9 MS. SHAMSI: In the first instance, yes.

10 MR. BARNEA: Your Honor, I understand your Honor has  
11 already ruled on this notion that the government would look at  
12 the brief first and has rejected that --

13 THE COURT: I did not agree with Judge Maas on having  
14 the government review it, but I still think, out of an  
15 abundance of caution because you do have the document and I  
16 expect that you are going to be operating in good faith and  
17 that your brief will be perfectly fine to be filed publicly,  
18 but I would still permit the government the time to review it  
19 and advise me whether they thought there was any problem. So I  
20 am going to still permit that in terms of a public filing.

21 Yes, I am glad that you asked me for that  
22 clarification.

23 And I would expect to know that very quickly as part  
24 of your response to the ACLU's brief.

25 MR. BARNEA: Absolutely, your Honor.

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1 THE COURT: And if there is no issue everything will  
2 be filed publicly.

3 MS. SHAMSI: Just to try to make sure everything is  
4 clear so that we don't have to keep coming back to you, would  
5 you be able to put a time limit as has been placed on the  
6 government in other similar contexts of three business days,  
7 four business days to respond should there be any concern with  
8 filing the document publicly, filing our brief publicly?

9 THE COURT: No. I will not do that right now from the  
10 bench.

11 Mr. Barnea, could you tell me now after you have  
12 received their brief, how much time you think you would require  
13 to make a response as to whether it could be filed publicly?

14 MR. BARNEA: First, I could review it quickly, but I  
15 want to send it down to the folks in the Defense Department to  
16 look at it, so a week would be --

17 THE COURT: A week.

18 MS. SHAMSI: And we would only come back to your Honor  
19 if there was disagreement.

20 THE COURT: That's how it is resolved. I hope this  
21 works out. I may see you again and that would be delightful,  
22 but good luck.

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