

THE EMPTY BATTLEFIELD AND THE THIRTEENTH CRITERION

**AN ANALYSIS OF THE DATA AND METHODOLOGY IN
THE DEPARTMENT OF DEFENSE'S RESPONSE TO
CONGRESSIONAL REQUEST FOR JUSTIFICATION OF THE
GUANTÁNAMO DETENTIONS**

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EXECUTIVE SUMMARY

The Seton Hall Center for Policy and Research (“Seton Hall”) published its first report on the Guantánamo detainees—a comparison between detainees’ enemy combatant designations and detainees’ Combatant Status Review Tribunal (“CSRT”) unclassified summaries of the evidence—nearly two years ago. That report was based entirely upon the Department of Defense’s own data, and revealed that the Defense Department’s records were at odds with its claim that those detained were properly classified as enemy combatants.

Due to a Congressional request, the Department of Defense delegated to West Point’s Combating Terrorism Center (“West Point”) the task of responding to the Seton Hall reports. In the process, West Point’s report³ recast the argument from whether a detainee’s enemy combatant status is justified by the unclassified summary of evidence in his CSRT, to whether a detainee’s unclassified summary meets arbitrary “threat levels” invented by West Point. This report analyzes West Point’s attempt to fulfill this congressional mandate.

West Point’s report attempts to challenge only the first of Seton Hall’s six Guantánamo reports.⁴ West Point does not, for instance, attempt to address the procedural defects of the CSRT as identified by Seton Hall in its subsequent reports.

Part One (A) of this report discusses West Point’s response to Seton Hall, and reveals the following:

1. West Point does not dispute any of Seton Hall’s key findings.
2. To the extent that West Point purports to find defects in Seton Hall’s methodology, it actually criticizes the Department of Defense’s evidentiary bases for the detention of Guantánamo detainees as enemy combatants.

Part One (B) of this report discusses West Point’s confirmation of Seton Hall’s findings, and reveals the following:

³ Jarrett Brachman, *et al.*, Combating Terrorism Ctr., *An Assessment of 516 Combatant Status Review Tribunal (CSRT) Unclassified Summaries* (2007) (hereinafter “WP Report”).

⁴ See Mark Denbeaux, *et al.*, *Report on Guantánamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data* (2006) (hereinafter “SH Profile”). Available at http://law.shu.edu/news/guantanamo_reports.htm.

1. West Point confirms Seton Hall's finding that ninety-five percent (95%) of those detained as enemy combatants were not alleged to have been captured by United States forces.
2. This fact, confirmed by West Point, directly contradicts the executive branch's contention that Guantánamo was populated by individuals who were "picked up on the battlefield, fighting American forces, trying to kill American forces."
3. Upon further examination, the data shows that only twenty-one (21) of the 516 detainees in Guantánamo are accused of ever having been on a battlefield.
4. *Only one* (1) detainee in Guantánamo was alleged to have been captured by United States forces on a battlefield.
5. These new battlefield statistics are corroborated by Department of Defense data revealing that (a) fifty-five percent (55%) of those detained were never accused of committing a hostile act; (b) ninety-two percent (92%) were never accused of being a fighter; and (c) sixty percent (60%) were accused *not* of being members of al-Qa`ida or the Taliban, but merely of being "associated" with those groups.

Part Two of this report discusses West Point's methodology and reveals the following:

1. West Point uses a methodology that is not only arbitrary but ultimately circular. It confuses rather than clarifies the issue of whether detainees are properly designated as enemy combatants. West Point deviates from Defense Department data and terminology, justifying such departures—if at all—with anecdotal evidence. West Point employs repetitive data fields and engages in double-counting, piling up statistics in favor of its implicit thesis that the detainees' dangerousness is sufficiently evident from the CSRT unclassified summaries of evidence.
2. While this process results in twelve explicit "threat variables," West Point's categories are vast enough to include literally tens of millions of Americans as evidencing threat. The explicit threat variables make sense only when coupled with West Point's implicit *thirteenth variable*: namely, that a detainee poses some type of threat if he satisfies any one of West Point's twelve variables *and* he satisfies the *criterion of being detained at Guantánamo*. Obviously, such reasoning is circular. Nonetheless, West Point applies this reasoning to its analysis of each detainee's CSRT unclassified summary.

3. When all of West Point's faulty categories are stripped away, all that remains are the variables contained within the Government's definition of "enemy combatant."
4. Despite erring heavily on the side of over-inclusion, West Point essentially concedes that at least twenty-seven percent (27%) of CSRT unclassified summaries of evidence *do not necessarily indicate that a detainee is in fact threatening*, as well as that more than one percent (1.16%) evidence *no threat whatsoever*.

INTRODUCTION

In February 2006, the Seton Hall Center for Policy and Research published its first in a series of six reports on the Guantánamo detainees. In this report, Seton Hall provided a detailed picture of the detainees, how they ended up in Guantánamo, and what the Department of Defense purported were the bases of their enemy combatant designations.⁵ Seton Hall based its profile of the detainees entirely upon the Department of Defense's own records: namely, the unclassified summaries of the evidence for each of 516 detainees for whom a CSRT had been convened.

Seton Hall found the Government's claim that those detained at Guantánamo were the "worst of the worst"⁶ to be at odds with the Department of Defense's own evidence. Among Seton Hall's findings were that: Fifty-five percent (55%) of detainees were not alleged to have committed any hostile acts against the United States or its allies; only eight percent (8%) of detainees were characterized as al-Qa`ida fighters; and five percent (5%) of detainees were captured by United States forces, whereas eighty-six percent (86%) were captured by either Pakistan or the Northern Alliance and handed over to the United States at a time when the United States offered large bounties for capture of suspected enemies.⁷

In subsequent reports, Seton Hall identified defects in the CSRT process, including, for example: that the Government relied upon hearsay and secret evidence; that the detainees were denied the opportunity to provide witnesses or other evidence; and that the detainees were denied adequate representation.

⁵ SH Profile at 2.

⁶ The Washington Post, in an article dated October 23, 2002, quoted then-Secretary Donald Rumsfeld as terming the detainees "the worst of the worst." Donald Rumsfeld Holds Defense Briefing. (March 28, 2002). FDCH Political Transcripts. Retrieved January 10, 2006 from Lexis-Nexis database.

⁷ SH Profile at 2-3.

The Department of Defense, at the request of Senator Carl Levin, Chair of the Senate Armed Services Committee, agreed on April 26, 2007 to respond to Seton Hall's reports.⁸ However, the Department of Defense did not identify "any specific disagreement" with the accuracy of the Seton Hall reports pursuant to Senator Levin's request. Instead, the Department of Defense commissioned faculty at the Military Academy at West Point to respond to Seton Hall's profile.⁹ Ninety days later, West Point's Combating Terrorism Center published its response, which, however, never addresses the central issue that the Senate Armed Services Committee was considering when Senator Levin issued his request. That is, West Point never attempts to address the question--Were the Combatant Status Review Tribunals an adequate substitute for habeas corpus?¹⁰

⁸ Senator Carl Levin, Chair of the Senate Armed Services Committee:

"Would you get, for the Committee, any specific disagreements that you have...factually, with the reports of Mr. Denbeaux."

Daniel J. Dell'Orto, Principle Deputy General Counsel, Department of Defense:

"...Within a relatively short period of time, although I think one of the reviews is taking—it's going to take us about another 30 days."

Senate Armed Services Committee Hearing, April 26, 2007.

⁹ Lt. Col. Joseph H. Felter, West Point faculty member and director of West Point's Combating Terrorism Center, acknowledged "that military officials had indicated they wanted to contest the Seton Hall report. 'They had been getting a lot of inquiries related to this previous study,' he said. 'They had a lot of concerns with the conclusions, but they did not have another study.'" Glaberson, William, "Pentagon Study Sees Threat in Guantánamo Detainees." *The New York Times*, July 26, 2007.

¹⁰ The West Point study authors disclaim that their study is the official position of West Point Military Academy, the CTC, the U.S. Army, or the Department of Defense. If the Pentagon-commissioned report does not reflect the official position of the Department of Defense, then the Department has still not officially responded to Senator Levin's request that it identify its specific disagreements with the Seton Hall study. For the sake of brevity, this response refers to the study—authored by the Director and the Director of Research at West Point Military Academy's Combating Terrorism Center—as the "West Point" report.

▪ **PART ONE (A)** ▪

WEST POINT'S RESPONSE TO THE SETON HALL STUDY

West Point, on behalf of the Department of Defense, does not list its factual disagreements with any of Seton Hall's reports, despite Senator Levin's request.¹¹ Instead, West Point's report invents its own methodology (discussed in Part Two of this report) for evaluating detainee dangerousness, and limits its disagreements with Seton Hall to an appendix in which it attempts to make four criticisms of just one of Seton Hall's reports. West Point's criticisms are without merit, and are discussed in detail below.

First, however, it is important to stress that the Pentagon-commissioned West Point report does not dispute any of the following:

- A. According to the Department of Defense, the majority of those detained in Guantánamo as enemy combatants were not accused of engaging in any combat against either the United States or its allies. In fact, fifty-five percent (55%) of the detainees were not determined to have committed any hostile acts against the United States or its coalition allies. That means that fifty-five percent (55%) of the “worst of the worst”¹²—those alleged to be enemy combatants—are actually civilians.
- B. Only eight percent (8%) of the detainees were characterized as al-Qa`ida fighters. Of the remaining detainees, forty percent (40%) had no definitive connection with al-Qa`ida, and eighteen percent (18%) had no definitive affiliation with either al-Qa`ida or the Taliban. Sixty percent (60%) of those detained were alleged only to have had some kind of “association” with one or the other. Furthermore, it is undisputed that to have been associated with the Taliban is to have been associated with the ruling party of Afghanistan before the United States took military action there.

¹¹ Supra note 6.

¹² Supra note 4.

- C. Moreover, detainees' alleged relationships with supposed terrorist groups vary considerably. Eight percent (8%) were detained because they were deemed "fighters for" such groups, and thirty percent (30%) were characterized as group "members"—but a large majority (60%) of detainees were detained merely because they are allegedly "associated with" a group or groups the Government asserts are terrorist organizations. As to two percent (2%) of prisoners, the Government identified no relationship with any terrorist group whatsoever.
- D. According to the Department of Defense, a maximum of five percent (5%) of those detained in Guantánamo were captured by United States forces and even fewer were captured on *any* battlefield.¹³ This data is expressly confirmed by West Point, and is discussed in detail in below.
- E. The Department of Defense's own documents show that eighty-six percent (86%) of the detainees were arrested by either Pakistan or the Northern Alliance and later turned over to United States custody.
- F. These detainees were handed over to the United States at a time during which the United States offered large bounties for the capture of suspected enemies.
- G. The Government has detained numerous persons based on alleged affiliations with a variety of groups. Many of these groups either do not exist, or do exist and the Department of State allows their members into the United States.

Furthermore, West Point does not attempt to address the glaring procedural defects in the CSRT proceedings, which Seton Hall identified in its *No Hearing Hearings* report.¹⁴ Thus, West Point does not dispute any of the following:

- A. The Government (1) did not produce any witnesses in any hearing; (2) did not present any documentary evidence to the detainee prior to the hearing in ninety-six percent (96%) of cases; and (3) relied on classified evidence that it kept secret from the detainee and which was presumed to be reliable and valid.
- B. Detainees were not allowed to produce evidence. All requests by detainees for witnesses not already detained in Guantánamo were denied, and the only documentary evidence that the detainees were allowed to produce was from family or friends.

¹³ "The CTC [at West Point] did confirm that only 5% of the publicly released 516 CSRT unclassified summaries provide information that an individual was captured by U.S. forces. CTC faculty also found that the majority of those captured, for whom the CSRT unclassified summaries provide data, were captured by forces other than the United States." WP Response at 7.

¹⁴ Available at http://law.shu.edu/news/guantanamo_reports.htm.

- C. Detainees were denied lawyers. Instead, each detainee was assigned a “Personal Representative” whose role, both in theory and practice, was minimal.
- D. Even when detainees won, they lost. In each case where the Tribunal found a detainee to be not/no-longer an enemy combatant, the Department of Defense ordered a new Tribunal convened, and the detainee was then determined to be an enemy combatant. In one instance, a detainee was found to be no-longer an enemy combatant by *two* tribunals, before a third Tribunal was convened which then determined the detainee to be an enemy combatant. The detainee was not informed of his favorable decision.

Although the West Point report does not dispute any of Seton Hall’s key findings, the study makes—in its appendix—four criticisms of the methodology Seton Hall used in its first report. At the core of each criticism is not Seton Hall’s particular use of the Department of Defense data, but rather deficiencies that West Point finds in the Department’s data itself.

A key difference between Seton Hall’s methodology and West Point’s methodology is that the Seton Hall profile assumed as true and accurate every piece of evidence that the Department of Defense provided to prove that those detained in Guantánamo are enemy combatants. Thus, Seton Hall accepted and honored the data that the Department of Defense produced; West Point does not.

West Point’s criticisms of Seton Hall’s methodology are as follows: (1) Seton Hall should have used more categories of data; (2) Seton Hall should not have made any distinction between “guest houses” and “safe houses”; (3) Seton Hall’s report failed to make clear that the Department of Defense may have more evidence than was published; and (4) the list of organizations in Seton Hall’s appendix included groups that were not terrorist organizations.

Seton Hall responds to each criticism in detail below. As a preliminary matter, however, it must be noted that: (1) the categories of data used by Seton Hall mirrored the *categories used by the Department of Defense*; (2) Seton Hall applied *the Department of Defense’s distinction* between “guest” and “safe houses”; (3) Seton Hall evaluated the *data that the Department of Defense provided* in the summaries of the evidence (in support of its determination of detainees’ enemy combatant status), and did not assume that the Department’s data was incomplete; and (4) the organizations listed by Seton Hall in its appendix were drawn from organizations *cited by the Department of Defense* as groups with which membership or associations were considered grounds for continued detention.

I. West Point contends that Seton Hall used too few data categories.¹⁵

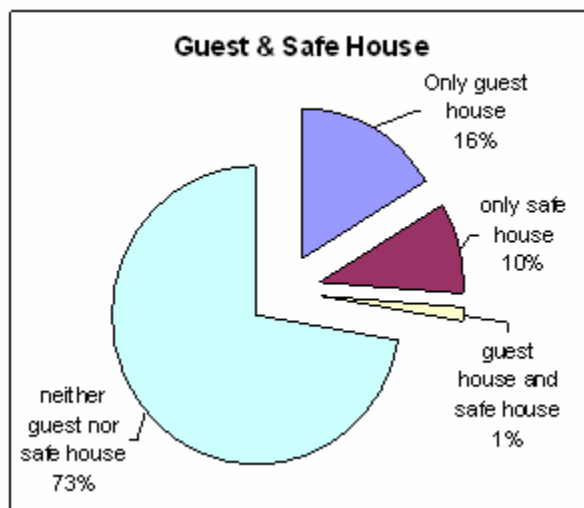
The West Point study suggests that an increased number of categories of data necessarily results in better findings. While that could in theory be true, West Point fails to explain why any of its new categories are relevant or might lead to more reliable findings. More accurate and more precise categories necessarily lead to more accurate data and more precise findings; more categories only lead to more data. There is no logical correlation between sheer quantity of categories and quality of findings.

The Seton Hall profile employed the same categories that were used by the Department of Defense. The West Point report does not honor the Department of Defense’s categories, but rather invents its own.

II. West Point suggests that Seton Hall erred in making a distinction between “safe houses” and “guest houses.”¹⁶

The West Point study’s second criticism is that the Seton Hall report failed to appreciate the contextual meaning of the term “safe house.” Specifically, the study contends that Seton Hall erred by failing to recognize that “safe houses” are a well known haven for criminals and terrorists, and that “guest houses” are exactly the same as “safe houses.” As West Point correctly notes, Seton Hall’s report did distinguish between “guest houses” and “safe houses”; Seton Hall drew that distinction because the Department of Defense drew that distinction. As in all aspects of its study, Seton Hall honored the Department of Defense’s data and terminology. Therefore, where the Department of Defense characterized a facility as a “safe house,” Seton Hall maintained

that facility’s characterization as a “safe house,” and where the Department characterized a facility as a “guest house,” Seton Hall maintained that facility’s characterization as such.



For instance, the Department of Defense’s data stated that 16% of the detainees stayed in “guest houses,” 10% stayed in “safe houses,” and 1% used both. Seton Hall illustrated the data as it was described by the Department of Defense with the pie chart reprinted here.¹⁷

Seton Hall’s methodology required that Seton Hall accept all of the Department of Defense’s data and definitions. As such, Seton Hall’s study used the Department of Defense’s terms objectively and accepted their plain meanings—unlike the West Point

¹⁵ WP Report at 4.

¹⁶ *Id.*

¹⁷ See SH Profile at Figure 15.

study—which subjectively interprets the Department’s terms in order to extrapolate different meanings from what was given. It is logically possible that West Point is correct, but that would be a reflection on the carefulness and accuracy of the Department of Defense’s records. However, West Point does not provide any basis for equating guest houses and safe houses other than the obvious problem with detaining an individual in part based on his stay in a “guest” house.

III. West Point contends that Seton Hall erred by failing to recognize that other data, unpublished by the Department of Defense, may exist.¹⁸

West Point points out that, although the Department of Defense may not have reported certain evidence, it does not follow that unreported evidence does not exist. While this is true, it is irrelevant to the purpose of Seton Hall’s study.¹⁹ Seton Hall repeatedly made clear that its analysis was of the Department of Defense’s *published* data; the Department of Defense stated that the published data comprising the summaries of evidence formed the bases upon which detainees were held as enemy combatants, and Seton Hall, for the purpose of its profile, assumed the truthfulness of everything the Department of Defense stated.

West Point does not go so far as to allege that Seton Hall ever explicitly contended that there could be no unpublished evidence known to the Department of Defense; rather, West Point suggests that Seton Hall’s language might lead a reader to that conclusion. West Point writes:

"[L]anguage in the Seton Hall study can potentially mislead readers by suggesting that if a CSRT record does not contain a direct reference to a piece of evidence, that it does not exist."²⁰

In fact, no such language appears in Seton Hall’s report. Because Seton Hall reported what the Department of Defense said—and not what the Department of Defense did not say—issues of incomplete data are issues to be taken with the Department of Defense, not with Seton Hall. If there are deficiencies in the data, those deficiencies exist because either (1) the Department of Defense does not have sufficient evidence to support its findings of enemy combatant status, or (2) the Department of Defense has, but failed to provide, sufficient evidence to support its findings of enemy combatant status.

A final point on the topic of potentially misleading implications about the existence or non-existence of unpublished evidence: West Point implies that any additional, unpublished data would support the Department of Defense’s findings of enemy combatant status, but the facts suggest otherwise. The recent declaration by Lieutenant Colonel Stephen Abraham, dated June 15, 2007 and filed in the United States

¹⁸ WP Report at 4.

¹⁹ The purpose of the Seton Hall study was to analyze the evidence that the Department of Defense actually *produced* to support its finding that a detainee was an “enemy combatant.”

²⁰ *Id.*

Supreme Court in *Al Odah v. U.S.*,²¹ describes the Department of Defense’s refusal to acknowledge whether exculpatory evidence had been withheld. If Lt. Colonel Abraham’s declaration is correct, then there exists unclassified evidence—withheld by the Department of Defense—that would likely have portrayed the detainees in a far more benign light than did the data that the Department elected to provide.

IV. West Point contends that Seton Hall erroneously included non-terrorist organizations in its appendix.²²

The Department of Defense, in its published data, listed detainees’ affiliations with more than seventy “organizations” as evidence of enemy combatant status. West Point correctly notes that many of the organizations cited by the Department as terrorist organizations either did not exist or were not properly characterized as terrorist organizations. Again, Seton Hall—in keeping with its stated methodology—simply recorded the names of the groups that the Department of Defense cited in its evidentiary bases for detainees’ detention as enemy combatants. That the groups were not properly categorized as terrorist or non-terrorist groups is a criticism of the Department of Defense and not of Seton Hall.

²¹ 127 S.Ct. 3067 (2007).

²² WP Report at 5.

▪ **PART ONE (B)** ▪

THE EMPTY BATTLEFIELD

As noted previously, West Point expressly confirms one of Seton Hall's key findings with its acknowledgment that:

The [West Point] CTC did confirm that only 5% of the publicly released 516 CSRT unclassified summaries provide information that an individual was captured by U.S. forces.²³

Thus, West Point confirms that ninety-five percent (95%) of detainees *were not reported to have been captured by the United States, on the battlefield or anywhere else.*²⁴ Another two percent (2%) of detainees were captured by coalition forces. The term "coalition forces" is not defined by the Department of Defense and the Department of Defense distinguishes "coalition forces" from Pakistani Authorities and the Northern Alliance/Afghani Authorities.

West Point's confirmation of this finding is significant because it directly refutes the claims of numerous government officials, including President Bush,²⁵ Vice President Cheney,²⁶ Secretary of State Condoleezza Rice,²⁷ former White House press secretary

²³ *Id.* at 41.

²⁴ The profile of the twenty-four (24) detainees who were captured by United States forces, twenty (20) of them were never on a battlefield, fourteen (14) of them are not accused of committing any hostile act, and, of course only one (1) of the remaining ten (10) was ever accused of being on a battlefield. Eleven (11) of those twenty-four (24) captured by US forces were captured in Afghanistan. Of those eleven (11), two (2) were in Tora Bora at some point. The location of capture is not stated for the other thirteen (13).

²⁵ "These are people picked up off the battlefield in Afghanistan....They were picked up on the battlefield, fighting American forces, trying to kill American forces." President Bush, June 20, 2005. Retrieved November 4, 2007 from http://www.theatlantic.com/doc/prem/200602u/nj_taylor_2006-02-07.

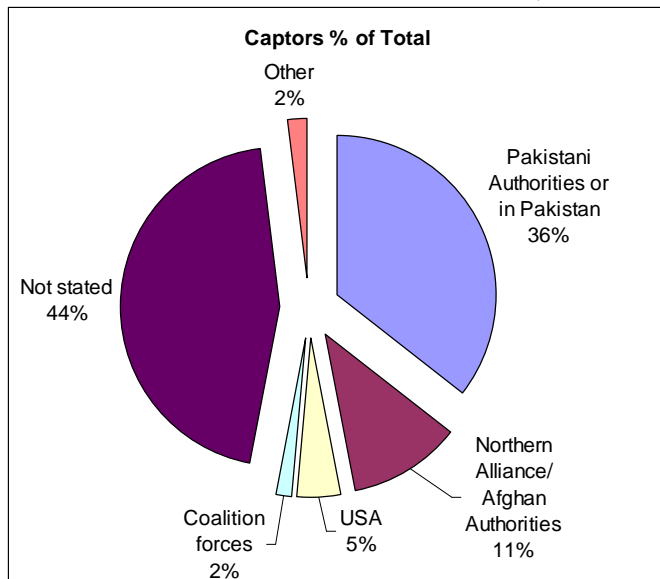
²⁶ "The people that are there are people we picked up on the battlefield, primarily in Afghanistan. They're terrorists. They're bomb makers. They're facilitators of terror. They're members of Al Qaeda and the Taliban....We've let go those that we've deemed not to be a continuing threat. But the 520-some that are there now are serious, deadly threats to the United States." Vice President Cheney, June 23, 2005. Retrieved November 4, 2007 from http://www.theatlantic.com/doc/prem/200602u/nj_taylor_2006-02-07.

Scott McClellan,²⁸ and Supreme Court Justice Antonin Scalia.²⁹ Each of these government officials has made public statements in perpetuation of the myth that the individuals detained at Guantánamo were captured on the battlefield by the United States.

There were no United States forces involved in the capture of ninety-five percent (95%) of those detained as enemy combatants. According to the same Department of Defense data, only four percent (4%)—or twenty-four (24) detainees— were reported to have been captured by US forces.

Fifty-five percent (55%) of those detained in Guantánamo were not accused of hostile acts. Of the forty-five percent (45%) that were accused of hostile acts, less than four percent (4%), or twenty-one (21) detainees, were accused of ever being on a battlefield.³⁰

According to the Department of Defense data that West Point reviewed, *only one* (1) of those detained in Guantánamo captured by United States forces was alleged to have been on a battlefield. The battlefield upon which the United States captured this single detainee is not identified. Therefore, according to Department of Defense and West Point, of the 516 detainees held in Guantánamo, 515 were not captured by United States forces



on a battlefield. Of the other twenty (20) alleged to have been captured on a battlefield, one (1) was turned over to the US by coalition forces, and the other nineteen (19) were turned over by non-coalition forces.

Again in accordance with our methodology, we assume that all government data is accurate. As indicated by the graph, referenced as Figure 12 in Seton Hall’s first report, the government states that five percent (5%) were captured by U.S. forces, eleven percent (11%) by Northern Alliance/Afghan

²⁷ “If we do close down Guantánamo, what becomes of the hundreds of dangerous people who were picked up on battlefields in Afghanistan, who were picked up because of their associations with [al-Qa`ida].” Condoleezza Rice, quoted by John D. Banusiewicz for American Forces Press Service, May 21, 2006. Retrieved November 3, 2007 from <http://www.defenselink.mil/news/newsarticle.aspx?id=15706>.

²⁸ “These detainees are dangerous enemy combatants....They were picked up on the battlefield, fighting American forces, trying to kill American forces.” White House press secretary Scott McClellan, June 21, 2005. Retrieved November 4, 2007 from http://www.theatlantic.com/doc/prem/200602u/nj_taylor_2006-02-07.

²⁹ “I had a son on that battlefield and they were shooting at my son and I’m not about to give this man who was captured in a war a full jury trial.” Supreme Court Justice Antonin Scalia, just prior to oral arguments in *Hamdan*. As quoted by *Newsweek*, March 8, 2006.

³⁰ The CSRT unclassified summaries only alleged that twenty-one (21) detainees were on battlefields or in battle.

Authorities, thirty-six percent (36%) by Pakistani Authorities or in Pakistan, two percent (2%) by other groups and two percent (2%) by coalition forces. The government does not identify the capturing entity for the remaining forty-four (44%) of the detainees.

Of the five hundred seventeen (517) detainees whose records were reviewed, four hundred ninety-six (496) were never reported to have ever been on any battlefield. This does not necessarily mean that these four hundred ninety-six (496) detainees were never on a battlefield; it means that the American Government either knows that the remaining prisoners were not captured on a battlefield *or* the government lacks a factual basis to assert that these prisoners were captured on a battlefield.

If one takes the view that all of Afghanistan is a metaphoric battlefield, then the seventy-one (71) detainees captured in Afghanistan were captured on a battlefield. None of those detained in Guantánamo were ever captured by US forces in either Pakistan or in the Afghanistan Pakistan border region.³¹

However, using these countries as synonymous with battlefields produces results contrary to the Government's grounds for detention of the individuals at Guantánamo. For example—as noted in Seton Hall's first Guantánamo report—fifty-five percent (55%) of those for whom a CSRT was convened were not accused of committing a hostile act.³² Furthermore, only eight percent (8%) of detainees were alleged to have been “fighters.” Because the majority of detainees were captured in Afghanistan or Pakistan, while the majority of detainees were *not accused of committing a hostile act*, it is not possible that the Government is considering the whole of these two countries to be a giant battlefield.

Thus, the majority of those detained at Guantánamo as enemy combatants are actually enemy *civilians*.

Part One in Review

West Point's CTC Report, on behalf of the Department of Defense, essentially concedes the Seton Hall report's key findings.

To the extent that the West Point response purports to find defects in Seton Hall's methodology, the response in fact criticizes the Department of Defense's evidentiary bases for the detention of Guantánamo detainees as enemy combatants. Thus, any alleged defects stem from deficiencies in the Department of Defense's data—not from Seton Hall's methodology—and are unrelated to Seton Hall's findings.

West Point concedes that the Defense Department's data is contrary to the executive branch's contention that the majority of Guantánamo detainees were captured on the battlefield by United States forces. This confirmation of Seton Hall's finding is

³¹ Forty-six percent (46%) of the detainees were not identified as having been captured in either Pakistan, Afghanistan or the Pakistan Afghanistan Border region and another two percent (2%) were affirmatively alleged to have been captured elsewhere, such as Bosnia, Gambia, Iran, or the Kashmir.

³² SH Profile at 2.

supported by Defense Department data revealing that the vast majority of detainees were neither captured by United States forces nor captured on any battlefield, and is consistent with the fact that the majority of detainees were not alleged to have committed a single hostile act.

With its response to Seton Hall, West Point's Combating Terrorism Center supplements, rather than rebuts, Seton Hall's profile in demonstrating the defects in the evidence upon which the Department of Defense determined that detainees were enemy combatants.

▪ **PART TWO** ▪

WEST POINT'S METHODOLOGY AND THE THIRTEENTH CRITERION

At the core of the methodology West Point uses to evaluate the detainees' dangerousness is the invention of a three-tiered³³ hierarchy of detainee "threat" with each of the three levels containing four discrete variables. If a detainee's CSRT unclassified summary of the evidence indicates the satisfaction of any one variable within a given level, that detainee is classified as evidencing that level of threat.³⁴

Rather than distinguishing between enemy combatants and non-enemy combatants (as was the purpose of the CSRT process), West Point attempts to distinguish instead between the three levels of "Demonstrated," "Potential," and "Associated" threat in order to evaluate the detainees in terms of a more ambiguous concept—"dangerousness." West Point seems to equate enemy combatant status with dangerousness—every factor that supports a finding of enemy combatant status³⁵ also supports a determination of threat under West Point's system. West Point goes beyond the enemy combatant definition, however, and creates threat variables classifying even behavior such as possessing a digital watch as threatening.

The over-inclusiveness and arbitrariness of many of West Point's threat variables necessitate West Point's reliance on a thirteenth variable which, when coupled with any of West Point's other twelve variables, solidifies a detainee's classification as threatening. West Point's threat variables, if applied to the population at large, would include an enormous number of individuals. An additional limitation—a thirteenth criterion—is necessary if West Point is to avoid this result.

³³ Additionally, West Point concedes that six (6) unclassified summaries do not satisfy any of West Point's threat variables; thus these six are classified as "Level IV: No Evidence of Threat."

³⁴ WP Report at 4.

³⁵ The second paragraph from each CSRT unclassified summary of the evidence reads: "[A]n enemy combatant has been defined as: an individual who was part of or supporting the Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy forces."

The implied thirteenth criterion is as simple as it is circular: the individual in question is held at Guantánamo.

Below is a visual representation of West Point’s hierarchy of threat variables. If one were to strip away the variables that are either over-inclusive or contain “other” as their largest or near-largest subcategory, only those variables contained in the Government’s definition of “enemy combatant” would remain.³⁶

Threat Level	Variable	Key Problem
Demonstrated Threat	Hostilities	An element of the definition of Enemy Combatant
	Fighters	An element of the definition of Enemy Combatant
	Combat Weapons	Variable is over-inclusive
	Training Camps	"Other" appears as variable's largest or near-largest subcategory
Potential Threat	Affiliations	An element of the definition of Enemy Combatant
	Small Arms	Variable is over-inclusive
	Commitment	"Other" appears as variable's largest or near-largest subcategory
	Support	"Other" appears as variable's largest or near-largest subcategory
Associated Threat	Connections	An element of the definition of Enemy Combatant
	International Travel	Variable is over-inclusive
	Pocket Litter	Variable is over-inclusive
	Guest House Stay	Variable is over-inclusive

Figure 1.

³⁶ Figure 1 represents only the primary problems with each variable. Some variables contain multiple problems; these are discussed in detail in the sections that follow.

I. Level IV Dangerousness: “No Evidence of Threat”

Six (6) of the 516 unclassified summaries do not contain data fitting into any of the twelve variables created by West Point.³⁷ West Point does not identify the six (6) detainees for which it was unable to find any incriminating information. West Point concedes, then, that detention at Guantánamo is not in and of itself evidence of threat.

II. Level III Dangerousness: “Associated Threat as an Enemy Combatant”

Like Levels I and II, West Point’s third level of threat contains exactly four discrete variables: “Guest House Stay”; “Travel to Three or More Countries”; “Pocket Litter”; and “Connections.”³⁸ To satisfy one of these four variables is to be classified by West Point as an “Associated Threat”—which evidently signifies that a detainee is *even less than* a “Potential Threat” (West Point’s second level of threat). West Point determines that seventy-seven percent (77%) of the CSRT unclassified summaries contain data satisfying at least one of its four Level III variables, and thus classifies these 77% of summaries as evidencing “Associated Threat.”³⁹

The four variables that comprise West Point’s third level of threat are over-inclusive and non-determinative of threat. These variables would sweep up millions of individuals under each threat level, if not for the thirteenth variable—being detained at Guantánamo.

A. Threat Variable: “Guest House Stay”

CSRT unclassified summaries indicating that a detainee stayed in a guest house, safe house, or both, are classified by West Point under the “Guest House Stay” Level III threat variable. Although the Department of Defense distinguished between “guest houses” and “safe houses” in the CSRT unclassified summaries, West Point chooses to abandon distinctions between the two in its report without citing any basis to justify that choice. While a “guest house” is, by its plain meaning, “a house for the reception of paying guests,”⁴⁰ West Point asserts that a “guest house” (synonymous with “safe house”) is any “type of infrastructure that houses individuals involved in nefarious activities.”⁴¹

In fact, guest houses are a preferred form of lodging for American, European, and local travelers in the region.⁴² Guest houses typically offer budget rates compared with

³⁷ WP Report at 6.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Oxford English Dictionary.

⁴¹ WP Report at 26.

⁴² For example, The Embassy of Afghanistan in Washington, D.C. informs travelers visiting its website that two types of accommodations exist in Afghanistan: hotels and guest houses. The Embassy explains that the difference between the two is one of cost and amenities: “Guest houses are generally less expensive than hotels because fewer amenities are offered; guests usually share bathrooms.” Thirty-three places for travelers to stay are listed on the Embassy’s website—twenty-six of these are guest houses. *The Embassy of*

large hotels, and are similar to bed-and-breakfasts. The actual definition of “guest house” is important not only because it is quite different from what is connoted by the term “safe house,” but also because the Department of Defense itself distinguished between the two in detainees’ unclassified summaries.⁴³

West Point’s decision to merge two terms that the Department of Defense itself distinguished has the effect of being over-inclusive. Although seventeen percent (17%) of detainees were alleged by the Department of Defense in their unclassified summaries to have stayed only at a “guest house,” West Point asserts that where the Department of Defense said “guest house” it really meant to say “safe house.” Consequently, West Point sweeps up detainees never alleged by the Department of Defense to have stayed at a “safe house” under what it calls its “Guest House Stay” threat variable. West Point finds that twenty-four percent (24%) of CSRT unclassified summaries meet this criterion.⁴⁴ Thus, according to West Point, to have stayed in a guest house is to have “interacted with members of terrorist groups or exhibited behavior frequently associated with terrorist group members.”⁴⁵ This determination is inconsistent with what the Department of Defense actually stated, and is over-inclusive and non-determinative of threat.

B. Threat Variable: Travel to Three or More Countries

West Point includes all CSRT unclassified summaries indicating that a detainee traveled to three or more countries under its “International Travel” threat variable.⁴⁶ Given that a majority of detainees were captured in the Afghanistan-Pakistan region,⁴⁷ it is not surprising that those two countries were by far the most common countries to appear in detainees’ travel histories. Based upon West Point’s Figure 20, it appears that travel within Afghanistan and Pakistan totals approximately three times the amount of detainees’ travels to all other countries combined.⁴⁸ Thus, detainees who fled for Pakistan when violence erupted in Afghanistan had only to have traveled to one other country to be considered a “Travel” threat.

West Point’s statement concedes that “operationally relevant travel history” is “*not determinative of an individual’s threat or propensity to commit hostile acts*”

Afghanistan, Washington, D.C.: Travel Information. Retrieved October 15, 2007 from <http://www.embassyofafghanistan.org/travel/travel4.html>.

⁴³ Because Seton Hall’s original report strictly honors the Department of Defense’s data and terminology, it accurately represents that the detainees’ unclassified summaries alleged that sixteen percent (16%) of detainees had stayed at a “guest house,” ten percent (10%) had stayed at a “safe house,” and one percent (1%) had stayed at both. See SH Profile at Fig. 15.

⁴⁴ WP Report at 6.

⁴⁵ *Id.*

⁴⁶ *Id.* West Point purports to concern itself with a detainee’s “operationally relevant travel.” However, West Point evidently considers any travel to three or more countries to be “operationally relevant.” Although West Point contends, anecdotally, that “[t]here are multiple known al-Qa`ida and Jihadist international travel routes[,]” it fails to cite to any authority on this matter, and never claims to limit its consideration of “International Travel” to such “known” routes.

⁴⁷ WP Report at 23.

⁴⁸ *Id.* at 29.

(emphasis added).⁴⁹ Nonetheless, each of the 119 unclassified summaries determined by West Point to indicate travel to three or more countries⁵⁰ is classified as a Level III threat. Again, West Point employs a data field that is over-inclusive⁵¹—and, by its own admission, not determinative of threat—to evaluate the detainees’ dangerousness.

C. Threat Variable: Pocket Litter

CSRT unclassified summaries satisfying West Point’s “Pocket Litter” threat variable are summaries indicating that a detainee possessed one of either a digital watch “of a concerning type” or “a large amount” of United States or foreign currency.⁵² West Point does not define what constitutes “a large amount” of currency; nor does it describe what causes a digital watch to be “of a concerning type” (although the Department of Defense data indicates that the watches were made by Casio).⁵³

West Point concedes that “in itself possession of large amounts of currency is not a highly concerning indicator of threat.”⁵⁴ However, West Point mitigates this concession with a contention that, “when taken in concert with *other variables*,” the possession of a large amount of money “tends to provide some sense of an individual’s role within an organization” (emphasis added).⁵⁵ West Point posits one of these “other variables”: “being in an active combat zone.”^{56, 57} Accordingly, West Point strays from its stated methodology of considering each of its threat variables discretely, and implicitly acknowledges its reliance on a thirteenth variable: that is, to exhibit one of West Point’s threat variables is not necessarily to be a threat, *unless* one exhibits the additional criterion of being detained at Guantánamo.

D. Threat Variable: Connections

West Point includes all CSRT unclassified summaries indicating that a detainee had an “individual-to-individual relationship” with someone who was affiliated with al-Qa`ida, the Taliban, “or associated forces,” under its “Individual Connections” threat

⁴⁹ *Id.* at 28.

⁵⁰ *Id.* at 29.

⁵¹ It is interesting to imagine how many Americans would satisfy West Point’s “Travel” threat variable, given that in the 2006 fiscal year alone, 12,133,537 United States passports were issued. *Bureau of Consular Affairs*. Retrieved October 23, 2007 from http://travel.state.gov/passport/services/stats/stats_890.html.

(Of course, Americans who travel internationally fail to satisfy West Point’s thirteenth criterion because they are not held at Guantánamo.)

⁵² WP Report at 29.

⁵³ Incidentally, Casio sold 33 million timepieces world-wide in 2006 alone, and has sold 60 million of its G-Shock digital watches to date. *Casio Corporate Report 2007*. Retrieved October 23, 2007 from http://world.casio.com/env/pdf/report_2007/All_ENG.pdf.

⁵⁴ WP Report at 29.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Only five percent (5%) of detainees are even alleged to have been captured on the battlefield. *See* SH Profile at 2.

variable.⁵⁸ The stated difference between “Connections” and “Affiliations” (which West Point classifies as a Level II threat variable) is that a “connection” is a relationship between two individuals, whereas “affiliation” is “an ongoing relationship between an individual and an organization, group or institution[.]”⁵⁹ In light of these definitions, it seems counterintuitive that affiliations would be more numerous than connections; to be affiliated, it would seem, is necessarily to be connected to at least one other affiliated person. Nonetheless, West Point finds 155 fewer instances of “Connection” than of “Affiliation.”⁶⁰

The “Connections” variable as an indicator of threat is problematic. First, what it means to be connected is never explained by West Point. Acquaintanceships are evidently termed connections by West Point. Furthermore, while “connection with a Taliban member” is cited by West Point as the most common type of connection,⁶¹ it is undisputed that to have been connected to a member of the Taliban is to have been connected to someone who was a member of what was the ruling party of Afghanistan at the time of its invasion by the United States.⁶²

Like the other Level III threat variables, West Point’s “Connections” variable is over-inclusive and non-determinative.

III. Level II: “Potential Threat as an Enemy Combatant”

West Point’s third level of threat again contains four discrete variables: “Small Arms”; “Commitment”; “Support Roles”; and “Group Affiliations.”⁶³ Although *West Point concedes that classification as a Level II threat does not necessarily indicate threat*, to satisfy one of these four variables is to be classified by West Point as a “Potential Threat.” West Point determines that ninety-five percent (95%) of the CSRT unclassified summaries contain data satisfying at least one of its four Level II variables, and thus classifies these 95% of summaries as evidencing “Potential Threat.”⁶⁴

⁵⁸ WP Report at 25.

⁵⁹ *Id.*

⁶⁰ *Id.* at 24-25.

⁶¹ *Id.* at 25.

⁶² See SH Profile at 16:

“The Taliban was a religious state which demanded the most extreme compliance of all of its citizens and as such controlled all aspects of their lives through pervasive Governmental and religious operation. Under Mullah Omar, there were 11 governors and various ministers...ministries of the Interior, Public Health, Police, and the Department of Virtue and Prevention of Vice. There was a Health Minister, Governor of the State Bank, an Attorney General, an Education Minister, and an Anti-Drug Control Force. Each city had a mayor, chief of police, and senior administrators.

None of these individuals are at Guantánamo Bay” (emphasis added).

⁶³ WP Report at 5.

⁶⁴ *Id.*

A. Threat Variable: Small Arms

West Point includes CSRT unclassified summaries indicating that a detainee either received small arms training or possessed small arms under its “Small Arms Training/Possession” threat variable.⁶⁵ Like other variables above and below it, the “Small Arms” variable is vastly over-inclusive—and in this instance, West Point concedes as much, writing:

In the Afghanistan-Pakistan region where most of these individuals were captured, familiarization with and possession of AK-47’s and other small arms is *a part of daily life for many and not a sufficient indicator of threat*⁶⁶ (emphasis added).

Small arms, as West Point concedes, are ubiquitous in the Afghanistan-Pakistan region.⁶⁷ Furthermore, and rather importantly, West Point admits that the “Small Arms” variable *is not a sufficient indicator of threat*. It explains that:

For this reason, [West Point’s Combating Terrorism Center] felt it was prudent to identify and separate those unclassified summaries containing evidence of weapons training/possession limited to small arms such as AK-47’s and include them as a Level II versus Level I threat.⁶⁸

West Point *explicitly concedes* that the satisfaction of its “Small Arms” variable is not a significant indicator of threat; yet, it treats the satisfaction of that variable as a basis for the categorization of a detainee as a Level II threat. Thus, a detainee’s unclassified summary need not allege a sufficient indicator of threat for West Point to categorize him as a Level II threat.

This is a significant error. Since detainees who are categorized as at most level II threats are not actually threatening, this means that the twenty-seven percent (27%) of detainees classified by West Point as at most Level II threats⁶⁹ are not in fact threatening.

⁶⁵ *Id.*

⁶⁶ *Id.* at 23.

⁶⁷ In fact, United Nations experts estimate that there are approximately 10 million small arms circulating throughout Afghanistan, a country with a population of about 23 million. *Center for Defense Information*. Retrieved October 15, 2007 from file://C:\DOCUME~1\Owner\LOCALS~1\Temp\DVRL9V62htm.

Small arms are similarly commonplace in the United States, where the National Rifle Association claims 3 million members. *National Rifle Association*. Retrieved October 23, 2007 at <http://www.nra.org/aboutus.aspx>. There are nearly 80 thousand licensed gun dealers in the United States. *The Brady Center*. Retrieved October 10, 2007 from <http://www.bradycenter.org/gunindustrywatch/>.

⁶⁸ WP Report at 23.

⁶⁹ Seventy-three percent (73%) of CSRT unclassified summaries rise to West Point’s first level of threat. *Id.* at 5.

B. Threat Variable: Commitment

According to West Point, its “Commitment” threat variable is satisfied by ninety-eight (98) CSRT unclassified summaries indicating that a detainee “expressed a commitment to pursuing violent Jihadist goals.”⁷⁰ However, little more than the mention of jihad in a detainee’s unclassified summary is enough to qualify as “Commitment” for West Point. Out of 516 unclassified summaries, there are exactly *zero* instances where the word “violent” (or any variation thereof) is used in any relation to the word “jihad” (or any variation thereof).⁷¹ Furthermore, in only twenty-six (26) instances can a detainee’s commitment to violent jihad be contextually inferred.⁷²

Of the ninety-eight (98) unclassified summaries West Point classifies as expressing commitment, forty-seven (47) of these are categorized under “other commitment,”⁷³ making up the largest subcategory of commitment. West Point does not describe what it means by “other commitment” but does not include in that category any of the following: providing non-combat support in waging “violent jihad”; pledging to continue “violent jihad”; pledging to continue to motivate others to wage “violent jihad”; admitting willingness to follow a fatwa to wage “violent jihad”; and pledging allegiance to Osama bin Laden.⁷⁴

Conceptions of jihad range from one of religious warfare to that of “a ceaseless struggle...to distinguish the compassion, love and beauty of God in all things and to strip away everything else.”⁷⁵ The following conversation, which occurred between a detainee and CSRT Members—through an interpreter—illustrates how the concept of jihad can often be confusing, even to believers:

Question: Do you believe in jihad?

Response: I believe in Islam. Do not dissect Islam.

Q. I’m not. All I’m asking is do you believe in jihad.

R. I cannot answer that question. It is a mysterious question and I cannot answer it.

Q. Do you know what jihad is?

⁷⁰ *Id.*

⁷¹ In fact, the word “violent” occurs only once in the whole of the CSRT unclassified summaries. The word “violent” also occurs exactly one time in the unclassified summaries.

⁷² Additionally, among unclassified summaries which contain data indicating a detainee’s commitment to jihad in any form (violent or non-violent), fifty-six (56) summaries designate the detainee as “hostile,” and only fifteen (15) designate the detainee as a “fighter.”

⁷³ WP Report at 22.

⁷⁴ *Id.*

⁷⁵ Karen Armstrong, *A History of God* 241 (1994).

R. Jihad, as far I'm thinking has many meanings. Just like what he was doing there, helping people or what he was doing when Russia was attacking. Don't think that when you are saying jihad, that you are always talking about somebody killing somebody. Jihad could mean somebody helping other people. Opening schools all these are part of the jihad. So when I went to Pakistan, I went to do just the humanitarian part of the jihad.

Q. But jihad does mean killing people correct?

R. That is true but I'm a coward, I cannot go into these things. All I did for my part of the jihad is helping people. That's why I chose (inaudible).⁷⁶

Although West Point acknowledges that "Commitment" is a "somewhat subjective" measure,⁷⁷ the study's authors are not deterred from defining a category for determining "Commitment" that essentially amounts to little more than word-tallying. Instead of appreciating that jihad is a complicated and amorphous concept subject to a multitude of interpretations, West Point concludes that, for every detainee, commitment to any concept of jihad necessitates commitment to personal violence. Again, West Point invents a threat variable that is over-inclusive.

C. Threat Variable: Support Roles

West Point includes CSRT unclassified summaries indicating that a detainee performed roles other than that of a fighter under its "Support Roles" threat variable.⁷⁸ West Point names twenty-six (26) subcategories of "Support Roles," including "Accountant," "Driver," "Cook," and "Medical Care Giver."⁷⁹

Of West Point's twenty-six (26) subcategories, "Bodyguard" and "Other" are by far the largest, with "Other" approximately four times greater than the next largest category.⁸⁰ Thus, another of West Point's variables is subdivided into categories, the largest or near-largest of which is "Other."

D. Threat Variable: Group Affiliations

West Point includes all CSRT unclassified summaries indicating that a detainee had a relationship "with al-Qa`ida, the Taliban, [or] other terrorist/extremist groups" under its "Group Affiliations" threat variable.⁸¹ The "Group Affiliations" variable is similar to the "Individual Connections" variable, except that the former describes

⁷⁶ CSRT Transcript, ISN 589, FOIA 001875.

⁷⁷ WP Report at 20.

⁷⁸ *Id.* at 19.

⁷⁹ *Id.* at 20.

⁸⁰ *Id.*

⁸¹ *Id.* at 5.

individual-to-group relationships—including “informal” as well as formal relationships—while the latter describes individual-to-individual relationships.⁸²

Although affiliation with the Taliban is one of West Point’s most frequently cited affiliations,⁸³ it is undisputed that to have been affiliated with the Taliban is to have been affiliated with what was the ruling party of Afghanistan at the time of its invasion by the United States.

IV. Level I: “Demonstrated Threat as an Enemy Combatant”

Comprising West Point’s top level of threat are four variables that overlap considerably: “Hostilities”; “Fighter”; “Training Camps”; and “Combat Weapons.”⁸⁴ West Point contends that seventy-three percent (73%) of the CSRT unclassified summaries contain data satisfying at least one of its four Level I threat variables, and thus classifies these 73% of summaries as evidencing “Demonstrated Threat.”⁸⁵

The four variables comprising West Point’s top level of threat, in stark contrast to West Point’s other variables, are serious and *would seem* to bear a discernible relation to a detainee’s actual dangerousness, to the extent that dangerousness can be defined. However, the force of West Point’s classification of 73% of unclassified summaries as evidencing “Demonstrated Threat” is weakened by problems with West Point’s methodology.

For example, West Point concedes that:

In addition to RPG’s, grenades, explosives, and sniper rifles, forty records contained evidence of training/possession of “other” weapons which were coded separately than [sic] “AK-47’s and “Other Small Arms.” Records that included weapons in the “other” category were included in the count for the variable “COMBAT WEAPONS[.]”⁸⁶

Thus, where an unclassified summary indicates the possession of any unnamed weapon, West Point imposes a classification of “Combat Weapon” on what is at best unidentified and at worst might be as innocuous as a pocketknife. Nonetheless, to satisfy West Point’s problematic “Combat Weapons” threat variable is to be classified as a top level threat.

Another problem arises with the “Training Camps” variable. Here, West Point admits the “commonly accepted understanding [that] the majority of those trained in those camps would not go on to formally join al-Qa`ida.” West Point further admits that its training camp criteria relies instead upon “anecdotal evidence suggest[ing] that a large

⁸² As noted previously in section II(d), West Point counterintuitively determines that there are far fewer unclassified summaries indicating “Connection” than there are summaries indicating “Affiliation.”

⁸³ WP Report at 24.

⁸⁴ *Id.* at 5.

⁸⁵ *Id.*

⁸⁶ *Id.* at 18.

percentage still did participate in some level of violent of violent Jihad, including participation with the Taliban or associated groups and movements.”⁸⁷ Furthermore, “Other” occurs once again as the largest or near-largest subcategory of West Point’s threat variable—of the fifteen (15) subcategories within “Training Camps,” “Other” is by far one of the two largest, and is more than five times greater than the next largest category.⁸⁸

Also worth noting is that, while West Point implies that any additional, unpublished data would support the Department of Defense’s determinations of enemy combatant status, the facts suggest otherwise. The recent declaration by Lieutenant Stephen Abraham, dated June 15, 2007 and filed in the United States Supreme Court in *Al Odah v. U.S.*,⁸⁹ describes the Department of Defense’s refusal to acknowledge whether exculpatory evidence had been withheld from Tribunal Members. If Lieutenant Colonel Abraham’s declaration is correct, then there exists unclassified evidence—withheld by the Department of Defense—that would likely have portrayed the detainees in a far more benign light than did the data that the Department of Defense elected to provide.

Part Two in Review

Although West Point, on behalf of the Department of Defense, relies upon circular reasoning and problematic methodology in its attempt to paint a portrait of the Guantánamo detainees as exceedingly dangerous, West Point is nonetheless forced to concede that at least twenty-seven percent (27%) of CSRT unclassified summaries do not indicate that a detainee is threatening. It is only through the use of West Point’s implied thirteenth criterion—the incarceration of a detainee in Guantánamo—that West Point can arrive at its conclusions.

⁸⁷ *Id.* at 15.

⁸⁸ *Id.* at 16.

⁸⁹ *Supra* note 19.

CONCLUSION

With its response to Seton Hall, West Point supplements, rather than rebuts, Seton Hall's profile in demonstrating the defects in the evidence upon which the Department of Defense determined that detainees were enemy combatants.

West Point's confirmation that ninety-five percent (95%) of detainees were not captured by United States forces—on battlefields or anywhere else—dispels the myth perpetuated by government officials that the Guantánamo detainees were captured by United States soldiers on the battlefield.

West Point's report creates a hierarchy of threat variables in an attempt to evaluate detainees' dangerousness, but when all of its faulty categories are stripped away, all that is left is the Government's definition of "enemy combatant." Problematic categories notwithstanding, West Point concedes that at least twenty-seven percent (27%) of unclassified summaries do not necessarily indicate that a detainee is threatening.