

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

THE TRUTH ABOUT THE ALLEGED RECIDIVISM OF RELEASED GUANTÁNAMO DETAINEES

By

Mark Denbeaux
Professor, Seton Hall University School of Law, and
Director, Seton Hall Law Center for Policy and Research,

Joshua Denbeaux and R. David Gratz,
Denbeaux & Denbeaux,
Counsel to two Guantánamo detainees

Co-Authors

Daniel Lorenzo, Mark Muoio, Grace Brown, Jennifer Ellick, Jillian Camarote,
Douglas Eadie, and Paul Taylor,
Student Research Fellows, Center for Policy and Research

Contributors

Matthew Darby, Shana Edwards, Daniel Mann, Megan Sassaman, Helen Skinner, Michael Ricciardelli, Student Research Fellows(Class of 2009); Adam Deutsch, Gabriella Hughes, James Hlavenka, Brianna Kostecka, Michael Patterson, Anthony Torntore, Student Research Fellows (Class of 2010); and John Gregorek, Senior Fellow

Executive Summary

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

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

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

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

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

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

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

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

Introduction

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

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

Claims of Detainee Recidivism

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

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

³ *Id.*

⁴ *Id.*

At least 30 detainees who have been released from the Guantanamo Bay detention facility have since returned to waging war against the United States and its allies.

A dozen released detainees have been killed in battle by U.S. forces, while others have been recaptured. Two released detainees later became regional commanders for Taliban forces. One released Guantanamo detainee later attacked U.S. and allied soldiers in Afghanistan, killing three Afghan soldiers.

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

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

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

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

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

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

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

⁵ *Minority Views*, p. 13.

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

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

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

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

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

⁷ The preamble of the release stated:

Former Guantánamo Detainees who have returned to the fight:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹ See *The Meaning of “Battlefield”*

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

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

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

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

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

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

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

The Political Release of ISN 220

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

¹⁵ ISN 220, CSRT 1452.

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

¹⁷ ISN 220, Administrative Review Board 952.

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