

SECOND REPORT ON THE GUANTANAMO DETAINEES:

Inter- and Intra-Departmental Disagreements About Who Is Our Enemy

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EXECUTIVE SUMMARY

1. The Department of Defense identified 72 terrorist organizations in the Combatant Status Review Tribunals (“CSRT”). The Defense Department considers affiliation with any one of these groups sufficient to establish that a Guantanamo detainee is an “enemy combatant” for the purpose of his continued detention. This report refers to these 72 terrorist organizations as the “Defense Department List.”
2. Fifty-two of those groups, 72% of the total, are *not* on *either* the Patriot Act Terrorist Exclusion List or on two separate State Department Designated and Other Foreign Terrorist Organizations lists (jointly referred to as the State Department Other Lists). These lists are compiled for the purposes of enabling the government to protect our borders from terrorists entering the United States.
3. Twelve of the organizations, 18% of the total, are on *either* the State Department Other Lists or the Patriot Act Terrorist Exclusion List, *but not on both*.
4. Members of 64 of the 72 groups the Defense Department believes to be terrorist organizations, 89% of the total, would be permitted in the United States by *either* the State Department Other Lists *or* the Patriot Act Terrorist Exclusion List.
5. In addition to being inconsistent with the Defense Department list, the State Department lists are inconsistent with each other. That is, 46 organizations that the State Department represented to Congress as terrorist organizations on the State Department Other Lists do not appear on the Patriot Act Terrorist Exclusion List.
6. The inconsistency between the State Department Other Lists and the Patriot Act Terrorist Exclusion List raises serious questions about the security of our borders.
7. The Defense Department justifies holding many detainees indefinitely due to their nexus with a group that *neither* the State Department Other Lists *nor* the Patriot Act Terrorist Exclusion List recognizes as a terrorist organization.
8. This inconsistency leads to one of two equally alarming conclusions: either the State Department is allowing persons who are members of terrorist groups into the country or the Defense Department bases the continuing detention of the alleged enemy combatants on a false premise.

INTRODUCTION

The first Seton Hall University School of Law study, [*Report on Guantanamo Detainees: A Profile of 517 Detainees through Department of Defense Data*](#), compared the Defense Department data with the Government's claim that every detainee in Guantanamo Bay was properly declared an enemy combatant and characterized as the "worst of the worst."¹

The Seton Hall research revealed a surprising fact: one third of the detainees were found to be enemy combatants based upon their nexus to an organization allegedly linked to al Qaeda and/or the Taliban. The Department of Defense, for the purpose of the Combatant Status Review Tribunals (CSRT) proceedings, concluded that these organizations were terrorist organizations and concluded that detainees' nexus to those organizations, no matter how slight, was sufficient to hold the detainees indefinitely as "enemy combatants."

This report analyzes the Government's CSRT data again, this time examining the contradictory positions taken by the State Department and the Defense Department as to what groups are terrorist organizations. All data examined and compared is data of the United States Government, and it has all been unclassified. No classified evidence is included in this report.

Of the 517 detainees at Guantanamo Bay, 164 (32%) are enemy combatants because the Defense Department concluded that they were linked to a Defense Department-listed terrorist organization other than the Taliban or al Qaeda. The Defense Department relied on connections to these organizations to conclude that the detainee had a nexus to al Qaeda or the Taliban.

The Department of State is charged by statute to maintain a list of terrorist organizations for use in protecting our borders. This report analyzes the Department of Defense list, as compiled from the CSRT proceedings, and compares it to the Patriot Act Terrorist Exclusion List and the Department of State Other Lists. These State Department lists are internally inconsistent and significantly contradict the Defense Department's conclusion that the groups it identified are in fact terrorist organizations.

¹ The Washington Post, in an article dated October 23, 2002 quoted Secretary Rumsfeld as terming the detainees "the worst of the worst." In an article dated December 22, 2002, the Post quoted Rear Adm. John D. Stufflebeem, Deputy Director of Operations for the Joint Chiefs of Staff, "They are bad guys. They are the worst of the worst, and if let out on the street, they will go back to the proclivity of trying to kill Americans and others." Donald Rumsfeld Holds Defense Department Briefing. (2002, March 28). FDCH Political Transcripts. Retrieved January 10, 2006 from Lexis-Nexis database.

Since the Defense Department list differs substantially from the Department of State Other Lists and the Patriot Act Terrorist Exclusion List, both cannot be accurate. Either the Defense Department is improperly identifying terrorist organizations and unnecessarily detaining alleged enemy combatants, or the State Department is not properly prohibiting terrorists from entering the United States.

THE DATA

Data Used is the Government's Own Data

The Department of Defense list (Appendix A in this report) has never been formally codified by the Government. The list was created as part of the first Seton Hall study by reviewing the Government's CSRT summaries of evidence presented against each detainee. In order to justify the detention of certain detainees the Government alleged that the detainee had some sort of nexus to particular organizations. The Defense Department identifies these organizations as terrorist organizations with ties to al Qaeda or the Taliban.

The State Department Other Lists are actually two lists: "Designated Foreign Terrorist Organization" and "Other Selected Terrorist Organizations." Although these lists are technically distinct, they are usually cited together by the Government and are referred to herein as the State Department Other Lists. The State Department is mandated by statute to create and maintain these terrorist organization lists to prevent the immigration of persons associated with terrorist organizations.

The Patriot Act Terrorist Exclusion List was created by mandate of § 411 of the Patriot Act and is also maintained by the State Department.

The interplay of these three lists was concisely explained by the State Department Report to Congress, "The 'FTO List' and Congress: Sanctioning Designated Foreign Terrorist Organizations"²:

The purpose of this report is to provide Congress with an overview of the nature and status of the designated foreign terrorist organizations list, as a potential tool in overseeing the implementation and effects of U.S. legislation designed to sanction terrorists. It centers on the list of terrorist groups that are formally designated by the Secretary of State pursuant to section 219 of the Immigration and Nationality Act, as amended under the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132.) These groups are often collectively referred to as the "FTO list."

FTO list designations, which last for two years and must be renewed, occur

² U.S. Department of State, Patterns of Global Terrorism 2002, published April 2003; accessible at <http://www.state.gov/s/ct/rls/>, p. 99ff. (Some spellings have been adapted.)

after an interagency process involving the departments of State, Justice, Homeland Security and the Treasury. Since the designations can be challenged in court, they require a detailed administrative record often based on classified information. An organization that is placed on the FTO list is subject to financial and immigration sanctions, potentially including the blocking of assets, the prosecution of supporters who provide funds, refusal of visas, and deportations of members. There have been a number of designations and changes since the list was established, but it currently includes thirty-six organizations.

The FTO list is often confused with some of the other “terrorist lists” that are maintained by the U.S. government . . . [T]he “Terrorist Exclusion List” or “TEL,” which relates to immigration and is pursuant to Section 411 of the USA Patriot Act of 2001 (8 U.S.C. 1182) is maintained by the State Department. Like the FTO list, the TEL includes the names of terrorist organizations, but it has a broader standard of inclusion, is subject to less stringent administrative requirements, and is not challengeable in court.

The FTO list is not primarily concerned with immigration. According to the 2001 Report on Foreign Terrorist Organizations released by the Office of the Coordinator for Counterterrorism on October 5, 2001, “*Representatives and certain members* of a designated FTO, if they are aliens, *can be denied visas or excluded from the United States.*” www.state.gov/s/ct/rls/rpt/fto/2001/5258.htm (emphasis supplied). Mere association with a group on the State Department Other Lists is not sufficient to deny aliens access to American visas.

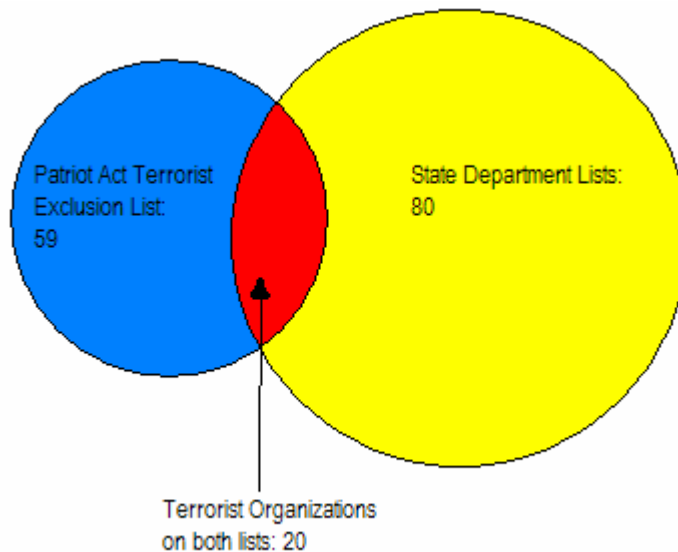
The Patriot Act Terrorist Exclusion List, in contrast, is exclusively concerned with immigration. Its “broader standard of inclusion” and its “less stringent administrative requirements” protect Americans from all individuals suspected of any involvement with those groups specified in the list. For purposes of national security, the Patriot Act Terrorist Exclusion List should include all of the terrorist groups that meet the strict requirements for the State Department lists. To the extent that the Department of Defense List accurately identifies terrorist organizations, the State Department should also include those organizations on its Terrorist Exclusion List.

Either American Borders Are Not Protected from Dangerous Terrorist Organizations Or Detainees Are Being Held Based on Association with Non-Terrorist Organizations

Discrepancy Among State Department Lists

Although the State Department maintains both the State Department Other Lists and the Terrorist Exclusion List, they are markedly different from each other.

The State Department Other Lists and the Patriot Act Terrorist Exclusion List agree on only 20 terrorist groups, although the State Department Lists name 80 such groups and the Patriot Act Terrorist Exclusion List names 59.

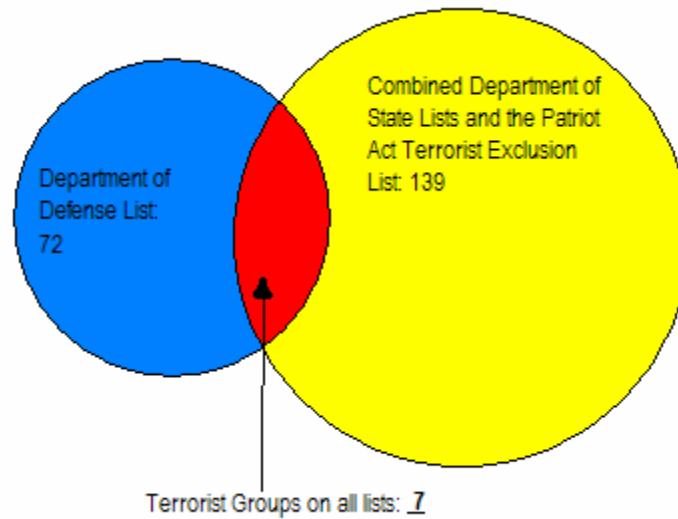


Stated negatively, the Patriot Act Terrorist Exclusion List does *not* recognize 39 groups that the State Department Other Lists claim are terrorist organizations, and the State Department Other Lists do *not* recognize 60 groups that the Patriot Act Terrorist Exclusion List designates as terrorist organizations.

The Patriot Act Terrorist Exclusion List is used for immigration purposes only. The State Department Other Lists are used not only for immigration purposes but also to deport, block assets of, and criminally prosecute members of listed organizations. While it might be appropriate that the State Department Other Lists would not recognize some of the groups on the Patriot Act Terrorist Exclusion List, the failure of the Patriot Act Terrorist Exclusion List to recognize many of the groups on the State Department Other Lists is startling. It suggests that members of these groups could gain admission to the United States.

Discrepancies Between the Department of Defense and State Department Lists

Even more disturbing are the very large discrepancies between the Department of Defense List and both the State Department Other Lists and its Terrorist Exclusion List.



Of the 72 groups on the Defense Department List, only 7 groups, 10%, are on both the State Department Other Lists and the Patriot Act Terrorist Exclusion List.

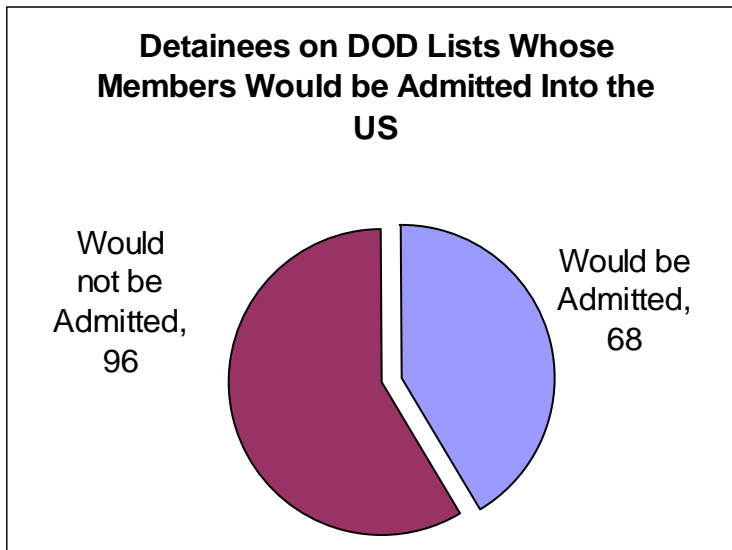
Of these 72 groups, 15 Defense Department List groups appear on *either* the State Department Other Lists *or* the Terrorist Exclusion List *but not both*.

Of these 72 groups, 52 Defense Department List groups are on *neither* the State Department Other Lists *nor* the Patriot Act Terrorist Exclusion List.

The State Department created the State Department Other Lists and the Patriot Act Terrorist Exclusion List to deny members of terrorist organizations entry to U.S. soil. The Defense Department List was compiled to link Guantanamo Bay detainees to groups associated with al Qaeda or the Taliban, thereby validating the continued detention at Guantanamo Bay of persons “associated with” such groups. The inconsistency between the lists suggests two equally disturbing possibilities. If the Department of Defense List is correct, then domestic American civilians are not protected from members of dangerous terrorist groups. If the State Department Other Lists and the Patriot Act Terrorist Exclusion List are correct, then a significant number of Guantanamo Bay detainees are being held based on their connection to groups that do not participate in terrorist activities.

The Members of at Least 52 Groups Identified by the Defense Department as Terrorist Organizations Would be Admitted into the U.S. by the State Department

Of the 517 Guantanamo detainees, the Defense Department concluded that 164 individuals had a nexus with at least one of the 72 groups the Defense Department identified as terrorist groups. Therefore, the Defense Department concluded that any detainee with a link to any of those 72 was linked to al Qaeda or the Taliban and thus was properly characterized an Enemy Combatant. These 164 constitute 32% of the total 517 detainees



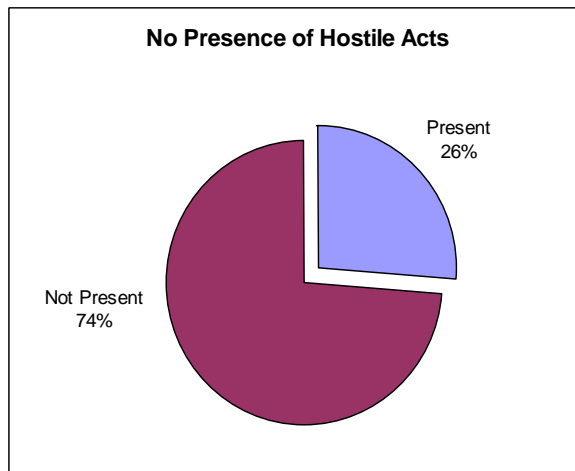
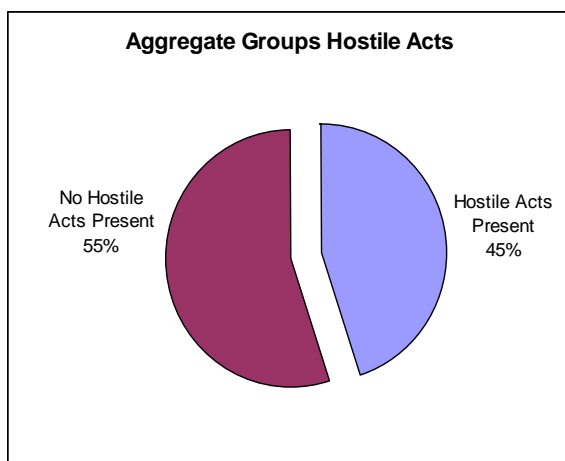
Of those 164 detainees linked to the Department of Defense Terrorist Organization List, the Department of State Other lists and the Patriot Act Terrorist Exclusion List would not preclude 68 of them from entering the U.S. This graph illustrates the number of detainees that the State Department would allow into the country.

State Department Data Contradicts the Defense Department’s Conclusions that Guantanamo Detainees are Enemy Combatants

Where the Defense Department’s conclusion that an organization is linked to terror is inconsistent with the State Department Other Lists and the Patriot Act Terrorist Exclusion List, serious questions arise about the Defense Department’s conclusions that detainees linked to such organizations are enemy combatants.

This concern is supported by an analysis of the CSRT summaries of the evidence for all the detainees. The Government accuses 45% of all detainees of having committed a hostile act against the United States and its coalition forces. Of those detainees accused of involvement with

organizations *not* listed by the Department of State Other Lists or the Patriot Act Terrorist Exclusion List, only 26% are accused of any hostile act.



The Failure of the State Department and the Defense Department to Coordinate About Terrorist Organizations Is a Matter of Grave National Security Concern

Included in the CSRT summaries (prepared by the Defense Department as part of the process of determining whether a given detainee was an enemy combatant) are references to “Al-Isiah Reform Party” which the Defense Department describes as “a radical fundamentalist group closely associated with and supportive of al Qaida activities in Yemen.”

Also included in the CSRT summaries are references to “Dawa wa Irshad” which the Defense Department identified as “a terrorist organization.”

The CSRT summaries also describe a detainee who is held as an enemy combatant because he was “associated with” al Qaida, a conclusion reached because of his involvement with “Al Ighatha,” which the Defense Department described as “a large Saudi NGO with field offices worldwide, many of which are staffed by or support terrorists or mujahidin. The NGO is linked to al Qaida and other extremist NGO’s.”

None of “Al-Isiah Reform Party,” “Dawa wa Irshad” nor “Al Ighatha” is even mentioned in *either* the State Department Other Lists *or* its Terrorist Exclusion List.

Most alarming, perhaps, is the fact that the organization in which Mohammed Atta claimed membership, Takfir-wal Hijra (also called the Takfiri Seven) is not identified in any State Department lists or in the Terrorist Exclusion List. This is true even though the group wages war on unbelievers and conceals its faith to carry out its mission. It is described in the

CSRT summaries, but Roland Jacquard, one of the world's leading scholars on Islamic terrorism, says flatly, "Atta was Takfiri."³ Mohammed Atta, of course, entered the country without much difficulty.

CONCLUSION

There is something wrong when the State Department and Defense Department are not closely coordinating with one another on issues of national security. There is something terribly wrong if they are not speaking to each other. It would appear that the two Departments do not agree even on how to define a terrorist or terror group.

While this issue is certainly a matter of national security, there is the less alarming possibility that the Defense Department has simply not properly identified terror organizations the State Department has declined to so identify.

During one CSRT hearing a detainee questioned the tribunal on how they could tell who was in al Qaida. This exchange followed:

Tribunal Member: Do you have a full definition of al Qaida? What it is?

Detainee: I don't sir.

Tribunal Member: Would you be surprised to hear Usama Bin Laden founded al Qaida, and al Qaida includes people from all over the world? People from America, Afghanistan, Pakistan, Philippines, and people from wherever?

Detainee: Sir, how could anybody know who al Qaida is?

Tribunal President Response: Good question. That's a very good question.

³ See <http://www.time.com/time/magazine/article/0,9171,182881-2,00.html> ; <http://www.time.com/time/magazine/story/0,9171,1101011112-182881-4,00.html> ; and <http://observer.guardian.co.uk/waronterrorism/story/0,1373,560787,00.html> This information, although obtainable on the internet by Seton Hall students over a weekend, has not made its way into government lists.

APPENDIX

DEFENSE DEPARTMENT LIST OF TERRORIST ORGANIZATIONS OTHER THAN THE TALIBAN OR AL QAEDA

(As Compiled From CRST Summaries)

Afghanistan Support Committee
al Birr Foundation
Al Haramain
Al Ighatha
Al Irata
Al Nashiri
Al Wa'ad
Al Wafa
Al-Gama'a al-islamiyya
Algerian Armed Islamic Group
Algerian resistance group
al-Haramayn
Al-Igatha Al-Islamiya, Int'l Islamic Relief Org
Al-Islah Reform Party in Yemen
Al-Itihad al Islami (AIAI)
Ariana Airlines
Armed Islamic Group of Algeria
Bahrain Defense Organization
Chechen rebels
Dawa wa Irshad
East Turkish Islamic Movement
Egyptian Islamic Jihad (EIJ)
Extremist organization linked to Al Qaeda
Fiyadan Islam
Hamas (Islamic Resistance Front)
Harakat-e-Mulavi
HIG
Hezbollah
International Islamic Relief Organization (IIRO)
Iraqi National Congress (INC)
Islamic Group Nahzat-Islami
Islamic Movement of Tajikistan
Islamic Movement of Uzbekistan
Islamic Salvation Front
Itihad Islami
JABRI, Wai Al
Jaish-e-mohammad
Jama'at al Tablighi
Jamaat ud Dawa il al Quran al Sunnat (JDQ)

Jamat al Taligh
Jamiat Al Islamiya
Jemaah Ilamiah Mquatilah
Jihadist
Karim Explosive Cell
Kuwaiti Joint Relief Committee
Lajanat Dawa Islamiya (LDI)
Lash ar-e-tayyiba
Lashkar-e-Tayyiba(LT)
LIFG
Maktab al Khidman
Mujahadin
Mujahedin Brigade in Bosnia
Mulahadin
Muslims in Sink'lang Province of China
Nahzat-Islami
Pacha Khan
Revival of Islamic Heritage Society
Salafist group for call and combat
Sami Essid Network
Samoud
Sanabal Charitable Committee
Sharqawi Abdu Ali al-Hajj
small mudafah in Kandahar
Takfir Seven
Takvir Ve Hijra (TVH)
Talibari
Tarik Nafaz Shariati Muhammedi Molakan Danija
Tunisian Combat Group
Tunisian terrorists
Turkish radical religious groups
Uighers
World Assembly of Muslim Youth
yemeni mujahid