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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____)
AMERICAN CIVIL LIBERTIES UNION et al.,)
)
Plaintiffs,)
)
v.)
)
DEPARTMENT OF DEFENSE et al.,)
)
Defendants.)
_____)

No. 09 Civ. 8071 (BSJ) (FM)

~~FILED EX PARTE AND
IN CAMERA~~

(U) SUPPLEMENTAL DECLARATION OF WILLIAM K. LIETZAU

William K. Lietzau, pursuant to 28 U.S.C. § 1746, declares as follows:

1. (U) I am the Deputy Assistant Secretary of Defense (“DASD”) for Rule of Law and Detainee Policy in the U.S. Department of Defense (“DoD”). I have held this position since February 16, 2010.¹ In this capacity, I am responsible for developing policy recommendations and coordinating policy guidance relating to individuals captured or detained by the Department of Defense. I am a retired Marine Corps officer who served primarily as a judge advocate, including assignments as the Deputy Legal Adviser to the Chairman of the Joint Chiefs of Staff, Staff Judge Advocate to the United States European Command, and Chief of the Law of War Branch for the Department of the Navy’s International Law Division. I also previously served as Deputy Legal Adviser to the National Security Council.

2. (U) The statements in this declaration are based on my personal knowledge and information that I have received in my official capacity.

3. (U) In my current capacity as DASD for Rule of Law and Detainee Policy, I am an Original Classification Authority (“OCA”) pursuant to Executive Order 13,526 (the “Executive Order”). I am familiar with relevant security classification determinations with respect to detainee operations.

¹ (U) Previously, my title was DASD for Detainee Policy. The Rule of Law portfolio was added in June 2011.

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4. (U) I previously submitted a declaration in this matter on July 13, 2011. I make this supplemental declaration in further support of the DoD's Motion for Partial Summary Judgment and Related Relief and in response to Plaintiffs' Cross-Motion for Partial Summary Judgment and Opposition to Defendants' Motion for Partial Summary Judgment (the "ACLU's Opposition") submitted by the American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively, the "ACLU").

5. (U) In this supplemental declaration, I address several matters raised in the ACLU's Opposition. Specifically, in response to the ACLU's Opposition, this supplemental declaration explains the following: (a) the criteria used by the Detainee Review Boards ("DRB") to determine whether detainees at the Detention Facility in Parwan ("DFIP"), which replaced the Bagram Theater Internment Facility ("BTIF"), should be classified as Enduring Security Threats ("ESTs") — which are contained in the classified document at issue in this motion (the "Document") — are not legal criteria that DoD uses to decide which detainees the United States has the authority to detain, *see infra* paragraphs 6-9; (b) these EST criteria are "military plans . . . or operations" as that term is used in Section 1.4(a) of the Executive Order and relate to the "foreign relations or foreign activities of the United States" as that term is used in Section 1.4(d) of the Executive Order, *see infra* paragraphs 10-12; (c) the EST criteria are properly classified and the Document is properly withheld, *see infra* paragraphs 13-28; and (d) portions of Sections II.C and II.D of the ACLU's Opposition must remain under seal permanently because their public release could harm national security. *See infra* paragraphs 29-32.

A. (U) The EST Criteria Are Discretionary Threat Criteria, Not Legal Detention Criteria

6. (U) As a matter of law, U.S. forces operating under Operation Enduring Freedom authority in Afghanistan have the authority to detain enemy forces until the end of hostilities. As a matter of policy, DoD has chosen to limit detention by such U.S. forces at the DFIP to those enemy forces who meet certain discretionary criteria. The DRB is a non-judicial, administrative body designed to assist commanders in assessing whether each person transferred to the DFIP meets these discretionary criteria.

7. (U) The first assessment the DRB makes with respect to each detainee is a *determination* as to whether the detainee meets the discretionary criteria, established by DoD

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policy, regarding the *status* of persons transferred to the DFIP for continued detention by U.S. forces — namely, whether these detainees are:

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

These status-based criteria reflect the Government's interpretation of the Authorization for Use of Military Force ("AUMF"), approved by Congress on September 18, 2001, as informed by the principles of the laws of war. Although DoD applies these criteria as a matter of law to the review of persons detained by U.S. forces at Guantanamo Bay, Cuba, it applies them to persons detained by U.S. forces at the DFIP only as a matter of policy. In the context of U.S. military detention operations at Guantanamo Bay, a U.S. court can order the release of a detainee who petitions for habeas and is found not to meet these criteria. In the context of U.S. military detention operations at the DFIP, DoD policy requires that a detainee "be released from DoD custody as soon as practicable" if a DRB determines that the detainee does not meet these criteria. Thus, by operation of DoD policy, a DRB determination that a detainee does not meet these status-based criteria is binding on the convening authority, *i.e.*, the flag or general officer who is appointed by the Commander of U.S. Central Command ("USCENTCOM") to oversee the DRB process and who is ultimately responsible for ensuring that detainees are transferred and released from the DFIP in accordance with DoD policy.

8. (U) The second assessment the DRB makes is a *recommendation* based on whether the detainee meets the discretionary criteria for continued detention by U.S. forces, established by DoD policy, regarding the *threat* of persons transferred to the DFIP. The DRB makes this threat-based assessment only with respect to detainees determined to meet the status-based criteria. In particular, the DRB assesses whether continued detention of the detainee by U.S. forces is necessary to mitigate the threat that the detainee poses, taking into account an assessment of his potential for rehabilitation, reconciliation, and eventual reintegration into society. Thus, although as a matter of law, U.S. forces have the authority to detain enemy forces

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until the end of hostilities, irrespective of whether the threat they pose can be mitigated by other lawful means, as a matter of policy, DoD has chosen to transfer or release many detainees whose threat can be mitigated by other lawful means. In this regard, the DRB makes an assessment that serves as a recommendation to the convening authority regarding disposition.

9. (U) The third assessment the DRB makes, which is the subject of the Document, is a *recommendation* as to whether the detainee meets the further discretionary criteria, established by DoD policy, that govern *who within DoD may approve any transfer or release of the detainee*. Again, the DRB makes this assessment only with respect to detainees determined to meet the status-based criteria.² In particular, the DRB assesses whether the detainee meets the criteria for classification as an EST. If the detainee is classified as an EST, a decision to transfer or release the detainee requires approval at a higher level of authority within DoD than a transfer or release of a non-EST.³ However, there is no requirement that a subsequent DRB conclude that the detainee is not an EST before his transfer or release can be approved. Nor does a detainee's classification as an EST alter or limit DoD's options with regard to the detainee's disposition. Classification as an EST has no bearing on whether U.S. forces can continue to detain an individual, transfer the individual to the custody and control of Afghanistan or another country, or release the individual. The only difference between the process for obtaining a

² (U) Although the ACLU hypothesizes that the number of ESTs at the DFIP is "likely in the hundreds," the number of ESTs has in fact never been in the hundreds, and is currently well below 100.

³ (U) DoD has not restricted the ability of the Commander of USCENTCOM to delegate his approval authority for the transfer or release of non-ESTs in Afghanistan. With respect to ESTs, however, DoD policy does not permit the Commander of USCENTCOM to delegate his authority to approve the transfer or release, within Afghanistan, of ESTs who are Afghan nationals and whose potential threat is limited to the territory of Afghanistan below the level of the Commander of U.S. Forces – Afghanistan ("USFOR-A"), who is the highest-ranking U.S. military official within the Afghanistan theater of operations. For ESTs whose potential threat extends beyond the territory of Afghanistan, the authority to approve such detainees' transfer or release may not be delegated below the level of the Commander or Deputy Commander of USCENTCOM, who are the highest-ranking U.S. military officials with responsibility for the broader USCENTCOM area of operations. With respect to the return of non-U.S./non-Afghan nationals (i.e., third-country nationals) to their countries of origin or the transfer of such nationals to countries other than Afghanistan, DoD policy requires approval by the Deputy Secretary of Defense or his designee, regardless of whether the detainee has been classified as an EST.

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decision to transfer or release an EST and the process for obtaining a decision to transfer or release a non-EST is the level of authority within DoD required to approve the request.⁴

B. (U) The Document Concerns "Military Plans . . . or Operations" and the "Foreign Relations or Foreign Activities of the United States"

10. (U) The discretionary nature of the EST criteria is one of the principal reasons for classifying them as "military plans . . . or operations" (Executive Order § 1.4(a)). As explained above, these criteria are not DoD's interpretation of whom it has the authority to detain, but rather a tool for assessing whether, when, where, and under what conditions the highest-threat detainees (whom it has already determined it has the authority to detain) might be safely transferred or released in support of counter-insurgency strategies and other operational objectives. As discussed in my previous declaration submitted in this case, public disclosure of these criteria could undermine the accuracy of such assessments and result in the premature transfer or release of high-threat detainees under conditions not designed to mitigate their threat.

11. ~~(S//NF)~~ [REDACTED]

[REDACTED]

⁴ (U) Neither the Document, nor the EST criteria on which it is based, represents a further interpretation of the AUMF or the status-based criteria derived from the AUMF. Rather, the Document is a means of recording which individuals determined to meet the status-based criteria derived from the AUMF pose the greatest threat, as reflected in the EST criteria.

⁵ ~~(S//NF)~~ [REDACTED]

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[REDACTED]

12. ~~(S//NF)~~ [REDACTED]

[REDACTED]

C. (U) The EST Criteria Are Properly Classified and the Document Is Properly Withheld

13. (U) I have reviewed the ACLU's Opposition, and in particular, Sections II.C and II.D of that document, in which the ACLU argues that the EST criteria are not properly classified or, alternatively, that the Document is not properly withheld. I have also reviewed each of the sources of information cited by the ACLU in support of its argument that the EST criteria are not properly classified, or that the Document is not properly withheld, in these sections of its submission.

⁶ ~~(S//NF)~~ [REDACTED]

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14. (U) I have also reviewed the Document, which is a worksheet that USCENTCOM and USFOR-A developed to assist DRBs in applying the EST criteria established in a July 2, 2009 DoD policy memorandum entitled "Policy Guidance on Review Procedures and Transfer and Release Authority at Bagram Theater Internment Facility" (the "July 2009 DoD Policy Guidance"), Shamsi Decl. Exhibit D. The office I oversee prepared the July 2009 DoD Policy Guidance for the Deputy Secretary of Defense's issuance. This office is also responsible for overseeing implementation of the July 2009 DoD Policy Guidance. Thus, in my capacity as DASD for Rule of Law and Detainee Policy, I have primary responsibility within DoD for advising others on the meaning and interpretation of the EST criteria contained in the July 2009 DoD Policy Guidance, as further reflected in the Document, as well as the reasons for their classification.

15. (U) After reviewing the ACLU's Opposition, the sources of information cited by the ACLU in its Opposition, and the Document, I conclude that, with one narrow exception discussed below, the EST criteria are properly classified and the Document is properly withheld.

16. (U) Earlier in this FOIA case, DoD released to the ACLU a redacted version of the July 2009 DoD Policy Guidance. In the version released to the ACLU, DoD did not redact a phrase that reads, "An 'Enduring Security Threat' is an individual who, assessed by capability and commitment," followed by a redacted section. The phrase "by capability and commitment" also appears in the Document. DoD publicly disclosed the un-redacted portion of this sentence in the July 2009 DoD Policy Guidance because it contains no classified information. DoD redacted the remainder of the sentence because it does contain classified information. Attached as Exhibit A hereto is a redacted version of the Document, in which this four-word phrase and additional unclassified background information are not redacted.

D. ~~(S//NF)~~ [REDACTED]

17. ~~(S//NF)~~ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
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[REDACTED]

18. (S//NF)

[REDACTED]

[REDACTED]

⁷ (S//NF)

[REDACTED]

[REDACTED]

⁸ (S//NF)

[REDACTED]

[REDACTED]

⁹ (S//NF)

[REDACTED]

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[REDACTED]

19. ~~(S//NF)~~ [REDACTED]

[REDACTED]

20. ~~(S//NF)~~ [REDACTED]

[REDACTED]

21. ~~(S//NF)~~ [REDACTED]

[REDACTED]

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22. ~~(S//NF)~~ [REDACTED]

[REDACTED]

23. ~~(S//NF)~~ [REDACTED]

[REDACTED]

24. ~~(S//NF)~~ [REDACTED]

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[REDACTED]

25. ~~(S//NF)~~ [REDACTED]

[REDACTED]

26. ~~(S//NF)~~ [REDACTED]

[REDACTED]

27. ~~(S//NF)~~ [REDACTED]

[REDACTED]

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[REDACTED]

28. ~~(S//NF)~~ [REDACTED]

[REDACTED] ot
[REDACTED]

E. (U) Public Release of Portions of the ACLU's Opposition Would Harm National Security

29. (U) As explained above, I have reviewed the ACLU's Opposition, focusing in particular on Sections II.C and II.D of the brief. Based on this review, I have determined that the public release of certain portions of the ACLU's Opposition could disclose information properly classified under Executive Order § 1.4(a) or § 1.4(d), and thus would harm national security.¹⁰

30. ~~(S//NF)~~ [REDACTED]

[REDACTED]

¹⁰ (U) The paragraphs of the ACLU's Opposition whose public release I believe would harm national security are all paragraphs of Section II.C, except the first and last paragraphs in that section, and all paragraphs in Section II.D, except the first, second, penultimate, and last paragraphs in that section.

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31. (S//NF) [REDACTED]

32. (S//NF) [REDACTED]

(U) I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on the 2nd day of December, 2011.



WILLIAM K. LIETZAU
Deputy Assistant Secretary of Defense
For Rule of Law and Detainee Policy
U.S. Department of Defense

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Detainee Review Board Report of Findings and Recommendations
(Classified Annex – Enduring Security Threat)

<u>Date of Board</u>	<u>Detainee Name</u>	<u>Detainee ISN</u>
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STEP 4 Instructions: The intent for EST assessments is to identify those detainees who

(b)(1) 1.4a, (b)(7)e

A detainee may be a threat to US and coalition forces and he may be interned at the DFIP, but not be an Enduring Security Threat.

(S) In making the assessment of whether the detainee is an “Enduring Security Threat,” I find that:

A. By capability and commitment¹

1. The detainee DOES or DOES NOT (circle one)

(b)(1) 1.4a, (b)(7)e

2. The detainee DOES or DOES NOT (circle one)

(b)(1) 1.4a, (b)(7)e

B. The threat posed by the Detainee MAY / MAY NOT (circle one)

(b)(1) 1.4a, (b)(7)e

Based off the answers above, complete Step 4 on the first page.

(b)(1) 1.4a, (b)(7)e

Considerations:-

(b)(1) 1.4a, (b)(7)e

¹ In assessing capability, the review board should consider

(b)(1) 1.4a, (b)(7)e

In assessing commitment, the review board should consider

(b)(1) 1.4a, (b)(7)e

² Definitions: The following definitions apply when assessing a detainee’s status as an “Enduring Security Threat”:

(b)(1) 1.4a, (b)(7)e

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