THE CONSTITUTION PROJECT

Safeguarding Liberty, Justice & the Rule of Law

UNDERSTANDING CLAIMS ABOUT RECIDIVISM AND GUANTANAMO[1]

Once every six months, the Director of National Intelligence (DNI) – in consultation with the Director of the Central Intelligence Agency and the Secretary of Defense – is required to make public an unclassified "Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba" (Reengagement Report). DNI's most recent such report was made public on September 14, 2016.[2]

Ostensibly on the basis of DNI's numbers, some pundits and policymakers claim roughly a 30% recidivism rate for former Guantanamo detainees. That figure is both inaccurate and misleading in a number of respects, particularly if it is being used to gauge the likelihood that a detainee transferred *now* will subsequently engage in terrorism. The most accurate figure for that purpose is 5.6%.

The 30% figure deceptively combines two very different statistical categories in the Reengagement Report.

The first category is for former detainees "confirmed of reengaging" (17.6%). The second is for those "suspected of reengaging" (12.4%).[3] The standard for inclusion in the "confirmed" category is "*a preponderance of information* which identifies a specific former GTMO detainee as directly involved in terrorist or insurgent activities." (Emphasis added). In other words, DNI considers reengagement "confirmed" if it is more likely than not – i.e., there is a 51% chance – that a former detainee is directly involved in terrorism. That is not an especially high threshold to meet, but it is significantly more burdensome than the minimal standard for inclusion in the "suspected" category: "*Plausible but unverified or single-source reporting* indicating a specific former GTMO detainee is directly involved in terrorist or insurgent activities." (Emphasis added).

It is simply not reasonable to count as recidivists the 12.4% of former detainees who are merely "suspected" of reengaging, given how low the bar has been set for being included in that category.

An overwhelming majority of the 17.6% of former detainees that DNI considers "confirmed of reengaging" was transferred during the Bush Administration, before current rules and processes governing transfers were in place.

As of the most recent published DNI report, 693 detainees had been transferred out of Guantanamo. According to DNI, 122 of those detainees were "confirmed of reengaging." 113 of those 122 were transferred during the Bush Administration.[4] When President Obama took office, he ordered an inter-agency review of all remaining detainees at Guantanamo.[5] The review panel included senior officials from the military, the State Department, the Justice Department, the Department of Homeland Security,

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[2] *See* https://www.dni.gov/files/documents/FINAL%20-%20GTMO%20Unclass%20CDA%20Response%20-%20September%202016.pdf ("Reengagement Report").

[3] The 30% figure is a result of combining the "confirmed" and "suspected" categories.

[4] *See* Reengagement Report, *supra* note 2.

[5] *See* Executive Order 13492, available at http://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1893.pdf.

the Joint Chiefs of Staff, and DNI. By unanimous agreement, the review panel approved more than half of the detainees for transfer.[6] With one unique exception,[7] the Obama Administration has only transferred detainees that U.S. national security agencies have together first determined no longer pose a significant threat.

Moreover, under current law, before transferring any detainee the Secretary of Defense must determine and explain to Congress what steps will be taken to substantially mitigate any risk of the detainee engaging in terrorist activities after release, and why the transfer is in U.S. national security interests. In making those determinations, he must consider a host of security-related factors, including:

- Assessments of the threat, if any, the detainee poses;
- Prior confirmed cases of individuals released to the same country who later engaged in terrorist activity;
- Any transfer country steps or assurances that it has or will work to substantially mitigate the risk that the individual will engage in terrorist activity or otherwise threaten the U.S., its allies or interests;
- The transfer country's capacity, willingness and past practices (where applicable) in taking such risk mitigation measures; and
- The transfer country's control over any detention facilities where the individual may be held, and willingness to share information with the United States about the individual.

These rules and processes were not in place during the Bush Administration.

Only 5.6% of detainees transferred under President Obama are "confirmed of reengaging."

President Obama has transferred 161 detainees as of the last DNI reengagement report. According to DNI, only nine of those 161, or 5.6%, were "confirmed of reengaging."[8] In other words, using a more-likely-than-not test, the DNI has concluded that only 5.6 percent of detainees transferred under Obama have had subsequent direct involvement in terrorism.

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DNI's reengagement statistics should not necessarily be taken at face value. Studies by nongovernmental organizations have concluded that the reengagement rate is much lower than DNI claims, and academics have found problems with DNI's data that serve to inflate its numbers.[9] But if DNI's most recent statistics are used, they should at least be interpreted correctly. And if the purpose is to gauge the likelihood that a detainee transferred from Guantanamo *now* will subsequently engage in terrorism, then the most accurate reengagement rate is 5.6%.

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[6] *See* http://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf.

[7] In May 2014 five former Taliban officials who had not yet been cleared for transfer were sent to Qatar in order to secure the release of an American hostage.

[8] *See* Reengagement Report, *supra* note 2. Another 11 detainees of 161 transferred under Obama, or 6.8 percent, are "suspected of reengaging" by DNI, based on a much lower standard of evidence. As explained above, we do not consider an allegation of reengagement that is "plausible" but *not* supported by a preponderance of evidence to be a meaningful basis for categorizing a former detainee as having reengaged in terrorism.

[9] *See* Report of The Constitution Project Task Force on Detainee Treatment, Chapter 9 (Recidivism) at pp. 299-300, available at http://detaineetaskforce.org/pdf/Chapter-9_Recidivism.pdf.