Afghanistan Analysts Network

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Kafka in Cuba

The Afghan Experience in Guantánamo

EXECUTIVE SUMMARY

This report presents a detailed investigation into the cases of eight of the longest-serving Afghan detainees in Guantánamo (see Box 1). All are either still incarcerated in Guantánamo or have recently been transferred to the United Arab Emirates where they are believed still to be in some form of detention. Combined, these cases add up to exactly one hundred years of state-imposed detention without trial, under the harshest conditions.

Reading through the United States military and court documents outlining the allegations and evidence against these eight men, one enters a Kafkaesque world of strange, vague accusations, rife with hearsay, secret evidence, bad translations, gross errors of fact and testimony obtained under duress and torture. The tenuous nature of the allegations against the eight men has been further compounded by a shifting legal landscape and state secrecy.

The report finds that the US military has, in none of the eight cases, been able to substantiate its accusations. Military boards, designed to ensure only enemy combatants who were a threat to the US were held, were unable even to clear out the obvious, multiple mistakes from the detainees' files or recognise the fantastical nature of many accusations. America's courts have also repeatedly shown themselves unable or unwilling to stand up to the executive. They have failed to question what the government has asserted or protect individuals from the arbitrary power of the state.

Of the eight cases scrutinised, six men were captured in the early years of the intervention when US forces were carrying out mass arbitrary detentions in Afghanistan. It was a time when US forces were desperate for intelligence on the whereabouts of Osama bin Laden. They were also intent on hunting down the 'remnants' of the Taleban even though, in terms of fighting forces offering resistance, there were no remnants. They ended up detaining large numbers of innocent Afghans. Many had been falsely denounced, often by Afghan strongmen who used their new US allies to get revenge against personal or factional enemies, or for financial reward.

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Pakistan also handed non-combatants over, claiming they were terrorists – and was paid for doing so. The result was that, although some senior Taleban were captured in those early years, almost anyone could end up in Guantánamo. Those detained included opponents of the Taleban, members of the new, post-Taleban establishment, old men, children and at least one Shia Muslim. The six Afghans in this study who were detained in 2002 and 2003, far from being the 'worst of the worst' as the Guantánamo detainees have repeatedly been described, are more like flotsam left stranded by the high tide of mass, arbitrary detentions. Two may possibly have been low-level insurgents, although not with al Qaeda; the others look to have been entirely innocent.

The other two men who are part of this study were detained in 2007 and their cases are somewhat different for three main reasons: by 2007, there was an actual insurgency and US intelligence was better, albeit still far from perfect; the US has also revealed far less about the specific allegations and evidence against these two men and; neither has had a chance to defend himself publically even in the limited ways open to other detainees. One, the last man to be rendered and tortured by the CIA, has been categorised as a 'high value' detainee, meaning much of the detail of the allegations against him is classified. Both of these detainees are accused of being facilitators for al Qaeda. However, in neither case has the US put forward evidence to substantiate its claims. Indeed, what can be seen points to the same worrying problems as seen in the first six cases, a reliance on unverified intelligence reports, hearsay and the use of torture.

The impression that none of the eight are 'big fish' is given weight by the fact that the Taleban did not try to get any of them out in exchange for captured US serviceman, Bowe Bergdahl, in 2014.

Failures of intelligence

None of the eight were detained on the battlefield, so US justifications for the detentions have relied almost entirely on intelligence. This intelligence has been parlous. US forces only captured two of the eight men directly, both following tip-offs from unknown sources. The other six were handed over to the US military or CIA by Pakistan or Afghan forces. In three of the cases, there are very strong indications that the detainees were denounced or handed over for political or monetary reasons. In two others, this looks likely or has been alleged. Five of the men have said American forces tortured them and in two of the cases there is independent corroboration of this. Another was likely 'softened up' by Afghan allies prior to US interrogation. The remaining two men have not spoken publically either way about their treatment.

Where there are publically available documents, i.e. for the first six cases, they show multiple, basic mistakes in Afghan geography, dates and factional membership, as well as fundamental misunderstandings, such as mistaking non-belligerent and even anti-jihadist groups for extremists. Ahistorical allegations are made: reaching back into the 1980s, the US military deems as nefarious some of the associations it shared at the time, and asserts the existence of al Qaeda before bin Laden founded it. It assumes employment in itself can be counted as evidence of support for the ideological aims of the employer and his hostility to the United States. Meaningless strings of associations – detainee knew X who knew Y who knew Z who knew bin Laden – are put forward as evidence of wrongdoing. For all eight detainees, raw intelligence reports are routinely relied upon, along with hearsay, double hearsay (X said Y said detainee was a terrorist), statements obtained under duress or torture, and summaries, rather than transcripts, of interrogations. Resulting allegations have then been presented as uncontested fact.

All eight are alleged to have held multiple memberships or associations with as many as five organisations, including Afghan, Arab and Pakistani groups and mutually antagonistic or non-belligerent Afghan groups. The depiction of individuals as members of multiple, disparate organisations is bewildering. Afghanistan is a country where membership of an organisation is almost always grounded in a solidarity grouping – tribe, ethnicity, clan or former comradeship – even more so during an insurgency, where personal links are crucial for trust. Such allegations make no sense, either from an intelligence perspective where it is precise chains of command which form one of the prisms for understanding an enemy like al Qaeda or the Taleban, or from a legal perspective, where again, chains of command are fundamental for making a case that war crimes have been perpetrated. It suggests rather that the US military did not know who they had picked up or why exactly they might be dangerous and had to formulate cases against detainees retroactively, to present at the Combatant Status Review Tribunals (set up in 2004 to try to prevent habeas cases after the Supreme Court had determined that detainees could seek legal redress through the federal courts).

Failures of justice

It is significant that not a single one of the eight is accused of carrying out a particular attack. Mostly, the accusations against them are more inchoate – carrying out unspecified attacks, membership of, association with, planning to attack, training and translating. One is accused of financing only; under International Humanitarian Law (the 'Laws of War'), this is considered a non-combat, support role. Where cases have reached the courts (Military Commission trials) and accusations had to be firmed up. Three of the men were charged, but only with 'providing material aid for terrorism' or 'conspiring to commit terrorism', not of committing actual acts of violence. All three saw these charges dropped, or, their trials folding after the Supreme Court deemed Military Commission trials were illegal.

The vague nature of the allegations has been aggravated by murky and changing laws, shifting interpretations of the law and the Byzantine way US governments, courts and military review boards have dealt with the detainees. The military boards established by the state, purportedly to ensure the US was only holding actual combatants and only those who were dangerous to the US or its allies, utterly failed to question the claims made to them. Even though they were not independent, it is difficult to see how clearly far-fetched allegations and case files rife with contradictions and factual errors could have stood scrutiny. Strikingly many of the detainees embraced the chance to speak at their first boards, to try to put matters straight, as they saw it, and correct errors. As they realised these were not forums where they would get a fair hearing, attendance at later hearings fell away.

As to getting justice through the courts, at Military Commission trials, detainees were charged with offences that did not exist in law and judges did not know what system of law they had to apply. Procedural matters have held up both habeas corpus petitions and military trials for years. The state has also been tardy in handing over documents to the defence or sought to introduce new evidence as cases went along. It has also sought to keep evidence secret from defendants, the public and even security-cleared counsel. Delays on the part of the state have not been punished by the courts. Indeed, one detainee had to wait for almost three years for the judge to make up her mind about his habeas petition.

Judges have, not always but often, accepted secret evidence, as well as hearsay and statements made under duress; they have even weighed up whether to accept testimony obtained from those who have been tortured. Most worryingly, judges have shown a strong tendency to accept state evidence and the interpretation the state puts on its evidence. For example, the possession of a satellite phone was accepted as adequate evidence of involvement in terrorism. In three cases, the state's assertion that the mass, quietist, missionary organisation, Jamat al-Tabligh, is a front for al Qaeda was accepted by judges with no delving into whether this was a reasonable claim to make. In the one habeas case which went to appeal, even as the bulk of the state's evidence was shown to be wrong or had to be discarded, this had no impact on how the remaining evidence was assessed by the courts; the judge remained convinced that the state's assertions were true.

This may now have changed, a little. A new body, the Periodic Review Board, has been reviewing all remaining detainee cases. In the last year, it has decided that six of the eight Afghans should be transferred, i.e. sent to another country with security guarantees. In two of these cases, the Board recognised that the allegations against the men were not true: one was told his role with the Taleban had been "limited" and that he had been "misidentified as the individual who had ties to al-Qaeda weapons facilitation," as had been his contention all along. Another was told there was a "lack of clear information regarding his involvement with al-Qa'ida or the Taliban." With the other four, the allegations against them were judged to be true, but they posed no risk to the US or the risk could be mitigated. In August 2016, three of the detainees were transferred to the United Arab Emirates, although they remain in some form of detention and it is not clear if they will be allowed to return to Afghanistan.

Viewing the US detention regime through the lens of the Afghan experience in Guantánamo raises broader questions about the effectiveness of US intelligence and justice. This study's 'deep dive' into the Afghan files by a country expert has revealed multiple, obvious and persistent flaws in the intelligence which left men detained for more than a decade. Is this the case for the intelligence behind the detention of other nationalities also?

The Afghan experience in Guantánamo in itself highlights the peril of the power to arbitrarily detain. For individuals and their families, the consequences have been gross miscarriages of justice. For Afghanistan, the mass arbitrary detentions in the early years of the US-led intervention was a major factor driving some Afghans towards insurgency. It helped revive a conflict Afghans had hoped was finally over, one which they and the United States are still enmeshed in. At a time, also, when Afghanistan is facing an actual, terrorist threat, the United States

is still ploughing time and resources into keeping men in Guantánamo against whom it has yet to put forward any real evidence of wrongdoing.

Box 1
The Eight Afghan Detainees

1. **Haji Wali Mohammed**, ISN 560, 53 years old from Baghlan, money changer at the Central Money Market in Kabul, accused of being al Qaeda and Taleban financier. Detained in Pakistan, 26 January 2002; handed over to US forces, February 2002; taken to Guantánamo, 30 April 2002: **14** years in detention. Habeas petition denied. 2010 Task Force decided to hold him indefinitely. Cleared for transfer by Periodic Review Board, 26 September 2016. Still in Guantánamo.

2. **Abdul Zahir**, ISN 753, 44, from Logar, translator and *choki dar* (doorman), accused of being al Qaeda translator. Detained by US forces, July 2002; taken to Guantánamo, 27 October 2002: **14** years in detention. 2010 Task Force decided to refer him for prosecution; no action on his case since 2008. Cleared for transfer by Periodic Review Board, 11 July 2016. Still in Guantánamo.

3. **Obaidullah**, ISN 762, mid-30s from Khost, grocer accused of being member of al Qaeda IED cell. Detained by US forces in July 2002; taken to Guantánamo, 28 October 2002: **14** years in detention. Habeas petition denied. 2010 Task Force review decided to refer him for prosecution; no movement on his case since 2009. Cleared for transfer by Periodic Review Board, 19 May 2016. Transferred to UAE, 14 August 2016, where believed still in detention.

4. **Bostan Karim**, ISN 975, 46, from Khost, seller of plastic flowers and missionary accused of being leader of al Qaeda IED cell. Detained by Pakistan, August 2002; handed over to US, February 2003; taken to Guantánamo, 6 March 2003: **13** years in detention. Habeas petition denied. 2010 Task Force review decided to hold him indefinitely. Cleared for transfer by Periodic Review Board, 2 June 2016. Still in Guantánamo.

5. **Mohammed Kamin**, ISN 1045, 38, from Khost, imam accused of being terrorist with al Qaeda, Afghan Coalition Militia, North African Extremist Network, the Taleban, Harakat ul-Mujahedin and Jaish-e Muhammad. Detained by Afghan forces, 14 May 2003 and handed over to US; taken to Guantánamo, 21 November 2003: **13** years in detention. 2010 Task Force decided to hold him indefinitely. Cleared for transfer by Periodic Review Board, 28 September 2015. Transferred to UAE, 14 August 2016, where believed still in detention.

6. **Hamidullah**, ISN 1119, 53, from Kabul, dealer in property and second-hand cars from prominent Hezb-e Islami family, accused of being a pro-monarchy plotter allied with Mahaz-e Milli, the Taleban, al Qaeda, Hezb-e Islami, Iran and various Jamiat commanders. Detained (probably) by NDS and handed over to US, August 2003; taken to Guantánamo, 21 November 2003: **13** years in detention. 2010 Task Force decided to hold him indefinitely. Cleared for transfer by Periodic Review Board, 11 February 2016. Transferred to UAE, 14 August 2016, where believed still in detention.

7. **Harun Gul**, ISN 3148, 35, from Nangarhar, possibly a grocer, accused of being Hezb-e Islami commander and al Qaeda courier. US says NDS detained him, 4 February 2007, and handed him over (NDS denies this); taken to Guantánamo 22 June 2007: **nine** years in detention. 2010 Task Force decided to refer him for prosecution; no legal movement on his case. Periodic Review Board, 14 July 2016, recommended his continuing detention.

8. **Muhammad Rahim**, ISN 10029, 51, from Nangarhar, former used car salesman and possible buyer and seller of honey and vegetables, accused of being personal facilitator and translator for Osama bin Laden. Detained by Pakistan, February 2007; rendered to Afghanistan and tortured by CIA; taken to Guantánamo, March 2008; **nine** years in detention. Classified as 'high value' detainee, with extremely little information about him released; held in particularly stringent security. 2010 Task Force decided to hold him indefinitely. Periodic Review Board, 9 September 2016, recommended his continuing detention.

Abbreviations

ACM	Anti-Coalition Militia (term only used by US military, does not refer to a particular group)
ARB	Administrative Review Board
AUMF	Authorisation of the Use of Military Force
CSRT	Combatant Status Review Tribunals
FOB	Forward Operating Base
FOIA	Freedom of Information Act
JT	Jamat al-Tabligh
HIG	Hezb-e Islami Gulbuddin
IMU	Islamic Movement of Uzbekistan
IIS	Intelligence Information Report
ISI	Directorate of Inter-Services Intelligence (Pakistani military intelligence agency)
ISN	Internment Serial Number
NDS	National Directorate of Security (Afghan intelligence agency)
NIFA or NIF	National Islamic Front of Afghanistan
NAEN	North African Extremist Network (term only used by US military, does not refer to an actual group)
PDPA	People's Democratic Republic of Afghanistan (the 1978-1992 communist government)
TD	Telegraphic Dissemination (from the CIA)

1. INTRODUCTION

1.1 Background

In the first years after 2001, the United States military and the CIA detained Afghans in very large numbers. Most never left Afghanistan, but about two hundred were taken to the camp set up for War on Terror detainees at the US naval base at Guantánamo Bay, in Cuba. Afghans were by far the largest national grouping, comprising more than a quarter (220) of the 781 men held there.1

There were some senior Taleban among the Afghan detainees, but the vast majority of those taken to Cuba had nothing to do with the Taleban movement, far less al Qaeda. There were shepherds, taxi drivers, men who had opposed the Taleban and welcomed their downfall, old men, minors and at least one Shia Muslim. Over the years, almost all of the Afghans held in Guantánamo have been released.

The cases of the eight Afghans who were still in detention at the start of 2016 are the focus of this study. In recent weeks, three of them (cases 3, 5 and 6) have been transferred to the United Arab Emirates (where they remain in some form of detention). These cases have been included in this report, along with the five Afghans still being held. There are many questions surrounding these detentions – why were they captured in the first place and why have they been kept locked up for so many years? Are these eight men, kept incarcerated while almost all their compatriots have been judged safe to be freed, really the 'worst of the worst', or are they merely the flotsam left stranded by the tide of mass detentions?

Viewing the US detention regime through the lens of the Afghan experience in Guantánamo raises broader questions about US intelligence and justice. In 2001, the Bush administration believed America was facing a uniquely dangerous enemy and the old rules could not apply. This led his administration to take unprecedented or highly unusual measures – keeping all details of the detentions secret, not applying the Geneva Conventions, including the minimum protections given by common article 3, withholding federal protections from the detainees and using torture in interrogations. All this meant that those captured in the mass detentions in Afghanistan, often without any basis in sound intelligence, could find themselves in Cuba, unprotected by any of the usual measures safeguarding individuals from arbitrary detention (whether criminal or military). The cases of the eight Afghans exemplify how men could then be left in limbo in Guantánamo.

Although not the focus of this study, it is worth bearing in mind that there were other consequences of the US detentions policy. Arbitrary detention was one of the main factors that drove some Afghans towards insurgency, opening the way to a new phase in Afghanistan's long, bitter war which Afghans and the US are still wrestling with. Given that Afghanistan is now facing an actual, current, terrorist threat, it is also troubling that time and resources are still going into holding men in Guantánamo whose cases are either threadbare or against whom the United States has still to put forward evidence.

1.2 Historical context

In the wake of the devastating attacks of 11 September 2001, the US declared war against the Taleban's 'Islamic Emirate' which had harboured the author of those attacks, Osama bin Laden. The Taleban were then in control of as much as 85 per cent of Afghanistan and bin Laden's al Qaeda, like other foreign militant groups, had found a refuge there, a place to train and get battlefield experience and support the Taleban's civil war fight against the Northern Alliance.

The Taleban had emerged in Kandahar in 1994 as an attempt by mullahs who had fought the Soviet occupation in the 1980s to bring order to a city engulfed by vicious, internecine fighting. In Kandahar, as in most of the country, when the communist PDPA government fell in 1992, the victorious mujahedin factions had turned their guns on each other in a civil war. Militias and strongmen not only fought each other, but preyed on the civilian population: murder, kidnap, robbery and looting were all common and sexual violence against women and youths a well-grounded fear.[2] Because of this, at least initially, many Afghans welcomed the harsh, but clear rule of the Taleban mullahs. The area under Taleban control grew rapidly. In 1996, the Taleban captured Kabul and the factions which had been fighting over the

[1] Men from 49 nationalities have been held in Guantánamo. The biggest contingents have been Afghans (220), Saudis (135), Yemenis (115) and Pakistanis (72). 'Countries of Citizenship', 'The Guantanamo Docket', *The New York Times,* http://projects.nytimes.com/Guantanamo/detainees/by-country.

[2] The Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes against Humanity: 1978-2001 Documentation and analysis of major patterns of abuse in the war in Afghanistan,* 2005, 61-114, https://www.opensocietyfoundations.org/sites/default/files/ajpreport_20050718.pdf.

capital mostly realigned themselves into the Northern Alliance. It battled on against the Taleban for the next five years, gradually losing territory. In the north, in areas showing resistance, the Taleban perpetrated a number of massacres of civilians and a scorched earth policy. However, even in their southern heartland, by 2001, they were losing popularity, as no end to the war – and conscription – appeared in sight and Afghanistan's isolation in the world only deepened.[3]

Foreign militants originally came to Afghanistan to fight the Soviet occupation in the 1980s and, by the 1990s, most had left. Some of those remaining ran training camps (in the east and south), including Pakistani militant groups, supported by Islamabad, preparing to fight in Indian-controlled Kashmir. The Saudi jihadist, Osama bin Laden, had been in Afghanistan in the 1980s and returned in 1996, to the eastern province of Nangarhar where he was welcomed by the mujahedin there. When the Taleban captured Nangarhar, they 'inherited' him and other foreign militants.

By 2001, the number of foreign militants in Afghanistan had grown to about 1,500-2,000 and they had become important to the Taleban's war efforts.[4] The foreigners mainly organised themselves and fought separately, although some Taleban did have close relationships with them, for example Saif ul-Rahman Mansur who headed the Qargha garrison, to the west of Kabul, which had a foreign contingent. The Taleban said publically that foreign Muslims were welcome to come and join the 'jihad', but they did not need them; they denied the presence of training camps.[5] Along with al Qaeda, there were various Pakistani groups (such as Lashkar-e Tayeba, Jaish ul Muhammad, Harakat ul Ansar and Sipah-e Sahaba), the Islamic Union of Uzbekistan (IMU) and 'unaligned militants', including Arabs who had not sworn a *bayat* (an oath of loyalty) to bin Laden. Relationships between the Taleban and their 'guests', as the foreign fighters were referred to in Afghanistan, between Mullah Omar and bin Laden, and between Afghans and Arabs were not always easy; not all Taleban wanted to host bin Laden, and not all the internationally-minded, foreign militants thought the conservative, insular, Afghan-focused mullahs of the Taleban were 'Islamic enough'.[6]

During these years, al Qaeda carried out a number of attacks on American targets, including bombing two American embassies in east Africa in August 1998 which killed more than two hundred people (President Bill Clinton afterwards bombed two of the group's training camps in Afghanistan with cruise missiles). In late 1999, after failing to persuade the Taleban to hand over bin Laden, the United Nations Security Council put Taleban-controlled Afghanistan under sanctions. In the last few years of his rule, however, Taleban leader Mullah Omar became increasingly reluctant to hand over his 'guest'.[7] Bin Laden, meanwhile, used Afghan soil to plot the attacks on New York and Washington carried out on 11 September 2001.

Following those assaults on its territory, the US issued an ultimatum to the Taleban: hand bin Laden over or face America's military might. Mullah Omar refused and on 7 October 2001, the US with UK support launched its attack. Significantly for the future of Afghanistan (including with regard to detentions), as well as an air campaign against Taleban frontlines and facilities and foreign militants' houses and camps,[8] the US also chose to use local proxies as its boots on the ground. It funded and armed the Northern Alliance and other anti-Taleban commanders, supplying money and weapons and deploying small numbers of US Special Operations Forces and CIA operatives to advise and fight alongside them.

On 13 November, five weeks after the bombing campaign began, Kabul fell, and on 7 December, so did the Taleban's last stronghold and birthplace, Kandahar. The foreign militants who had survived the bombing fled to Pakistan. The Taleban largely went home, although some senior leaders also fled across the border. The strongmen whom America

[3] The Taleban's 2000/2001 ban on cultivating opium poppy, which ruined the livelihoods for farmers, labourers and traders and a drought contributed to undermining the popularity of the Taleban government in its heartlands. Author observations. See also Alex Strick Van Linschoten And Felix Kuehn, *An Enemy We Created: the Myth of the Taliban-Al Qaeda Merger in Afghanistan, 1970–2010,* Hurst, 2010, 119, 185.

[4] Author's reporting from the time. See also Kate Clark, 'Chechens in Afghanistan 3 (Flash from the Past): Diplomats, yes, but fighters?', Afghanistan Analysts Network, 12 July 2016, https://www.afghanistan-analysts.org/chechens-in-afghanistan-3-flash-from-the-past-diplomats-yes-but-fighters/; and Van Linschoten et al, *An Enemy*, [see FN 3], 173-179. Foreign militants appear in the war crimes reporting of this period. See Afghanistan Justice Project, *Casting Shadows*, [see FN 2], 121, 141, 144.

[5] Author insight from the time. See also Kate Clark 'Chechens in Afghanistan 3…', [see FN 4].

[6] Bin Laden and his followers were Salafi. Afghan Sunnis, including Taleban, belong overwhelmingly to the Hanafi school of Islam.

[7] Van Linschoten et al, *An Enemy*, [see FN 3], 167.

[8] On 12 September 2001, NATO committed its members to collective self-defence and, on 28 September 2001, the United Nations Security Council passed the unprecedentedly far-reaching Resolution 1373 obliging states to take various anti-terrorism measures.

had supported were able to capture governorships, ministries and other state institutions. The capital was taken by the forces of the strongest faction of the Northern Alliance, Shura-ye Nizar, a network within the mujahedin faction of Jamiat-e Islami.[9] Its leaders claimed the defence, interior and foreign ministries and the intelligence service, the National Directorate of Security (NDS). In Bonn, in December 2001, Hamed Karzai, a civilian from one of the mujahedin factions which did not fight on after 1992, was selected as Afghanistan's new interim leader.

The country which the US found itself somewhat in charge of in December 2001 could not be characterised as split between good guys and bad guys, Taleban and democrats. Rather, it was complex and multi-layered and riven with newly armed factions who treated the apparatus of state as war booty. This was the context in which US forces would be detaining Afghans.

1.3 Methodology and Outline of the Report

For this report, the author scrutinised the publically available documents on the Afghan detainees. Her extensive knowledge of Afghanistan and personal experience of living in the country during the Taleban era and immediately after[10] were brought to bear in assessing the cases made against the eight Afghans who are the focus of this study. The various court rulings and US government policy documents, and academic literature on detentions also formed a necessary background for understanding the complex and changing legal context underpinning the detention regime at Guantánamo Bay. For a list of the author's relevant, previous research, see Annex 1.

The report is organised as follows.

In "Chapter 2, Easily Detained, US Post-2001 Detention Policies in Afghanistan," the author looks at how America came to detain so many people in Afghanistan, mostly in dubious circumstances. The Taleban regime had collapsed swiftly and unambiguously in 2001. Yet the US believed there were still 'remnants of the Taleban' whom it needed to hunt down. In reality, US forces ended up detaining not only Taleban, many of whom had surrendered, but also huge numbers of ordinary people. The chapter also looks at how Afghans and Afghan and Pakistani state agencies were able to exploit the US desire to hunt down terrorists by falsely informing for money or because of personal rivalries.

"Chapter 3: Sources of Information and the Shifting Legal Landscape" looks at the system facing detainees when they arrived in Cuba: a secret detention regime without basic legal protections. Getting information about the detainees has largely been bound up with legal challenges and with deliberate, unauthorised disclosures of information. This chapter briefly outlines the evolving legal situation and the sources of information that have emerged, often as a result of this process. These information sources have formed the basis for finding information out about the detainees.

"Chapter 4: The Case Studies" scrutinises the evidence against the eight Afghans, finding that far from them being the 'worst of the worst', the US has failed to make a compelling case against any of them. It first gives summaries of the cases, and then presents a forensic look at the allegations and evidence against each of the eight. None were captured on the battlefield, so intelligence forms the main or sole basis of allegations. Cases are rife with hearsay, factual errors and misunderstandings, testimony obtained under duress or torture, and secret evidence. Those who have tried to find redress through the courts or faced trial in military tribunals have encountered uncertainty about the law, repeated procedural delays and judges who have believed assertions by the government in the face of deep flaws in its evidence.

"Chapter 5: Conclusion" contains some final reflections on the failure of the US state and justice system to deal fairly with those the state detains, and the consequences of this failure.

[9] Shura-ye Nizar was built up under the leadership of Jamiat commander Ahmad Shah Massud in the 1980s and became the most coherent and formidable part of the resistance against the Soviet occupation. Officially dissolved in 1993, it has nonetheless remained as a recognizable and coherent network of commanders and politicians from the environs of Kabul and the north-east.

[10] The author was the BBC Kabul correspondent 1999-2002 and continued to make reporting trips to Afghanistan every year thereafter, including stints of up to four months, until her current work with AAN, which began in 2010. See her biography on the final page of this report.

2. EASILY DETAINED: US POST-2001 DETENTION POLICIES IN AFGHANISTAN

2.1 Creating an Enemy to Detain

In the early years of the intervention, the US carried out mass detentions in Afghanistan. This was driven partly by a genuine fear that 'another 9/11' might happen if plots were not uncovered swiftly, something which created a risk-averse attitude to early releases: no one wanted to be the person who released the detainee who knew the location of Osama bin Laden or details of the next plot against America. The detentions were also pushed, however, by the mistaken assumption that remnants of the Taleban to fight did actually exist. In terms of forces still fighting, such remnants no longer existed. There would be no Taleban 'resistance' to speak of until early 2003 and even that was very patchy and very local; it took several years for the insurgency to really take off.

In reality, for anyone who knew Afghanistan and was there in late 2001, the opposite was true. The Taleban's defeat had been total. Barely a single Afghan had rallied to their cause and the collapse they had suffered – military, political and psychological – had been swift and absolute.

Al Qaeda and other foreign fighters, where they could, fled to Pakistan. Taleban foot soldiers and commanders largely went home, accepting defeat and hoping to live peacefully. Many of the senior leaders did cross into Pakistan, but, at the same time, reached out to figures they knew in the new administration to try to get security guarantees so that they could go home; such guarantees were necessary as many had enemies or rivals among the victorious Afghan commanders and civilian politicians, including Hamed Karzai himself.

In 2001, Afghans, including Taleban, thought peace had come and three decades of war was over. This idea was central to the Bonn Agreement which heralded the post-Taleban era and which began: "Determined to end the tragic conflict in Afghanistan and promote national reconciliation, lasting peace, stability and respect for human rights in the country ..."[11] The Taleban, however, were never viewed as part of that national reconciliation. Some sought to surrender, offering loyalty to those who had come out on the winning side in the US intervention in return for protection. Such reconciliation is normal Afghan practice, fundamental to notions of statesmanship, and how victors and vanquished behave. Traditionally, surrender would begin with elders approaching the winning party with guarantees of good behaviour by those who had been defeated.

> *… the victorious power responds by demanding that the fighters hand over their weapons and any other government property that they might have with them. The victor then pledges not to undertake any hostile act against the former enemies… [T]he final outcome may be subjugation (the former combatant goes home on parole) or co-option (the former combatants are integrated into the victorious army or its new administration). In 2001, many defeated Taliban invoked this form of reconciliation, handing in weapons and official assets to the Northern Alliance or pro-Karzai commanders and returning to their villages hoping to be able to reintegrate… The availability of such traditional mechanisms means that combatants can make an exit from the conflict with some dignity. This traditional form of subjugation and co-option has been frequently used since the Soviet intervention and has contributed significantly to conflict management and to rapid stabilization after a main conflict has been settled.*[12]

The most famous example of surrender came in early December 2001; a delegation of Taleban leaders met Hamed Karzai, newly selected as Afghanistan's interim leader at the Bonn Conference and then on the outskirts of Kandahar with his forces. The delegation, with Mullah Omar's blessing, had come to discuss terms and included the old regime's defence minister, Obaidullah, and two of its most senior military leaders, Abdul Ghani Baradar and Abdul Wahid (known as 'Rais-e Baghran'). It did not succeed. The letter they delivered to Karzai has not survived, but both Taleban and government officials have said it acknowledged the Taleban's 'Islamic Emirate' had no chance of surviving and accepted Karzai as the new interim leader.

> *The main request of the Taliban officials in this group was to be given immunity from arrest in exchange for agreeing to abstain from political life. At this juncture, these leading Taliban*

[11] *Agreement On Provisional Arrangements In Afghanistan Pending The Re-Establishment Of Permanent Government Institutions*, ['the Bonn Agreement'] *signed 5 December 2001, http://peacemaker.un.org/sites/peacemaker.un.org/files/AF_011205_AgreementProvisionalArrangementsinAfghanistan%28en%29.pdf.*

[12] Michael Semple, *Reconciliation in Afghanistan*, United States Institute for Peace, 2009, http://www.usip.org/publications/reconciliation-in-afghanistan, 14-15.

members (as well as the rank and file) did not appear to view the government and its foreign backers as necessitating a 1980s-type jihad. Some members even saw the new government as Islamic and legitimate.[13]

A few Taleban managed to get the necessary security guarantees,[14] but generally, US hostility[15] and a desire to settle scores on the part of many among the Afghan victors prevented such surrenders. It was not just the detentions in themselves that were so problematic, it was how they were conducted and whom they empowered. All too often, arrests of Taleban and others were made by forced entry into homes. This, for Afghans, was an unforgivable breach of personal honour. Women living in seclusion were disturbed and men who were detained could find themselves stripped, their beards shaven and harassed by military dogs which are seen as unclean. Some detainees were also tortured.

Detentions by US-allied Afghan groups were often accompanied by the extortion of money and looting of property. They frequently responded to attempts at surrender with disarmament at gunpoint and with looting, beatings, rape, and killings.[16] Being allied to the US military often gave local Afghan forces effective impunity, amplifying their ability to both commit crime and target rivals. The newly empowered Afghan commanders behaved as if the presence of US forces on their side meant that the old rules no longer existed and that long-term peace could go hand-in-hand with the persecution of former enemies. In the end, however, arbitrary detention would be a major factor sparking insurgency and renewed conflict.

2.2 Who Was the Enemy?

Unlike a 'classic' war where combatants wear uniform and are easily identified, Taleban and al Qaeda wear civilian clothing. This makes military detention difficult. Moreover, in the absence of much hostile action, few detainees could be captured on the battlefield. Instead, intelligence was the rationale behind most detentions. Unfortunately, the US military and CIA still only had a sketchy idea of Afghanistan and were poorly equipped to judge who might be a terrorist. They proved vulnerable to manipulation by Afghans who wanted to get someone detained or killed. The practice of giving money for intelligence also encouraged opportunistic informers to denounce others as terrorists.[17] Just over half of those detained at Guantánamo were handed over by Afghan allies (40 per cent) or by Pakistan (about 10 per cent). (36 per cent of the Afghan detainees were captured directly by US forces. The remainder were picked up in other countries or the information is not clear.)[18] The number of those detained in total has never been released. This is probably due not only to the US desire for secrecy, but also the chaotic nature of procedures. Certainly, however, thousands of Afghans found themselves in US hands in the early years of the intervention – before, that is, any sort of insurgency had begun.

Senior Taleban detained...

Among the thousands detained were a number of senior Taleban. They included men who had fought against US forces, however briefly, in 2001, including a few who had been accused of war crimes; other Taleban detainees had had purely civilian roles. Several of the Taleban who were captured had been seeking amnesties or had

[13] Anand Gopal, *The Battle for Afghanistan: Militancy and Conflict in Kandahar*, New American Foundation, November 2010, https://static.newamerica.org/attachments/4336-the-battle-for-afghanistan/kandahar_0.685663454461452584d08faeae6d538b.pdf.

[14] There were some successful defections en masse. See *The Politics Of Disarmament And Rearmament In Afghanistan*, Deedee Derksen, May 2015, United States Institute for Peace, 15.

[15] US Secretary of Defence Donald Rumsfeld, hearing of an offered Taleban surrender which would have left Mullah Omar living 'in dignity' in Kandahar, said Afghan allies would be dropped if they "frustrated and opposed" US goals and allowed key Taleban or al Qaeda leaders to "escape justice." Brian Knowlton, 'Rumsfeld Rejects Plan To Allow Mullah Omar 'To Live in Dignity': Taliban Fighters Agree to Surrender Kandahar', *The New York Times,* 7 December 2001, http://www.nytimes.com/2001/12/07/news/07iht-attack_ed3__7.html.

[16] Derksen, *The Politics of Disarmament,* [see FN 14], 15.

[17] One leaflet dropped by US forces said: "You can receive millions of dollars for helping the Anti-Taliban Force catch Al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people." 'Afghanistan Leaflets: TF11-RP09-1' (undated), from the website, 'Psywarrior', http://www.psywarrior.com/afghanleaf40.html. See also, 'Guantánamo Inmates say they were sold', Associated Press, 31 May 2005, http://www.nbcnews.com/id/8049868/ns/world_news/#.VyojqmPWPjA and the revelation by former president, Pervez Musharraf, that Pakistan captured 689 'al-Qaeda terror suspects', and handed more than 369 to Washington, earning bounties totalling millions of dollars. Pervez Musharraf, *In the Line of Fire,* Free Press (2008).

[18] Research by Matthew Rubin and Anand Gopal (in progress), kindly shown to author by email, March 2016.

surrendered or gone home hoping to live peacefully. Khairullah Khairkhwa, governor of Herat, was detained in Pakistan after he had met representatives of the new Afghan leader Hamed Karzai in an attempt to secure an amnesty.[19] Abdul Haq Waseq, deputy head of intelligence, was captured in a sting operation while he thought he was negotiating his surrender. Nurullah Nuri, head of the northern zone, and Fazl Mazlum, chief of staff, were handed over by General Dostum or were seized from his custody by US Special Operations Forces in Mazar-e Sharif soon after they had negotiated the surrender of thousands of Taleban in Kunduz to Northern Alliance forces.[20] Among the Taleban prisoners taken at Kunduz and held by Dostum were other senior and mid-ranking commanders who ended up at Guantánamo, including Shahzada, Abdul Qayum Zaker and Abdul Rauf Khadem.

The civilian ambassador to Islamabad, Abdul Salaam Zaeef, was detained by Pakistan, handed to US forces and rendered to Guantánamo. He was released to house arrest in Kabul in 2005 and eventually became a free man, among other things, setting up a girls school in Kabul.[21] Shahazada, released in 2003, joined the just-declared insurgency and was killed the following year. Zaker and Khadem were transferred to Pul-e Charkhi jail in Kabul in 2007 and released by the Karzai administration in 2008; both went on to join the insurgency, rising through the ranks to leadership positions.

The releases often showed that the Guantánamo system was not properly working out who detainees were. Human rights activists were horrified, for example, when they discovered Shahazada had been released. Detailed testimony pointing to his responsibility for massacres of Afghan civilians had been available, but, in 2003, the Bush administration was still keeping detainees' identities secret. "U.S. officials were apparently unaware of the commander's past record," one human rights report said, "which indicates either a serious intelligence failure or indifference to war crimes that do not fall under the official designation of ´terrorist acts.'"[22] The authors called on the US to indict another alleged war criminal, Fazl (who was famous enough for his presence at Guantánamo to be known), but this did not happen.

… and the other detainees

Taleban detainees were, however, in the minority. In the early years of the intervention, almost anyone could be detained. The mass detentions went far beyond actual Taleban commanders and senior officials. They included those associated with Taleban figures only by clan or tribe. There were also Afghans who had worked for the state during the Taleban era, even though most Afghans in public sector jobs during the Taleban era had been in those jobs before 1996 and after 2001 and considered themselves civil servants. In US military minds, however, there was often a conflation between the Taleban and pre-2001 civil servants. Wrongly detained people included men who had no public profile and others who were part of the post-Taleban establishment. They also included those who had opposed the Emirate and welcomed the US intervention in 2001.

In trying to fathom why detainees were captured, rather than trying to figure out their links to the Taleban or al Qaeda, it often makes more sense to look at the local allies of US forces and their relationship with the detainee. Understanding the particular tribal and factional context, and factoring in any opportunities to make money, often clarifies otherwise bizarre detentions. Here are a few examples:

- In Kunar, the anti-Taleban, Salafist leader, Haji Rohullah Wakil, had been chosen to represent the province in a national gathering, the Emergency Loya Jirga, in June 2002. Two months later, in August 2002, he was detained and taken to Guantánamo.[23] It seems a rival, keen to scoop up logging business and contracts for counter-narcotics work and the building of US bases, had told the US he was a

[19] Anand Gopal, *No Good Men Among the Living: American, the Taliban and the War through Afghan Eyes*, New York, Metropolitan Books Henry Holt and Company, 2014, 193; Bette Dam's *A Man and a Motor Cycle: How Hamid Karzai came to power,* Utrecht: Ipso Facto, 2014.

[20] These four men would later be released in exchange for US serviceman Bowe Bergdahl, along with Nabi Omari, a minor Taleb with good connections who was also captured in a sting operation. See Kate Clark, 'Freeing the 'Guantanamo Five' 2: Kafka in Cuba, 11 March 2012, Afghanistan Analysts Network, https://www.afghanistan-analysts.org/freeing-the-guantanamo-five-2-kafka-in-cuba/; and 'Releasing the Guantanamo Five? 1: Biographies of the Prisoners (amended)', 9 March 2012, Afghanistan Analysts Network, http://www.afghanistan-analysts.org/releasing-the-guantanamo-five-1-biographies-of-the-prisoners-amended/.

[21] Abdul Salaam Zaeef, *My Life with the Taliban*, London, Hurst 2011.

[22] Afghanistan Justice Project, *Casting Shadows*, [see FN 2], 9.

[23] Haji Sahib Rohullah Wakil Assessment (2005) ISN 798, http://projects.nytimes.com/Guantanamo/detainees/798-haji-sahib-rohullah-wakil/documents/11#search/p3/Loya%20Jirga.

terrorist. Rohullah Wakil's detention was "widely seen as a tipping point in turning the province against the new government and the United States." [24]

- In the south, van Bijlert reported, Uruzgan's first post-Taleban governor, Jan Muhammad, a man with close, long-standing ties to the Karzai family, "used his relations with US Special Forces and his reputation as an effective Taliban hunter to target a wide range of tribal leaders and former Taleban officials, particularly from the Ghilzai and Panjpai tribes."[25]
- In Kandahar, "entire tribes, like the Ishaqzai in Maiwand, a district west of Kandahar City… were systematically targeted and denounced as Taleban."[26] The tribes in Maiwand had indeed supported the Taleban when they first came to power in 1994, but "US forces were unable to recognize when those same tribes switched allegiances in 2001."[27] This was precisely what made Maiwand so lucrative in the eyes of the new US-allied governor, Gul Agha Shirzai, and his men: "There were weapons to be requisitioned, tribal elders to be shaken down, reward money to be collected – boundless profits to be made." [28]
- In Paktia, a province where popular revolt had driven the Taleban from power,[29] some al Qaeda fighters held out in the Shahikot mountains in Zurmat district. In March 2002, with some local Taleban support, they fought US forces. It might have seemed a black and white task to then work with local allies to find and detain the final Taleban and al Qaeda sympathisers in Zurmat. In reality, the US entered a minefield of duplicitous allies and old conflicts – Khalqi communists versus mujahedin and Harakat-e Enqelab versus Hezb-e Islami versus Jamiat-e Islami, as well as tribal feuds.

  Some Taleban were detained, but there were also members of the pre-Taleban, local, political leadership, opponents of the 'Islamic Emirate', ordinary folk, and two 14-year-old boys, Asadullah and Naqibullah, who were being kept and raped by a pro-American commander (he fell out of favour with his US allies and ended up in Bagram). One of the main denouncers was the provincial police chief, Abdullah Mujahed, a Jamiat commander, US ally and, said people in Paktia, one of the main sources of crime in the province; he was himself eventually also sent to Guantánamo along with a number of his drivers, cooks, and guards.[30] Policeman Nur Agha, described how he was detained and tortured on a tiny US base, spending "days… hanging from a prison ceiling." In Zurmat, he said, "There was no one left standing in the end. It was as if the whole system just devoured everyone."[31]

Other accusations: al Qaeda and Hezb-e Islami

The weakness in American understanding of the country was also shown in their conflation of the Taleban, Hezb-e Islami and al Qaeda and other foreign jihadist organisations. Many Afghans in Guantánamo were accused of belonging to the Taleban *and* al Qaeda, or to a whole of string organisations, including some that were non-jihadist or anti-jihadist. For a country where membership of a fighting group usually has some basis in a solidarity grouping – clan, tribe, ethnic group or past comradeship – accusations of multiple, overlapping memberships make no sense.

Moreover, the chances of an *Afghan* being a member of al Qaeda at this time were so tiny that such an accusation would need more explanation than the word of a local commander. Bin Laden's group had been an overwhelmingly Arab jihadist organisation in Afghanistan up till 9/11 and one which not even all jihadist Arabs in the country had belonged to. After the US intervention, 'al Qaeda' went from an entity scarcely spoken about in Taleban-controlled Afghanistan (people referred to 'the Arabs' or, in reference to all the foreigners fighting in the country, 'the Taleban's guests') to a

[24] Christopher D Kolenda, Rachel Reid, Chris Rogers and Marte Retzius, *The Strategic Costs of Civilian Harm: Applying Lessons from Afghanistan to Current and Future Conflicts*, Open Societies Foundations, June 2016, 24. See also Gopal, *No Good Men*, [see FN 19], 139-143.
[25] Martine Van Bijlert 'Unruly Commanders and Violent Power Struggles: Taliban Networks in Uruzgan', Chapter 7 in Antonio Giustozzi (ed) *Decoding the New Taliban: Insights from the Afghan Field* (New York/Chichester: Columbia University Press/Hurst, 2009), 158.
[26] Van Linschoten et al, *An Enemy*, [see FN 3], 261.
[27] Gopal, *No Good Men*, [see FN 19], 114.
[28] Gopal, *No Good Men*, [see FN 19], 114.
[29] Author observations. See also Kate Clark, '2001 Ten Years on (3): The fall of Loya Paktia and why the US preferred warlords', Afghanistan Analysts Network, 24 November 2011, https://www.afghanistan-analysts.org/2001-ten-years-on-3-the-fall-of-loya-paktia-and-why-the-us-preferred-warlords/.
[30] Gopal, *No Good Men*, [see FN 19], 134-139. See also Clark, '2001 Ten Years on (3)…', [see FN 29].
[31] Gopal, *No Good Men,* [see FN 19], 138.

common claim and insult to fling at one's enemies without need for evidence or further explanation.[32]

Afghanistan is a country in which every foreign organisation, whether the military, embassies, media bureaux, human rights organisations, or indeed al Qaeda, needs Afghans to facilitate their work. The question of when a job translates into adherence to the ideological aims of the employer or loyalty to his cause is a crucial issue here. Before 2001, Afghans could work for one of 'the Arabs' without knowing or caring about his aims. After 2001, it would be difficult to argue such associations were innocent or just based on needing a job; al Qaeda's notoriety was then too well entrenched.

Members of the Afghan mujahedin faction, Hezb-e Islami, were also at risk of detention. It actually ploughed a highly distinctive path immediately after the fall of the Taleban and in the years thereafter. Its leader, Gulbuddin Hekmatyar, made contradictory statements in late 2001/early 2002 about the US-led intervention and the new government, before eventually coming out as implacably opposed.[33] A section of Hezb-e Islami went on to form part of the post-2001 insurgency as an exceptionally junior player and, in February 2003, Hekmatyar was placed on the US[34] and UN[35] sanctions lists as, respectively a terrorist and "associated with Al-Qaida, Usama bin Laden or the Taliban." No other Hezbi figures were sanctioned, nor was the faction itself.[36] There were also moves, however, from the very beginning by senior party members to openly organise as a political party inside Afghanistan. Most senior Hezbis came back to Afghanistan after the fall of the Taleban and many eventually managed to join the government, becoming ministers, governors and – currently – one of the deputy CEOs. A legal Hezb-e Islami party was allowed to register in 2005.

Few senior Hezbis were detained by the US. One exception was Hekmatyar's son-in-law, Ghairat Bahir, who was detained in Pakistan, along with his driver, Gul Rahman, by the ISI. He was handed over to the CIA inside Pakistan and rendered to a black site in Afghanistan. Both men were tortured; Gul Rahman froze to death in custody.[37] However, a surprisingly large number of Afghan detainees at Guantánamo were 'accused' of being Hezb-e Islami. Often, the mere fact that they or their family members had fought with the faction against the Soviet army in the 1980s was cited as evidence of their being 'enemy combatants'. This is inexplicable. In the 1980s, Hezb-e Islami was America's most favoured ally among the mujahedin factions then fighting its Cold War enemy, the USSR and the largest recipient of US funding and weapons.[38] Moreover, whatever anyone may or may not have done in the 1980s, it said nothing, in itself, about their combatant status in the 2000s. Yet, for those intent on making false accusations to US forces for money or because of

[32] For a scholarly, in-depth look at this issue, see Van Linschoten et al, *An Enemy*, [see FN 3].

[33] After the 9/11 attacks, Hekmatyar, speaking from Iran where he had lived since the Taleban captured Kabul in 1996, threatened to fight with the Taleban against any American invasion ('Iran Report: November 5, 2001', Radio Liberty, 5 November 2001, http://www.rferl.org/a/1342853.html). However, one of his sons-in-law, Humayun Jarir, was a representative at the Bonn talks in December 2001 which established the new post-2001 Afghan polity (Iran Report: November 26, 2001', Radio Liberty, 26 November 2001, http://www.rferl.org/a/1342856.html). He then condemned the new Afghan government and his hosts, Iran, for supporting it ('Iran Report: February 11, 2002, Radio Liberty, http://www.rferl.org/a/1342769.html) and said he would organise forces to fight US troops; Iran expelled Hekmatyar in February 2002. 'Iran 'expels' Afghan warlord', BBC, 26 February, 2002, http://news.bbc.co.uk/2/hi/middle_east/1842427.stm

[34] 'U.S. Designates Gulbuddin Hekmatyar a Terrorist', Statement by U.S. Department of State, 19 February 2003, http://iipdigital.usembassy.gov/st/english/texttrans/2003/02/20030219165118pkurata@pd.state.gov0.704632.html#axzz4LN0w6xor.

[35] Narrative Summaries Of Reasons For Listing QDI.088 Gulbuddin Hekmatyar, Security Council Committee Pursuant to Resolutions 1267 (1999) 1989 (2011) and 2253 (2015) Concerning ISIL (Da'esh) Al-Qaida and Associated Individuals Groups Undertakings and Entities, 20 February 2003, https://www.un.org/sc/suborg/en/sanctions/1267/aq_sanctions_list/summaries/individual/gulbuddin-hekmatyar.

[36] On 29 September 2016, a peace agreement was signed by Hekmatyar and President Ghani. Borhan Osman, 'Peace With Hekmatyar: What does it mean for battlefield and politics?', Afghanistan Analysts Network, 29 September 2016, https://www.afghanistan-analysts.org/peace-with-hekmatyar-what-does-it-mean-for-battlefield-and-politics/.

[37] *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, Open Society Foundations, February 2013, https://www.opensocietyfoundations.org/reports/globalizing-torture-cia-secret-detention-and-extraordinary-rendition, 33, 53.

[38] Human Rights Watch, *Blood Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity*, July 2005, http://www.hrw.org/sites/default/files/reports/afghanistan0605.pdf, 15.

personal or factional rivalry, it was easy to target someone associated with Hezb-e Islami.[39]

Pakistani involvement

Bahir and Gul Rahman were just two of hundreds of men detained by Pakistan and handed over to the US as 'terrorists'. Former president General Pervez Musharraf has admitted his country made millions of dollars from US bounties for such detainees.[40] The renditions were part of a wider, years-long pattern of arbitrary arrests, torture, and disappearances in Pakistan, with the government, as the director at the Human Rights Commission of Pakistan, I. A. Rehman, described it, "using the cover of the fight against terror to decimate and suppress political opposition within the country."[41] Among the detainees were Afghans, Pakistanis and members of other nationalities; some had links to al Qaeda or the Taleban, while others had just run afoul of the Pakistani authorities.

2.3 Interrogation and Torture

US interrogations in Afghanistan usually started locally in what were called Field Detention Sites, as Gopal has described:

> *Interrogators there typically would have a limited grasp of Afghan politics, and intelligence would be poorly shared, so epic confusions usually ensued. The unit apprehending you might have a relationship with one strongman, for instance, while you worked for another strongman tied to a different wing of the US military or the CIA. In this way, hundreds of Afghans working for pro-American commanders wound up ensnared by one of the Coalition's many tentacles.*[42]

From there, the US military command transferred some of the detainees to Bagram or Kandahar Airfield.

> *You would then be questioned by a new set of interrogators, who made little attempt to reconcile existing intelligence with any fresh information that they obtained. Your journey would likely end here, locked away for months or even years—unless you were one among the two hundred Afghans destined for Guantánamo where you would be assessed by officials ever farther removed from the battlefield, with even foggier knowledge of the country's politics. A result of this cascade of bureaucratic inefficiencies was that only a handful of Guantánamo's Afghan inmates would turn out to be Taliban members of any import.*[43]

Torture could be practiced at every stage in the detention procedure and was systemic (even though not everyone was tortured). This has been documented in detail, including by human rights organisations,[44] the US government[45] and the US Senate in various reports looking into the use of torture in Guantánamo, Afghanistan and Iraq by the military[46] and the CIA.[47] Journalists also reported on the abuse of detainees, including this author who spoke to former detainees in Paktia and a former interpreter who had worked in various interrogation centres, including in Paktia,

[39] One factor in this was that Hezb-e Islami's old factional enemy, Shura-ye Nizar/Jamiat-e Islami, was in a position of considerable power after it captured Kabul in November 2001 and gained control of the ministries of defence and interior and the NDS (see pages 8-9). In some cases, it appears to have denounced former Hezbi commanders and fighters to the Americans. The Shura-ye Nizar-controlled NDS also made mass arrests in April 2002 of Hezb-e Islami leaders (including three future governors) meeting openly in Kabul. Author's radio report (text on file, no URL), 2 April 2016 and Kate Clark, 'Talking to the Taliban: A British perspective', 3 July 2013, Afghanistan Analysts Network, https://www.afghanistan-analysts.org/talking-to-the-taliban-a-british-perspective/, which quotes original reporting by author in April 2002

[40] Musharraf, *In The Line of Fire*. [see FN 17].

[41] Author interview for television report, 'On the trail of Pakistan's "disappeared"', Channel 4 News, 9 March 2007, video no longer available.

[42] Gopal, *No Good Men,* [see FN 19], 144.

[43] Gopal, *No Good* Men, [see FN 19], 144.

[44] *Enduring Freedom Abuses by U.S. Forces in Afghanistan*, Human Rights Watch, March 2004, http://www.hrw.org/sites/default/files/reports/afghanistan0304.pdf.

[45] The International Center for Transitional Justice (ICTJ) has listed various government investigations (up till 2008), *Research Brief: Selected examples of Defence, Intelligence and Justice Investigative Reports into detention and interrogation practices*, 2 November 2008, https://www.ictj.org/sites/default/files/ICTJ-USA-Accountability-AgencyInvestigations-ResearchBrief-Nov08.pdf.

[46] *United States Senate Inquiry into the Treatment of Detainees in U.S. Custody*, Committee on Armed Services, 20 November 2008, http://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf.

[47] *Study of the Central Intelligence Agency's Detention and Interrogation Program*, The Senate Select Committee on Intelligence, 12 December 2014, http://gia.guim.co.uk/2014/12/torture-report-doc/torture_report.pdf.

Kunar and Khost.[48] Detainee accounts have also been published.[49] Methods used included being deprived of sleep for days, food deprivation, being continuously shackled, being forced to kneel or stand in painful 'stress positions' for extended periods, being beaten, kicked, soaked in cold water, being stripped and sexually humiliated, and being forced to listen to music loud enough to deafen for hours at a time. The interpreter interviewed by this author had been sent to the bazaar in Khost to buy loudspeakers for just this purpose. A handful of prisoners are known to have been killed in US custody because of torture,[50] including two beaten to death in Bagram, a detainee who died in Kunar after being denied water and the brother of an anti-Taleban militia commander, Commander Parre in Zurmat, Paktia, who had been denounced as a terrorist by US ally Provincial Police Chief Abdullah (see pages 15-16) and was reported beaten to death by US forces.[51] Torture was also practiced by Afghan forces, including in state and private detention facilities, and, in Pakistan, by the ISI.

2.4 'The Worst of the Worst'?

Eventually and over many years, legal challenges and determined investigations by journalists and human rights groups have revealed just how disingenuous the Bush administration has been in continuing to say the detainees in Cuba were all dangerous men who had been "picked up off the battlefield," had been trying to kill American forces and were "terrorists, bomb makers and facilitators of terror," "trainers… recruiters, financiers, [Osama bin Laden's] bodyguards, would-be suicide bombers, probably the 20th 9/11 hijacker."[52] The first inkling of how arbitrarily the detentions had come about was aired a year after the camp in Guantánamo had been set up, in December 2002. Military officers from Guantánamo, reported *The Los Angeles Times,* were complaining about the 'poor quality' of detainees being sent*:*

> *At least 59 detainees – nearly 10% of the prison population… – were deemed to be of no intelligence value after repeated interrogations in Afghanistan….None of the 59 met U.S. screening criteria for determining which prisoners should be sent to Guantánamo Bay, military sources said. But all were transferred anyway, sources said, for reasons that continue to baffle and frustrate intelligence officers nearly a year after the first group of detainees arrived at the facility.*[53]

The paper said classified intelligence reports described dozens of Afghan and Pakistani detainees who were "farmers, taxi drivers, cobblers and labourers. Some were low-level fighters conscripted by the Taliban in the weeks before the collapse of the ruling Afghan regime."[54] As more information about those held at Guantánamo came out, the legal basis and indeed the rationale for many of the detentions was unfathomable.

Those taken to Cuba included old men, among them elders who themselves or, through their sons, were part of the new, post-Taleban political establishment and also men with dementia and osteoarthritis.[55] At least fifteen minors were also

[48] Interviews were for a radio piece aired on the BBC's 'The World Tonight'. Audio no longer available, but cut-down text version available here: Kate Clark 'Afghans tell of US prison ordeals', BBC, 21 July 2005, http://news.bbc.co.uk/1/hi/world/south_asia/4648959.stm.

[49] See, for example, Moazzam Begg and Victoria Brittain *Enemy Combatant: A British Muslim's Journey To Guantanamo and Back*, London, Free Press, 2006 and Zaeef, *My Life…* [see FN 21].

[50] For details, see Human Rights Watch, *Enduring Freedom: Abuses*, [see FN 44].

[51] Craig Pyes and Kevin Sack, 'Two Deaths Were a "Clue That Something's Wrong"', *The Los Angeles Times,* 25 September 2006, http://www.latimes.com/news/la-na-torture25sep25-story.html; Craig Pyes and Kevin Sack, 'U.S. Probing Alleged Abuse of Afghans', *The Los Angeles Times,* 21 September 2004, http://articles.latimes.com/2004/sep/21/world/fg-detain21. See also Gopal, *No Good Men,* 138, [see FN 19].

[52] All quotes in the text are from 2005 from (in order) President Bush, the White House press secretary, Vice President Cheney and Secretary of Defence Rumsfeld. Stuart Taylor, 'Falsehoods About Guantánamo', *The Atlantic,* 27 June 2005, *http://www.theatlantic.com/magazine/archive/2006/02/falsehoods-about-Guantánamo/304632/*. See also Katharine Q Seelye 'Threats and Responses: The Detainees; Some Guantanamo Prisoners Will Be Freed, Rumsfeld Says' *The New York Times,* 23 October 2002, http://www.nytimes.com/2002/10/23/world/threats-responses-detainees-some-Guantanamo-prisoners-will-be-freed-rumsfeld.html and 'Obama admin set to transfer up to 24 more detainees from Gitmo, Fox News Politics, 25 May 2016, http://www.foxnews.com/politics/2016/05/25/obama-admin-set-to-transfer-up-to-24-more-detainees-from-gitmo.html.

[53] Greg Miller, 'Many Held at Guantánamo Not Likely Terrorists', *Los Angeles Times,* 22 December 2002, http://articles.latimes.com/2002/dec/22/nation/la-na-gitmo22dec22.

[54] Miller, 'Many Held at Guantánamo…', [see FN 53].

[55] For example, Haji Nasrat Khan 68, a stroke victim, with diabetes, high blood pressure and chronic lower back

taken to Guantánamo, five of them under the age of 16,[56] including the two boys who had been kept and sexually abused by the commander in Zurmat.[57] It could take detainees years to get home, even if they were cleared for release. The two boys from Zurmat were eventually freed after 20 months, but even then, despite realising that one had been gang-raped and describing the other as a "child conscript," the military felt it had to justify their transfer:

> *Though the detainee may still have some remaining intelligence, it's been assessed that that information does not outweigh the necessity to remove the juvenile from this current environment and afford him the opportunity to "grow out" of the radical extremism he has been subject to.*

Getting cleared for release, however, was only the first hurdle. What made it so difficult to actually get out of Guantánamo is the subject of the next chapter.

3. SOURCES OF INFORMATION AND THE SHIFTING LEGAL LANDSCAPE

3.1 Legal Complexities and Obstacles

Reading through the US military and court documents on the eight Afghans left in Guantánamo, one enters a Kafkaesque world rife with hearsay, secret evidence, bad translations, gross errors of fact, testimony obtained under duress and torture, and strange, vague accusations. The tenuous nature of the allegations against the eight men who are the focus of this study has been further compounded by a shifting legal landscape and state secrecy. The US state has sought to keep everything at Guantánamo secret and information has only been revealed gradually, often as a result of different legal challenges and the state's response to them, but also as a result of Freedom of Information Act (FOIA) requests, unlawful disclosures (leaks) of documents and investigative reporting. The next few pages outline the legalities underpinning detentions at Guantánamo; the major sources of information which are cited in the case studies in Chapter 4, are highlighted in bold to help the reader navigate those studies.

The primary, domestic, legal underpinning for the continuing Afghan campaign and all subsequent military actions, including military detentions, in the 'Global War on Terror' (including the current war on the Islamic State group, but not the invasion of Iraq) is the Authorisation of the Use of Military Force (AUMF). It was passed by Congress one week after the 9/11 attacks and authorised the president to:

> *… use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.*[58]

The Bush administration believed existing legal norms were inappropriate for dealing with the unprecedented threat the country faced. The nature of the enemy – the non-uniformed, non-state, terrorist al Qaeda – was certainly unusual. The Taleban, although largely unrecognised as Afghanistan's official government, were more recognisable as a traditional state enemy, but all were treated as what the Bush administration called 'unprivileged combatants'. It decided to

pain, was "an admitted retired [Hezb-e Islami Gulbuddin] commander" with supposed influence over the Hezbi leadership "through his sons" (one of whom, Izzat, also a detainee at Guantánamo, would later be elected an MP). When Nasrat Khan was transferred to Afghanistan in 2006, the authorities had to use a wheel chair to get him to the plane. Haji Nasrat Khan, Assessment, ISN 1009, 2005, http://projects.nytimes.com/Guantanamo/detainees/1009-haji-nasrat-khan/documents/11). Or Mohammed Sadiq, 89, who had dementia, major depression, and osteoarthritis and had been found with a Thuraya satellite phone he could not operate. Mohammed Sadiq Assessment, ISN 349, 2002, http://projects.nytimes.com/Guantanamo/detainees/349-mohammed-sadiq.

[56] 'Guantánamo's Children: The Wikileaked Testimonies', Center for the Study of Human Rights in the Americas, University of California, Davis, 22 March 22, 2013, http://humanrights.ucdavis.edu/reports/Guantánamos-children-the-wikileaked-testimonies/Guantánamos-children-the-wikileaked-testimonies. Other studies have given higher numbers: details are in this report.

[57] Asad Ullah, ISN 912, Assessment, 2003, http://projects.nytimes.com/Guantanamo/detainees/912-asad-ullah, http://projects.nytimes.com/Guantanamo/detainees/913-naqib-ullah/documents/11; Naqib Ullah, ISN 913, Assessment, 2003, http://projects.nytimes.com/guantanamo/detainees/913-naqib-ullah.

[58] 'Joint Resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States', 115 Stat. 224 Public 107-40, 18 September 2001, https://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf.

house detainees off mainland America at Guantánamo Bay, where it believed federal law would not apply, to use torture and allow the CIA to run a global rendition programme, and to treat detainees not as criminal suspects to be put on trial, or as prisoners of war under Geneva Conventions rules, or to give them the minimum protections prescribed in common article 3 of the Geneva Conventions.[59] Among other things, it bans torture, "degrading and humiliating treatment" and the passing of sentences unless "by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

One consequence of all this has been constant legal churn since 2001. There have been new laws and presidential orders, repeated legal challenges, and varying court rulings by judges trying to establish how all this would and should work in practice. The state's authority to detain without trial, try detainees in military courts, suspend the writ of habeas corpus and decide not to apply common article 3 to War on Terror detainees has been challenged – and often assessed in different ways by different judges and with different counter-responses by the state.

The government did get Supreme Court backing to use military detentions,[60] but saw a defeat in June 2004 over habeas corpus *(Rasul v. Bush).* One of the oldest rights, which aims to protect individuals from arbitrary detention, a habeas petition forces the state to justify the detention of an individual in court or release him or her. The ruling meant Guantánamo detainees could use federal courts to challenge the legality of their detentions. This also meant they could get access to legal counsel and a connection with the outside world. A spate of habeas petitions ensued.[61] Petitions were soon suspended, however, while courts ruled on procedures.

3.2 Combatant Status Review Tribunals and Administrative Review Boards

Meanwhile, the executive branch and Congress created new bodies which they hoped would be a substitute for habeas cases and thereby prevent detainees petitioning the courts. They established **Combatant Status Review Tribunals (CSRTs)** in Guantánamo in 2004. These were one-off military boards which determined if detainees were 'enemy combatants' or not.[62] From March 2005, **Administrative Review Boards (ARBs)**, again staffed by the military, were created to determine on a yearly basis whether detainees continued to be a threat to the United States or its allies.

The US government sought to make these boards secret and it took a two-year battle by the Associated Press, using multiple FOIA requests and three lawsuits, to get documents released. The first release of documents by the Pentagon in 2005 was heavily redacted; names and other information were blacked out.[63] It was only in 2006 that the full texts, summaries and transcripts of the proceedings of both boards, were released. This was also when the names of those held in Cuba were, for the first time, published.

The CSRTs and ARBs were not intended to be the equivalent of criminal courts or weigh evidence to a criminal standard. Indeed, military detention is 'preventative', aimed at keeping enemy combatants off the battlefield. However, Taleban and al Qaeda fighters wear civilian clothes and most men detained in Guantánamo were there as a result of intelligence and tip-offs and/or as transferees from allies alleging they were terrorists. Determining whether these men were actually combatants or not should, therefore, have been reasonably tricky. However, few were released by these boards.[64] It was difficult for

[59] Presidential Memorandum 'Humane Treatment of al-Qaida and Taliban detainees', signed 7 February 2002, https://www.aclu.org/files/assets/CIA.pdf.

[60] Hamdi v. Rumsfeld, 542 U.S. 507 (2004), https://www.law.cornell.edu/supct/html/03-6696.ZO.html.

[61] The right to habeas was never granted at Bagram and the names of this much more changing detainee population were released just once, on 22 September 2009, as a result of a FOIA request. 'Redacted List of Detainees Held at Bagram Air Base' American Civil Liberties Union (ACLU), 15 January 2010,https://www.aclu.org/redacted-list-detainees-held-bagram-air-base?redirect=national-security/redacted-list-detainees-held-bagram-air-base.

[62] An enemy combatant was defined as "an individual who was part of or supporting the Taliban or al Qaida 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 armed forces."

[63] Benjamin Wittes and Zaahira Wyne, *The Current Detainee Population of Guantanamo: An Empirical Study*, Brookings, 16 December 2008, http://www.brookings.edu/research/reports/2008/12/16-detainees-wittes, 4-5.

[64] Mark Denbeaux and Joshua Denbeaux, *No-Hearing Hearings, CRST: the Modern Habeas Corpus? An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantanamo*, Seton Hall Public Law Research Paper No. 951245, December 2006, http://law.shu.edu/publications/GuantanamoReports/final_no_hearing_hearings_report.pdf.

detainees to defend themselves. They did have a chance to speak, but no right to call witnesses. Nor did they have independent legal counsel. Detainees were not told the precise nature of allegations against them or who had made accusations. They enjoyed no presumption of innocence and most allegations were simply asserted, rather than being backed up by evidence. The usefulness of the summaries and transcripts of the CSRTs and ARBs for finding out information about the detainees and the allegations against them was limited by the vagueness of the charges and failure to properly question what was asserted, as one group of academics pointed out:

> *CSRT and ARB hearings are not judicial proceedings. Government allegations lack the specificity, detail, and supporting evidence typical of criminal trials. Allegations are often vague and key terms—such as, for example, "jihad," "guesthouse," and "training"—go undefined. Moreover, detainees lacked access to counsel to help them prepare their responses, which the record sometimes reproduces in summary form, not verbatim transcript. In some instances, moreover, the detainee chose to give a statement through his "personal representative," the non-legal military officer assigned to assist detainees in the process. The statements are often less than crystalline in their clarity and sometimes amenable to a range of different interpretations. These records in some instances contain translation errors, and lawyers for detainees have argued as well that some apparent admissions involve detainees repeating statements originally given under duress or trying to curry favor with authorities.*[65]

Even though the military boards were flawed, they did reveal, usually for the first time, the government's allegations against each individual detainee and, from the transcripts of proceedings, we got to 'hear' the voices of the men themselves. The detainees were frequently bewildered, as they tried to work out what sort of 'court' this was and where the justice was: how could they defend themselves against anonymous accusers? How could they explain matters when the boards did not appear to have even a basic understanding of their country? Why were witnesses (including other detainees) not allowed to appear?

[65] Wittes, *The Current Detainee Population*, [see FN 63], 6.

3.3 Military Trials

A second response to the Supreme Court's Rasul decision came from Congress with the Detainee Treatment Act of 2005 which stated: "No court, justice, or judge shall have jurisdiction to… consider… an application for… habeas corpus filed by or on behalf of an alien detained… at Guantánamo."[66] The act also provided for the creation of Military Commissions to put detainees on trial in a military court.[67] There were various pre-trial hearings, but before any actual trial could be held, on 29 June 2006, the Supreme Court ruled *(Hamdan v. Rumsfeld)* that the trials were illegal under the US Uniform Code of Military Justice and Geneva Conventions.[68] The Supreme Court said the military tribunal system did not amount to "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," as required by common article 3. In response, in October 2006, Congress enacted the Military Commissions Act, which again tried to strip federal courts of the jurisdiction to hear the habeas petitions of Guantánamo prisoners.[69] In June 2008, the Supreme Court ruled *(Boumediene v. Bush)*[70] that Military Commission Act procedures were not an adequate substitute for federal habeas corpus review and that the Military Commission trials had, in fact, amounted to an unconstitutional suspension of habeas corpus.[71] There was **media reporting of Military Commission trials** held under the 2005 Detainee Treatment Act and 2006 Military Commissions Act.

3.4 Petitions for Habeas Corpus

In 2008, habeas petitions restarted, but progress has been slow. Procedural arguments – whether detainees or their lawyers could see evidence and

[66] Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005).

[67] A presidential order had authorised military trials on 13 November 2001, the same day Kabul fell. Details were sparse; the Secretary of Defence was to be in charge of the specifics. See *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57831, 16 November 2001)*, http://fas.org/irp/offdocs/eo/mo-111301.htm.

[68] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[69] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, (2006), http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf.

[70] Boumediene v. Bush, 553 U.S. 723 (2008).

[71] The bar for suspending habeas corpus in America is set by the constitution and is very high: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9.

whether the state could add material to its case – have tended to slow petitions down. "I think the modus operandi," one lawyer told the author, "was to drag out the procedure. It keeps [my client] in prison one way or another."[72] Habeas court documents tend to be less useful than might be expected in providing information about detainees and the cases against them because they are frequently redacted and are often to do with procedural matters.

As to the hearings themselves, the courts have deemed the standard of evidence required to keep someone in military detention to be much lower than for criminal convictions. The bar was lowered still further by rulings in 2010 (*Al-Adahi v. Obama*) and 2011 (*Latif v. Obama*) which established that government evidence should be presumed to be accurate.[73] "Careful judicial fact-finding," one study found, "was replaced by judicial deference to the government's allegations," with the "government winning every petition."[74]

What this meant in practice will be seen in the case studies of those Afghans who sought to challenge the legality of their detentions through habeas petitions. Judges have often accepted raw intelligence as evidence and multiple pieces of evidence, each individually too weak to pass muster, which together produce an actual or apparent 'mosaic' pointing to culpability.[75] The courts have been open to the state's desire to keep some evidence secret from defendants, the public, and even lawyers, on grounds of national security. Judges have also been open to accepting testimony, both 'confessions' and accusations against other detainees, from those who have been tortured. Rather than dismissing such testimony out of hand, they have instead tried to assess how 'voluntary' it was: can a lapse of time between torture and confession make it 'voluntary' and, if the torture was carried out by one entity (a different US agency or a foreign agency). Can a later confession given to a different entity be deemed to have been freely given?[76] One defence lawyer, Carlos Warner, has described the situation as so bad that, "[n]o legitimate courts or actual due process exist in Guantánamo."[77]

3.5 The WikiLeaked Assessments

In April 2011, a sudden flood of new information showed that the evidence behind the accusations made against the detainees in the media, the military boards, Military Commissions and habeas cases was frequently weak or non-existent. WikiLeaks published internal, hitherto secret, assessments of the detainees, known as **Joint Task Force Guantanamo Detainee Assessments**.[78] The Assessments contained background information on the detainees and something of their versions of events, as well as allegations against them and the threat they were deemed to pose. There is information about each person's capture and the reasons for his transfer to Cuba and continuing detention. Detainees' behaviour at Guantánamo and mental and physical health is also detailed. The allegations made are usually very serious, but the Assessments are littered with factual errors, gross misunderstandings and hearsay. Much of the sourcing is raw intelligence, defined by the FBI as "unevaluated intelligence information, generally from a single source, that has not fully been... integrated with other information, or interpreted and analysed."[79] An analysis of the sourcing by Tom Lasseter and Carol Rosenberg also revealed dependence on 'supergrasses', i.e. detainees who informed on multiple individuals:

> *The allegations and observations of just eight detainees were used to help build cases against some 255 men at Guantanamo — roughly a*

[72] Defence lawyer who asked not to be named. Author interview by Skype, 26 January 2015.

[73] Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010); Latif v. Obama, 666 F.3d 746, 748 (D.C. Cir. 2011). For discussion of how this changed judges' reading of evidence, see Benjamin Wittes, Robert M Chesney, Larkin Reynolds and The Harvard Law School National Security Research Committee, *The Emerging Law of Detention 2.0: The Guantanamo Habeas Cases as Lawmaking*, Brookings, April 2012, http://www.brookings.edu/~/media/research/files/reports/2011/5/guantanamo-wittes/05_guantanamo_wittes.pdf.

[74] Mark Denbeaux, Jonathan Hafetz, Sara Ben-David, Nicholas Stratton, and Lauren Winchester, *No Hearing Habeas: D.C. Circuit Restricts Meaningful Review*, Seton Hall University School Of Law, 1 May 2012, Http://Law.Shu.Edu/Programscenters/Publicintgovserv/Policyresearch/Upload/Hearing-Habeas.Pdf.

[75] Wittes et al, *The Emerging Law of Detention*, [see FN 73].

[76] Wittes et al, *The Emerging Law of Detention*, [see FN 73], 92.

[77] 'Navigating a "Legal Black Hole": The View from Guantanamo Bay', Carlos Warner, *Akron Law Review*, 31-51, http://www.akronconlawjournal.com/articles/Article%203%20Warner%20Vol%205%20macro%20for%20posting.pdf, 37.

[78] *Final Report Guantanamo Review Task Force*, 20 January 2010, https://www.documentcloud.org/documents/723757-guantanamo-review-final-report.html.

[79] 'FBI Intelligence Information Reports (IIRs) Dissemination Systems FIDS', internal FBI document (undated), released through FOIA, 14 December 2010, http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0065/n1-065-10-025_sf115.pdf.

Box 2
Detainee Assessment Abbreviations – Pointers to Sources

Abbreviations used in Assessments and court documents are useful in revealing the sources of evidence and allegations. One of the most common is **SIR**, short for **Summary Intelligence Report**. These are "essentially interrogators' notes summarizing the uncorroborated statements a subject makes during an interrogation session."[80] In court, such reports, rather than the actual transcripts of the interrogation – which may have been lost or never made – are also often cited. It is easy to see how mistranslations, misunderstandings and incorrect inferences of the interrogator could creep in, given that these are summaries of interrogations, not verbatim transcripts.

Another type of source is the **IIR** short for **Intelligence Information Report**, which is a "generalized reporting vehicle that collects unprocessed and unverified summaries of claims made to U.S. intelligence agencies, usually by foreign sources."[81] These raw intelligence reports, says the FBI, usually bear cautions such as: "WARNING: THIS IS AN INFORMATION REPORT, NOT FINALLY EVALUATED INTELLIGENCE."

Other types of information source are: ***FM40****, code for an* ***interview report by the military Criminal Investigation Task Force****;*[82] ***FD-302****, an* ***interview report by the FBI***[83] *and* ***FBI LHM****, a* ***Letterhead Memorandum,*** *i.e. an official FBI memorandum that was expected to be shown to someone outside the FBI*[84]*; and* ***TD*** *or* ***Telegraphic Dissemination*** *from the CIA.*[85]

> *third of all who passed through the prison. Yet the testimony of some of the eight was later questioned by Guantanamo analysts themselves, and the others were subjected to interrogation tactics that defense attorneys say amounted to torture and compromised the veracity of their information… Any lingering doubts about the eight men and the quality of their statements were rarely listed when their information appeared in the case files of other detainees.*[86]

The reporters noted that such testimony found its way into government evidence presented in court. The Assessments, themselves, however, were unlawfully disclosed, and cannot be cited in court by defendants or habeas petitioners.[87]

3.6 Guantánamo under Obama

After taking power, Obama set up a new body, the Guantánamo Detainee Task Force, with military and non-military members, to review all detainee cases.[88] In 2010, the task force made secret decisions to detain indefinitely, transfer, i.e. transfer them from Guantánamo to their own or a third country with security guarantees, or prosecute. Three years later, in June 2013, a FOIA request forced the publication of these decisions.[89]

[80] Former intelligence officer, quoted in Traverse in Support of Petition for the Writ of Habeas Corpus, Mousovi v. Obama, In Re Petition Of Haji Wali Mohammed Morafa No. 05-1124 (RMC) (Redacted), (D.D.C. 15 Jan. 2010) , 2, 9.
[81] Wali Mohammed Traverse, quoting former intelligence officer, [see FN 81], 28.
[82] Wali Mohammed Traverse, quoting former intelligence officer, [see FN 81], 28.
[83] Wali Mohammed Traverse, quoting former intelligence officer, [see FN 81], 28.
[84] Phil Lapsely 'How to read an FBI File', 4 September 2008, from website 'The Exploding Phone' http://www .historyofphonephreaking.org/writings/htraff/.
[85] Appendix 1, 'List of Acronyms' in 'A Review of the FBI's Handling of Intelligence Information Prior to the September 11 Attacks, Special Report', November 2004 (released publicly June 2005), Office of the Inspector General, https://www.oig.justice.gov/special/0506/app1.htm.
[86] Tom Lasseter and Carol Rosenberg, 'WikiLeaks: Just 8 at Gitmo gave evidence against 255 others', *McClatchy Newspapers*, 25 April 2001, http://www.mcclatchydc.com/news/special-reports/article24626137.html.
[87] The documents were never declassified, despite being leaked, so anyone with security clearance cannot view them outside secure facilities. They can be submitted in court, but only in sealed filings and cannot be used by attorneys to contribute to or inform the public debate. Scott Shane, 'Detainees' Lawyers Can't Click on Leaked Documents' *The New York Times,* 26 April 2011, http://www.nytimes.com/2011/04/27/world/guantanamo-files-detainees-lawyers-restricted-leaked-documents.html?pagewanted=all&_r=0.
[88] It was made up of representatives of the Departments of Justice, Defense, State and Homeland Security, the Office of the Director of National Intelligence, and Joint Chiefs of Staff. *Final Report Guantanamo Review Task Force*, [see FN 78].
[89] 'Guantanamo Review Dispositions: Final Dispositions as of January 22 2010', letter from the US Office of the Attorney General to Charles Savage, of *The New York Times,* in response to his FOIA request for "a list of the name of each detainee at Guantanamo Bay and their status as determined by the Guantanamo Detainee Task Force," 17 June 2013, http://www.documentcloud.org/documents/714599-savage-final-response.html.

Obama also reintroduced military courts, signing into law the Military Commissions Act of 2009[90] and on, 7 March 2011, ordered the creation of a new body, known as the **Periodic Review Board**, to make assessments every three years as to whether each Guantánamo inmate still posed a threat to the US. Unlike the CSRTs and ARBs, the Periodic Review Board is not entirely military.[91] It began hearings three years behind schedule,[92] on 11 November 2013, and made its first decision on 9 January 2014.[93] Documents related to the reviews *are* largely being published, albeit some in redacted form.[94]

Compared to either the Task Force of 2010 or the earlier review boards at Guantánamo, the Periodic Review Board has, so far, had a higher rate of deciding to transfer detainees. In some cases, it has conceded that the allegations made against them were wrong or overblown. As of 29 September 2016, the board has reviewed the cases of 62 detainees and decided to transfer 34 of them (56%).[95] They include many whom the 2010 Task Force had ordered to remain in continuing detention without trial, so-called 'forever prisoners'. As to the eight Afghans whose cases are the focus of this study, the board has decided that two should remain in detention and cleared the other six for transfer.

On 14 August 2016, three were sent to the United Arab Emirates (UAE). AAN was told by US and Afghan government officials that these three men were in a 'de-radicalisation' programme, but could provide no information on how long that might last, or whether they would eventually be allowed to return home.[96] *The Wall Street Journal* reported they would be held in a rehabilitation facility "indefinitely until authorities decide they can be released at a minimum of risk."[97]

4. THE CASE STUDIES

4.1 Structure of the Case Studies

In presenting the cases of the eight Afghan detainees who are the focus of this study, AAN felt it important to lay out for readers all the information, the ins and outs of each case, timelines, accusations and evidence. This means that several of the case studies are long, particularly for those detainees who have gone through legal hearings. There is also a summary at the start of each case study, however, covering the most important points concerning the continuing detention of each man.

Each case study looks at:

- The capture of the detainee
- The treatment of the detainee, and any incidents of torture
- Allegations and evidence
- Legal proceedings, whether Military Commission trials or habeas petitions
- Current American plans for the detainee

Sourcing and footnotes

The New York Times' "Guantanamo Docket" website has gathered together all the documents from Guantánamo for each of the 771 detainees known to have been held there.[98] Here can be

[90] It amended the Military Commissions Act of 2006, prohibiting some evidence obtained through torture or cruel, inhuman or degrading treatment and putting some limits on the use of hearsay. Defendants gained the right to attend the entire trial and examine all the evidence, and prosecutors have to disclose the existence of any evidence that might exculpate the accused or raise doubts about the credibility of a government witness. Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (2009), https://www.congress.gov/bill/111th-congress/house-bill/2647/text; official summary here: https://www.congress.gov/bill/111th-congress/house-bill/2647.

[91] The Boards comprise one senior official from the Departments of Defense, Homeland Security, Justice and State and the Offices of the Joint Staff and Director of National Intelligence.

[92] Jennifer K Elsea and Michael John Garcia, *Wartime Detention Provisions in Recent Defence Authorization Legislation*, Congressional Research Services, 23 June 2014, http://fas.org/sgp/crs/natsec/R42143.pdf, 13.

[93] 'Completion of First Guantanamo Periodic Review Board' US Department of Defence Press Release NR-017-14, 9 January 2014, http://www.defense.gov/releases/release.aspx?releaseid=16473.

[94] Read documents here: Periodic Review Secretariat, Periodic Review Board, http://www.prs.mil/ReviewInformation/InitialReview.aspx.

[95] For a good overview, see 'Guantánamo Periodic Review Guide', Miami Herald, http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article68333292.html.

[96] Author interviews, Washington D.C., 28 October 2016.

[97] Jess Bravin and Carol E. Lee, 'U.S. Transfers 15 Guantanamo Bay Detainees', 15 August 2016, *The Wall Street Journal,* http://www.wsj.com/articles/u-s-transfers-15-guantanamo-bay-detainees-1471303872. Pooja Jhunjhunwala, Spokesperson US Department of State, told AAN aid could not discuss the specific assurances they receive from foreign governments. Email 8 September 2016.

[98] 'The Guantanamo Docket', http://projects.nytimes.com/guantanamo. The *Miami*

Table 1
Summary of the Eight Cases

Name	Captured by	Detained/denounced because of politics or money?	Alleged torture?	Current Location	Years in Detention
Wali M'd	Pakistan ISI	ISI accused of detaining him to protect agent	Yes, in Pakistan, Bagram, Kandahar, Guantánamo	Guantánamo	14
Zahir	US	No, although tip-off was inaccurate	No	Guantánamo	14
Obaid	US	Alleged	Yes, in Khost and Bagram	UAE	14
Karim	Pakistan	Possible	Yes, sleep deprivation Bagram	Guantánamo	14
Kamin	Afghan forces	Likely, local grievances	Yes, "softened up"	UAE	13
Hamid	Afghan NDS	Yes, factional	No	UAE	13
Harun		Not known	Yes, at Bagram and Guantánamo	Guantánamo	9
Rahim	Not known	Not known	Yes, by CIA	Guantánamo	9

In all cases, detainees were captured on the basis of intelligence, rather than on the battlefield. None has been accused of any specific attack.

found summary sheets and transcripts from the military boards which assessed whether detainees were enemy combatants, the Combatant Status Review Tribunals or CSRTs, and the boards which, every year, assessed whether detainees were still a danger to the United States, the Administrative Review Boards or ARBs. On the same website are the WikiLeaked secret Joint Task Force Guantanamo Detainee Assessments which give information about a detainee's capture, mental and physical health, reasons for his continuing detention, the allegations against him and usually something of the sourcing on which the allegations are based.

To reduce the length of the footnotes in this report, the general URL for each detainee on 'The Guantanamo Docket' website is given at the top of his case study. Footnotes then only specify 'CSRT', 'ARB' or 'Assessment', plus the year the Board or Tribunal was held or Assessment made. Other documents, which have not been collated elsewhere, are sourced as normal in the footnotes. These include government press releases and media reporting, and some court papers from military trials and habeas petitions.

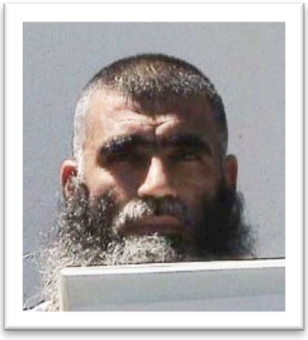
For the two Afghan detainees who were captured in 2007, Harun Gul and Mohammed Rahim, there are no published Combat Status Review Tribunals or Administrative Review Boards (and, for Rahim, no Assessment). For these two men, it is even more difficult to get information about what exactly the US state thinks they have done or why it continues to hold them.

Names, numbers and quotations

The system of transliterating Afghan names into English, as well as the names themselves, vary across US documents. In this paper, the most commonly used name and spelling is used, together with each detainee's Internment Serial Number, or ISN, which is unique and does not vary. There is a fairly high incidence of grammatical mistakes and typos in the Guantánamo documents. These have been left as per the original. Where extra information is needed to clarify, this is in square brackets [ ]. Anything in round brackets ( ) is from the original text.

4.2 Cases 1–6

4.2.1 Case 1: Haji Wali Mohammed (ISN 560), 14 Years in Detention



Herald has the best up to date news on Guantanamo, http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/.

- Place of Birth: Wazirabad, Pul-e Khumri District, Baghlan
- Date of Birth: 15 February 1966
- Detained by Pakistani intelligence, ISI, 26 January 2002; transferred to US forces, February 2002; transferred to Guantánamo on or about 30 April 2002
- 2010 Task Force ordered his indefinite detention. Cleared for transfer by Periodic Review Board, 26 September 2016. Still in Guantánamo.
- Guantánamo Documents: http://projects.nytimes.com/guantanamo/detainees/560-haji-wali-mohammed

Summary

In the US narrative, Wali Mohammed was a "primary financier" of the Taleban and al Qaeda, smuggling gold and facilitating money transfers, helping to finance the bombing of the two American Embassies in Nairobi and Dar es Salaam in 1998, buying surface-to-air missiles and investing one million dollars for Mullah Omar.

However, it provides no real evidence for this. The accusation that he was anything other than a publically known figure with a legal money exchange and gold importing business rests on hearsay. He was detained by the ISI in January 2001 in Pakistan and handed over to US forces, he believes, because the ISI wanted to protect one of its agents who owed Wali Mohammed money. Aside from the ISI's initial allegation, other sourcing for the accusations against him, as revealed by his WikiLeaked Joint Task Force Guantanamo Detainee Assessment, are reports from other foreign intelligence services and one fellow detainee reporting what another detainee had allegedly told him.[99] Wali Mohammed's attempts to petition for habeas corpus were held up by procedural arguments and delay and the state was allowed to use secret evidence. His petition was made in 2005 and a hearing was finally held in 2013; the judge made her ruling after three years of consideration, on June 2016; she ordered that the state could continue to detain him because of his associations with Hezb-e Islami (then, not actually a party to the conflict) and the Taleban. She dismissed as not credible its accusations that he had been al Qaeda's money manager. The Periodic Review Board cleared him for transfer in September 2016, noting, that his "business connections and associations with al Qa'ida and the Taliban pre-date 9/11 and appear to have ended."[100]

Capture and alleged torture

Money changer Wali Mohammed was detained by the ISI, on 26 January 2002, he believes because a tribal jirga in Pakistan was about to settle a financial disagreement between him and two other men, one an ISI informer, in his favour.[101] He said the ISI demanded money for his release, but as he was heavily in debt – more of which later – he was unable to pay.[102] Instead, in February 2002, the ISI handed him over to US forces.[103] He said US personnel interrogated him in Peshawar for three days[104] and then the ISI bound and blindfolded him and put him on a plane with two other detainees. After a 90-minute flight, they landed at what he later realised was Bagram Air Base, this according to testimony for his habeas petition (written in the third person):

> *He was taken from the plane and thrown onto the ground. It was winter time and very cold. Men stood on his back and re-tied his arms behind his back again with a belt. Wali Mohammed and the two other detainees were dragged to a cement room and thrown on the ground. Then they were beaten, one at a time. Wali Mohammed's clothes were stripped off, and he was given prison clothing. His hands and feet were bound again, and he was taken*

[99] Wali Mohammed Assessment, 2008, 5. See also Wali Mohammed's Traverse, which criticizes the state's reliance on this double hearsay in its defence of his detention. Wali Mohammed's lawyers describe this piece of evidence as an "interrogator's recollection of statements purportedly made by ISN 562 – an Afghan detainee at Guantánamo named Qari Hassan Ulla – about statements purportedly made by *another* Guantánamo detainee, ISN 532" about Wali Mohammed. The interrogator's report, it said, "strongly suggests that ISN 532 is an unreliable source" and that the "double hearsay information… is incongruous, plainly inaccurate and by nature all but impossible to verify," 69-70 (emphasis in original). One indication that the claim is unreliable is that ISN 562 questions whether Afghanistan has dollars; he is Afghan, so would not have had to ask such a question. [See FN 81].

[100] Wali Mohammad Final Determination, Periodic Review Board, 26 September 2016, http://www.prs.mil/Portals/60/Documents/ISN560/160927_U_FOUO_ISN560_FINAL%20DETERMINATION_PUBLIC_v1.pdf

[101] The debt was for about one million USD and was accrued after the two men, foreign currency exchangers Mohammed Tahir and Asef Cherk refused to buy a quantity of Afghanis as they had agreed after the currency had appreciated strongly following Hamed Karzai coming to power in Kabul. Wali Mohammed Traverse, [see FN 81], 11.

[102] Wali Mohammed CSRB, transcript, 2004, 4.

[103] Wali Mohammed Assessment, 2008, 3.

[104] Wali Mohammed Traverse, [see FN 81], 12.

> *to a cell. He had a sack over his head for three days.*[105]

He said he was tortured at Bagram:

> *Five days later, his hands and feet were untied and his hands were re-tied in the front. The abuse began again. He was beaten. Freezing water was poured on his neck. He was kept awake for long periods of time. If he fell asleep, someone banged a big stick against the wall of his cell to wake him up. He was dragged around until his feet bled.*[106]

After 15 days in Bagram, he said he was taken to Kandahar:

> *It was freezing cold. He was tied to a chair with his arms behind his back and only a thin shirt on. The interrogators wore heavy coats. They punched him in the head so the chair fell over. He had a sack over his head so he could not see the punches coming. He was made to sit upright on his knees with his arms stretched out over his head for between 30 and 60 minutes. He was told that he had to keep his eyes open. If he closed his eyes or dropped his arms, the time he had to remain in the position was increased.*[107]

After two months, he was taken to Guantánamo where, he said, the guards punched him in the head when he arrived.[108] At this point, his testimony is redacted.

The alleged mistreatment is consistent with information from other detainees and official accounts of procedures used (see pages 14-15). Despite what allegedly happened to him, it seems that Wali Mohammed made no confession to wrong-doing.[109] Indeed, his version of events has been unswerving – although that, in itself, the US believes, is evidence that he was trained in "counter-interrogation techniques."[110]

Allegations and evidence

The US has accused Wali Mohammed of financing the Taleban and al Qaeda over many years, using the legal cover of his money exchange business to make currency transfers and smuggling gold into Afghanistan. He is accused of investing money for Taleban leader Mullah Omar and helping to buy weapons.

Wali Mohammed was a money changer in the central money market in Kabul, the Saraye Shazada. He says that he was doing normal business. He has said he was involved in an arbitrage scheme in November 1997 with the Central Bank, whose director at the time was a Taleb and also an old friend, Mullah Abdul Rahman Zahid. Such schemes undertaken by money changers from the central money market were normal in Taleban and pre-Taleban times. Indeed, money changers are still powerful partners of the state when it comes to buying and selling currency and keeping the Afghan currency, the afghani, stable. Before 2001, Afghanistan had a non-existent banking sector and even today, it is weak and has been subject to state-linked corruption.

The arbitrage scheme with the Central Bank failed, Wali Mohammed said, because of currency shifts, so that what should have netted a profit resulted in massive losses on money borrowed from the central bank – $500,000 lost from $1.5 million. Wali Mohammed said the Taleban arrested his cousin to force him to go to their headquarters in Kandahar. When he arrived, he said he was also arrested and, under duress, was forced to pay back the lost money (even though the Central Bank had carried three quarters of the risk, according to the original agreement). He already owed a considerable sum of money from an earlier failed enterprise and went even more heavily into debt as he had to borrow from all and sundry to repay the Central Bank. In his interrogations, Wali Mohammed wrote out a list of those he said he owed money to.[111]

Other money changers knew Wali Mohammed was in serious debt, although they did not know who his creditors were: "He was in debt for a big amount in Pakistan," said one of the veteran money changers whom AAN spoke to (all asked for their names to be withheld). "Whatever he made he sent back to Pakistan to the people he owed. He didn't even buy a house here, only a shop. He didn't get super-rich."[112] A second money changer said: "He was not a very rich person. If he had been powerful and linked to the [Taleban] government, we would have known it from his business. He wasn't in a position to support the Taleban. He had

[105] Wali Mohammed Traverse, [see FN 81], 13.
[106] Wali Mohammed Traverse, [see FN 81], 13.
[107] Wali Mohammed Traverse, [see FN 81], 14.
[108] Wali Mohammed Traverse, [see FN 81], 15.
[109] No confession is mentioned in his Assessment which sources the state's allegations.
[110] Wali Mohammed Assessment, 2008, 4.
[111] Two documents attached to Wali Mohammed Traverse, both translated accounts by Wali Mohammed of his debts. The first is undated and untitled, Traverse, [see FN 81], 425-7; the second is 'Pocket Litter', Guantanamo, 11 December 2006, Traverse, 437-9.
[112] Author Interview money changer 1, 20 August 2015, Kabul. Afghanistan Analysts Network interviewed three money changers who had had businesses in the central money market during Wali Mohammed's time. All spoke on condition of anonymity.

no money. His family was suffering from calamities. His fortune had collapsed from previous times. He was in debt."[113]

The US has also accused Wali Mohammed of "smuggling gold for al Qaeda."[114] His work as an importer of gold was also carried out quite openly. According to the first money changer quoted in the previous paragraph, he made money through having good relations with the customs department at the airport which let him off import duties. "We knew he was buying gold, transferring it to Kabul for a percentage," he said. "He didn't have enough money to buy the gold himself, but bought it on commission. It was a three step deal: Wali Mohammed got the gold out of Kabul Airport, the big merchants bought it and then they sold it on to the jewellers."

Whenever the US puts its allegations to Wali Mohammed – that he financed the Taleban and al Qaeda – he sounds flabbergasted: how could he be accused of funding the Taleban when he was up to his ears in debt and the Taleban had put him in prison? In his Combatant Status Review Tribunal in 2004 – his first chance to speak publically – he was asked to respond to the allegations made against him and read out by his Personal Representative (an officer chosen to 'represent' him):

> Personal Representative: *The Detainee paid for a senior member of the Taliban to travel.*
>
> Detainee: *I was buried in losses; I'd lost lots of money. Should I pay for my losses, or pay for the Taliban's tickets? This accusation is not logical.*
>
> Personal Representative: *The Detainee purchased vehicles for the Taliban.*
>
> Detainee: *I still had my own problems and bills to pay; I wasn't in shape to buy vehicles for the Taliban. Should I pay my loan, or should I buy cars for the Taliban who had treated me brutally? This is not correct; you guys just think about it.*[115]

In his WikiLeaked Assessment, we can see the basis for the US accusations against him and they look to be extremely weak. About half of the sourcing for the case against him consists of actions Wali Mohammed is said to have "admitted to," "claimed" or "stated." None are criminal. They include changing money, importing gold, having a sister married to Gulbuddin Hekmatyar's nephew, knowing another money changer who was detained by the US (and subsequently released), and having license plates that allowed him to drive across the Afghan-Pakistan border.

The serious allegations – that he was close to Mullah Omar and bin Laden, that he financed the bombings of US embassies in east Africa in 1988, and bought missiles – were largely made by foreign intelligence agencies, mainly Pakistani and Jordanian. The ISI is also cited as a co-perpetrator of some of his alleged crimes, for example, that he purchased surface-to-air missiles with ISI help.[116] Other sources are: "sensitive reporting," an FBI source named as "Hajji Zabbi," a "cooperative source," and a fellow detainee, who was subsequently released, reporting what another detainee had supposedly told him (that Wali Mohammed was bin Laden's financial manager and had "reportedly travelled" to Japan, Europe, and the UAE with bin Laden's money).[117]

Some of the few concrete details in the accusations, i.e. something that is not hearsay, are three money exchanges he made in 2001 described in the Assessment as "possibly suspicious":

> *"… detainee was involved in several large money transfers possibly related to terrorist activities. According to a cooperative source, the transfers were suspicious because of their unusual size and connections to individuals possibly involved in terrorist activity."*[118]

The author has not been able to track down those named in the transfers, but did ask three money changers whether the amounts were actually big enough to be suspicious; all were about 200,000 Emirati dirhams, equivalent to between 47 and 69,000 US dollars, transferred from the UAE to Peshawar. They laughed at the question. "This must be the money he was sending through *hawala* that he could not carry in cash," said one. "This is not a lot of money. Money changers would have hundreds of times more than this. It doesn't seem suspicious. It is a normal part of gold business."[119]

It is worth pointing out here that, under International Humanitarian Law, the body of law, including the Geneva Conventions, which regulates warfare, financing is considered a non-combat, support role. If the US allegations were true, financing would still not amount to 'direct participation in hostilities', the line which civilians have to cross before they lose their protection

[113] Author Interview money changer 2, 20 August 2015, Kabul.
[114] Wali Mohammed CSRB, 2004, 1.
[115] Wali Mohammed CSRB, transcript, 2004, 5.
[116] Wali Mohammed Assessment, 2008, 8.
[117] Wali Mohammed Assessment, 2008, 5.
[118] Wali Mohammed Assessment, 2008, 7.
[119] Author interviews, money changer 1 and 2, Kabul, 20 August 2015.

against attack during conflict; whether it means they can be subject to military detention has been argued over by the courts, but is, by no means, clear-cut.

Amplification of allegations

Wali Mohammed suspects that one way in which he has been miscast as a terrorist financier was through translation errors of his own interrogations. He tries to explain this at the first chance he gets to speak publically, at his Combatant Status Review Tribunal in 2004.

Detainee:

> *Yes, I'm ready, but the only thing I have to tell you is that I've noticed in the interviews that there are discrepancies regarding the dates and the nature of the accusations translated in a different way; hopefully it will come up during this hearing.*

Tribunal President:

> *That's one of the reasons we're here today, is for you to provide an oral statement, and please, bring up those issues when we're at that point.*

Detainee:

> *Yes, I'm sorry that my case is known to be complicated. Hopefully, if it takes a bit longer to clarify, I am sorry. I have been translated by two or three different languages; Pashtu, Farsi and Urdu, and people took my evidence in different languages, so it has become a little bit complicated.*[120]

In Wali Mohammed's petition for habeas corpus, he gives an example of how he believes his interrogators came to believe he was lying: a problem with different calendars. The Afghan calendar has its new year on the spring equinox, so falls across two western years (this Afghan year, 1395, runs from 20 March 2016 to 19 March 2017). It is something that often leads to confusion. Wali Mohammed's Traverse (his formal rebuttal of the state's case for his continuing detention, the Factual Return) says:

> *Based on inconsistencies in their own translation and reporting of Wali Mohammed's interrogations - which variously date the Central Bank transaction in 1996, 1997 or 1998 –Respondents* [the US government] *contend that Wali Mohammed engaged in multiple transactions with the Taliban government over an 18-month period in 1996 and 1997.*[121]

The US's conflation of the Afghan state with the Taleban also leads to misunderstandings. Everything governmental in Taleban-controlled Afghanistan was controlled by the Taleban, from the national airliner to education to healthcare to the central bank. Every Afghan and foreigner living in Taleban-controlled Afghanistan had to deal with the Taleban when it dealt with the government. However, Wali Mohammed's dealings with the state are cited as suspicious, for example, in this opening exchange in Wali Mohammed's first Administrative Review Board (2005):

Designated Military Officer:

> *(3)The following primary factors favor continued detention: (3.a) Commitment (3.a.1) The Detainee admitted he was in business with the Taliban and worked with the Taliban because of the money.*

Detainee:

> *I didn't say I did business with the Taliban. I said I did business with Afghanistan Bank* [the central bank]…[122]

Or, with reference to Wali Mohammed's flying on Afghanistan's national carrier, Ariana, his Assessment says that "an FBI contact" had said, "Arabs often sent money to Afghanistan through the Taliban-controlled Ariana Airlines."[123] Many people flew on Ariana during the Taleban regime, as they had before the Taleban came to power and would do again after they lost power. In the late 1990s, it was the only commercial airline flying into and out of Afghanistan. Flying on Ariana was, in itself, in no way suspicious and says nothing about Wali Mohammed's actions or allegiances.

We have some other possible insights into Wali Mohammed. All of the 200 money changers in the central money market sent a petition to the US ambassador and to the authorities at Guantánamo Bay in about 2007 or 2008 asking for his release and saying he had no special or ideological relationship with the Taleban. As these money changers come from all over the country and represent all strands of ethnicity and political allegiance, this was significant. Wali Mohammed was also a strong and well-known supporter of the

[120] Wali Mohammed CSRB transcript, 2004, 1.

[121] Wali Mohammed Traverse, [see FN 81], 79. 1997 included parts of both Afghan years, 1376 and 1377. If one of those years had then been back translated, interrogators might then have ended up with 1997/1998 for 1376 and/or 1998/1999 for 1377.

[122] Wali Mohammed ARB 1 transcript, 2005, 3.

[123] Wali Mohammed Assessment, 2008, 5.

Afghan cricket team and was interviewed by the BBC in December 2001, captioned as the national team's "Development Manager." He told the reporter he was happy with the change of regime in Kabul: "The dark period is over now. There is peace and liberty in Afghanistan and we hope that cricket will gain more roots."[124]

Legal proceedings: Wali Mohammed's attempts to go to court

Unlike some of the other detainees, Wali Mohammed has repeatedly tried to use the tribunals and courts and, from what we can see, also his interrogations to tell his side of the story. This included filing a petition for habeas corpus on 7 June 2005. He was eager to testify, but the case has been held up by procedural arguments. (See pages 29-30 for a timeline of legal proceedings.) Like other detainees, his petition had to wait until 2008 for the courts to decide how to proceed in the Guantánamo habeas petitions. Then, on 25 November 2008, the state filed a classified Factual Return – its argument as to why Wali Mohammed's detention was justified. His lawyers then filed a 'discovery motion' to compel the state to reveal its evidence. The lawyers had to petition, for example, for Wali Mohammed to see his own passport and the notes he himself had written for his interrogators outlining his debts: the state had insisted they were classified documents. The judge did finally allow him to see passport and notes, but only in August 2009.

Then, on 1 December 2009, the government sought to amend its Factual Return. Wali Mohammed chose not to oppose this, "[g]iven his desire to expedite this proceeding…."[125] In January 2010, Wali Mohammed's counsel filed a Traverse, his formal response to the state's Factual Return, outlining why he believed his detention was unjustified. In May and June 2010, the court finally heard his habeas petition. He testified and closing arguments were heard. However, on 25 March 2011, the court acceded to a request by the government to re-open the record, and the state filed a Supplemental Factual Return. The fights over whether Wali Mohammed and his lawyers could see the state's evidence began again.

Throughout 2011 and into 2012, the back and forth continued. On 23 July 2012, the court allowed the state to add information to its Supplemental Factual Return, which was, controversially, 'Top Secret'. Neither Wali Mohammed nor his counsel (who had clearance only to see 'Secret' information) were allowed to see the state's new evidence. In some other cases, the state has managed to provide what are called 'adequate substitutes' which describe, "in less detail or with certain omissions or redactions, the classified information that could not be disclosed."[126] In this case, the state said it could not do this; revealing even 'adequate substitutes' even to Wali Mohammed's counsel would risk revealing its sources and methods of intelligence gathering. Wali Mohammed's counsel argued that the state had a choice: either disclose the relevant and material source information or refrain from relying on it. The judge, who did have 'Top Secret' clearance and had seen the evidence, agreed with the state:

> *It is true that this ruling will have a minor detrimental impact on Mr.* [Wali Mohammed] *Morafa's ability to contest the basis for his detention. However, the Court concludes that the incremental value to the Court of considering that evidence, in tandem with the "exceptionally grave damage to the national security" that could result from the unauthorized disclosure of Top Secret information …outweighs the marginal impact of withholding the information in question.*[127]

That the state was allowed to use secret evidence in the habeas arguments is deeply problematic, not only because it contravenes notions of natural justice, but also because we know from other cases that judges have shown a reluctance to question the government's evidence and interpretation of events. For example, in the cases of Obaid (case 3) and Bostan Karim (case 4) where the evidence against them has largely been discussed in open court, flaws were evident, but the judges accepted the evidence anyway. Also worrying is that, even though the Supreme Court (in 2008) called for "prompt" habeas rulings, the court took almost three years, from September 2013 to June 2016, to deliver its ruling. Part of the problem, it appears, is that, according to the judge, "The Government repeatedly adjusted the evidence on which it relies

[124] 'Hopes for prosperity in peace', BBC Sport Online, 12 December 2001, http://news.bbc.co.uk/sport2/hi/cricket/1706331.stm.
[125] Wali Mohammed Traverse, [see FN 81], 1.
[126] A court's inquiry when reviewing proposed substitutes is, essentially, to determine if all "relevant and material" information from the Top Secret document has been conveyed in the Secret substitute. Al Odah v. United States, 559 F.3d 539, 544 (D.C. Cir. 2009) (emphasis omitted).
[127] Mousovi v. Obama, 916 F. Supp. 2d 67 (D.D.C. 9 January 2013) (allowing state to use secret evidence in Wali Mohammed's habeas case).

to justify Petitioner's detention."[128] As a result, the court requested supplemental briefing from the government on 15 May 2015 and responses from both government and Wali Mohammed's lawyers continued through 2015.

In the end, Judge Collier delivered her ruling on June 2016, eleven years after the petition was made. She ruled that the state was justified in detaining Wali Mohammed, that he was "part of, and substantially supported, the Taliban and Hizb-I-Islami Gulbuddin at the time of his arrest in January 2002," but that there was "insufficient evidence that his activities in support of al-Qaida continued to that time."[129]

The court believed that Wali Mohammed had supported al-Qaida in 1998, although the court's heavily-redacted, publically-released judgement does not say what he is alleged to have done. However, it dismissed the government's assertion that Wali Mohammed had "hobnobbed constantly with U.S. enemies and flew all over Europe at bin Laden's command" and reveals that the government had to withdraw some of its evidence as more documentation was discovered.[130] It found it "not credible" that Wali Mohammed could have acted as al Qaeda's money manager after he had lost and had to pay back half a million dollars to the Central Bank.[131]

However, the court believed that, despite these financial losses, Wali Mohammed had continued to "have a close relationship with the Taliban" and continued to support them after 11 September 2001 (details of how are redacted).[132] It also says that "Petitioner's service to Gulbuddin Hekmatyar in late December 2001," (details of what this was are redacted) "is sufficient to establish that Petitioner was a part of, and purposefully and materially supported HIG at the time of his arrest on January 25, 2002."[133] At the time of Wali Mohammed's detention, however, Hekmatyar had been making contradictory statements about the US intervention and the new Afghan government. It would also be another year before he was placed on the US or UN sanctions list as a terrorist or associate of al Qaida or the Taliban[134] and just a decade earlier, the US had been one of the prime supporters of the Hezb-e Islami leader.

Much of the court's ruling refers to whether or not Wali Mohammed was the man identified as such in allegations. His is a common name and this, his counsel had contended, may have been the source of many of the accusations against him. However, here, the ruling is heavily redacted. As with Obaid and Bostan Karim (cases 3 and 4), Wali Mohammed's association with the mass, revivalist, Muslim organisation, Jamat al-Tabligh is also held as evidence of his malicious intent: it would not be surprising, the judge contended, that a Tablighi and member (sic) of the Taleban would support "those with similar views and whom the Taliban protected, such as Usama bin Laden and al-Qaida." However, Jamat al-Tabligh, an organisation with millions of South Asian members, is not militant; it believes now is the time for preaching, not fighting (*dawa*, not jihad) and the Taleban opposed its activities (see pages 43-44 for more detail). Moreover, although it might be assumed that Taleban members would have similar views to al Qaeda, in reality, the views of the rural, insular, conservative Pashtun mullahs who made up the Taleban were very far from the internationally-minded, Islamist jihadists of al Qaeda (see page 7).

All in all, it looks very thin. It appears that the US government has expended enormous efforts over many years scraping the barrel of its intelligence reporting to find something to justify Wali Mohammed's detention to the court. However, if its assertion, which the court accepted, that Wali Mohammed's activities had amounted to him being "part of, or substantially supporting" the Taleban and Hezb-e Islami, then the same could be said of tens of thousands of Afghans, possibly more. They would include many senior and mid-level members of the current Afghan administration. This is an immensely broad reading of the US presidential power to detain. Rather than Wali Mohammed having actually been any threat to anyone, he was extremely unlucky to have been sent to Guantánamo and to have ended up in limbo there when so many other Afghans with similar backgrounds are free and prospering.

US plans for Wali Mohammed

In 2010, the Guantanamo Task Force recommended Wali Mohammed for continued detention.[135] As with other decisions, reasons were

[128] Mousovi v. Obama, No. 05-1124 (RMC) (D.D.C. June 8, 2016) (redacted) (order denying Wali Mohammed habeas), 7.
[129] Wali Mohammed habeas denied, 2016, [see FN 128], 2.
[130] Wali Mohammed habeas denied, 2016, [see FN 128], 21.
[131] Wali Mohammed habeas denied, 2016, [see FN 128], 21.
[132] Wali Mohammed habeas denied, 2016, [see FN 128], 18.
[133] Wali Mohammed habeas denied, 2016, [see FN 128], 20.
[134] 'Narrative Summaries Of Reasons For Listing QDI.088 Gulbuddin Hekmatyar…' [see FN 35].
[135] Letter from US Department of Justice to Savage, [see FN 89].

not published. He had a Periodic Review Board hearing on 25 August 2016. His detainee profile said:

> *We assess with moderate confidence that AF-560 conducted financial transactions for Usama Bin Ladin in 1998 and 1999, either directly or through his ties to the Taliban, and was probably motivated by financial gain. We note identifying details for AF-560 have been corroborated, but there has been minimal reporting on AF-560's transactions completed on behalf of Bin Ladin. Efforts to link AF-560 to Bin Ladin are complicated by several factors, including incomplete reporting, multiple individuals with AF-560's name-Haji Wali Mohammad, and lack of post-capture reflections.* [136]

Wali Mohammad's lawyer, pointing to the state's admission that there were multiple individuals with his name, said his client had been "very unlucky – most of all in having an extremely common name. "[137] He quoted two former government intelligence officials who testified that "the identification of Mr. Mohammed is problematic. Even the late Taliban leader, Mullah Akhtar Mansour, reportedly carried a passport bearing the name 'Wali Mohammed.'"[138] Moreover, the lawyer said, the catastrophic failure of his client's arbitrage scheme with the Taleban-controlled Central Bank and subsequent harsh treatment by the Taleban, "makes it implausible that Wali Mohammed conducted financial transactions for Osama Bin Ladin thereafter – leaving aside that Mr. Mohammed speaks little Arabic and bin Ladin spoke no Pashto."[139]

The Periodic Review Board decided on 26 September 2016 that he could be transferred, noting bizarrely, since he has been incarcerated since January 2002, that his "business connections and associations with al Qa'ida and the Taliban pre-date 9/11 and appear to have ended."[140] It considered Wali Mohammed still posed "some level of threat", despite also saying he "does not appear to be motivated by extremist ideologies" and had been relatively compliant detainee.[141] For the time being, he remains in Guantánamo.

Legal timeline for Wali Mohammed

28 June 2004. Supreme Court *(Rusul v. Bush)* rules Guantánamo detainees can petition for habeas corpus in the federal courts.

7 June 2005. Wali Mohammed files habeas petition, along with others.

27 January 2006. Court orders the case be held in abeyance pending a ruling from the DC Circuit on whether it has jurisdiction to entertain the petition.

Various rulings from DC Circuit and Supreme Court as to what vehicle, if any, Guantánamo detainees can use to challenge their detention.

12 June 2008. Supreme Court (*Boumediene v. Bush)* rules that the removal of the federal courts' jurisdiction to hear petitions for habeas corpus by Guantánamo detainees under the Military Commission Act was an unconstitutional suspension of habeas corpus. Detainees can petition for habeas in federal court in a "prompt" hearing.

25 November 2008. Government files a classified Factual Return in support of Wali Mohammed's indefinite detention.

January 2009. Government notifies the court that it has identified additional documents possibly relevant to Wali Mohammed that are undergoing clearance review.

1 April 2009. Wali Mohammed files motion to compel discovery (of material relevant to government's Factual Return which the government asserts is too sensitive to disclose).

7 April 2009. Court hears oral arguments on motion to compel discovery and grants it in part and denies it in part.

29 May 2009. Government produces a copy of Wali Mohammed's passport and a copy of his own seven-page handwritten statement of his debts. Government maintains neither document can be shown to Wali Mohammed.

16 June 2009. Counsel for Wali Mohammed files a motion for a classification review of the passport

[136] Wali Mohammad Guantanamo Detainee Profile, Periodic Review Board, 31 March 2016, http://www.prs.mil/Portals/60/Documents/ISN560/20160331_U_ISN_560_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf.

[137] Wali Mohammad Private Counsel Statement, Periodic Review Board, 25 August 2016, http://www.prs.mil/Portals/60/Documents/ISN560/20160825_U_ISN_560_OPENING_STATEMENTS_OF_DETAINEES_REPRESENTATIVES_PUBLIC.pdf, 1.

[138] Wali Mohammad Private Counsel Statement, [see FN 137], 1.

[139] Wali Mohammad Private Counsel Statement, [see FN 137], 1.

[140] Wali Mohammad Final Determination, Periodic Review Board, [see FN 100].

[141] Wali Mohammad Final Determination, Periodic Review Board, [see FN 100].

and his note of his debts and for leave to show both documents to Wali Mohammed.

4 August 2009. Court orders the government to complete the requested classification review by August 31 2009. After classification review, Government agrees that both documents are unclassified and can be shown to Wali Mohammed.

1 December 2009. Government seeks to amend the Factual Return.

7 December 2009. Wali Mohammed consents.

11 December 2009. Court permits government to amend Factual Return.

15 January 2010. Wali Mohammed files his Traverse. He says that, "[g]iven his desire to expedite this proceeding," he had not opposed the US government's Motion to Amend its Factual Return. However, in doing so, "he expressly reserves his right to contend that the Amendment Exhibits be given no weight."

May 2010-June 2010. Court hears habeas corpus petition in closed session. Wali Mohammed testifies. Closing arguments are made.

October 2010. Government moves to re-open the record in a submission made *ex parte* (ie without Wali Mohammed or his counsel present).

5 November 2010. Court agrees to reopen the record.

25 March 2011. Government files a Supplemental Factual Return.

18 July 2011. Wali Mohammed files a motion for additional discovery, contending he is entitled to see the new materials submitted to the court by the government.

18 October and 3 November 2011. Court grants the motion in part and directs the government to conduct five additional searches.

23 July 2012. Government locates additional information allegedly inculpating Wali Mohammed and files a motion to add this information to the Supplemental Factual Return.

23 July 2012. Court grants government request to add material. However, it is classified as 'Top Secret'. Wali Mohammed's counsel is only cleared to see 'Confidential' and 'Secret' documents. Government files a motion *ex parte* and *in camera* (ie without Wali Mohammed or his counsel or the public present) for an exception to their disclosure duties.

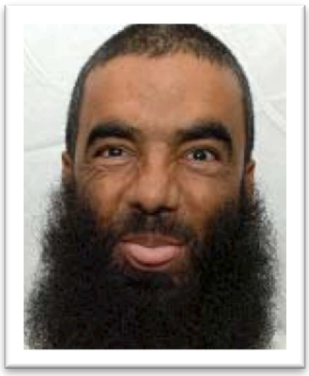
24 August 2012 and 18 September 2012. Oral arguments held in closed hearings. Court rules that the government is not required to disclose the Top Secret materials and can present them in court to the judge.

September 2013. Habeas hearing**.**

3 October 2013. Closing arguments.

8 June 2016. Court denies habeas corpus.

4.2.2 Case 2: Abdul Zahir (ISN753), 14 Years in Detention



- Place of Birth: Hesarak, Logar Province
- Date of Birth: 1972
- Detained by US forces in house raid, 11 July 2002; transferred to Bagram immediately; transferred to Guantánamo, 27 October 2002
- 2010 Task Force ruled he should be prosecuted. Periodic Review Board cleared him for transfer, 11 July 2016; **still in Guantánamo.**
- Documents: http://projects.nytimes.com/guantanamo/detainees/753-abdul-Zahir/documents/9

Summary

Zahir admitted to working as a doorman *(choki dar)* and translator during the Taleban era for an Arab commander, Abdul Hadi al-Iraqi (who was a member of al Qaeda). Before the 9/11 attacks, bin Laden's group was not a household name in Afghanistan and unemployment high; taking a job with an Arab commander was not then especially controversial. The US has produced no evidence that Zahir's role amounted to him being more than just an employee, although it contends he was a "trusted member of al Qaeda." In March 2002, Zahir was in a car from which a grenade was thrown into another car which badly injured one of the passengers, a foreign journalist. The prosecutor in Zahir's military commission trial, in 2006, accepted he had not thrown the grenade. Nor was he accused of any other specific attacks, only of "conspiring to commit war crimes, aid the enemy and attack civilians." (All the trials were

subsequently ruled illegal by the Supreme Court and stopped.) Zahir was in the mass of people who had been on the margins of the Taleban when they were in government. After their defeat, he associated with people who were hostile to foreigners. He may also have been a member of a group trying to organise attacks in the pre-insurgency era. However, if he was, he would have been a very minor player and there is no evidence that he was linked to al Qaeda after the fall of the Taleban. In July 2016, the Periodic Review Board said his role with the Taleban had been "limited" and that he had been "misidentified" as the individual who had ties to al Qaeda weapons facilitation.

Capture

Zahir was detained when US soldiers raided his house after a tip-off that he had chemical or biological weapons.[142] In 2002, this fear was real, although no weapons of mass destruction were ever found in Afghanistan and the suspicious substances found at his house turned out to be salt, sugar, and petroleum jelly.[143] That arrest led to him being interrogated at Bagram where, the US military said, he admitted to "al Qaida activities and associates," although, it contended, "he downplays his role."[144] His Assessment said he was cooperative and forthcoming with background information and information concerning other detainees.

Allegations and evidence

Zahir's account of his life does reveal associations with al Qaeda. The US believes this showed ideological commitment and accused him of being "a trusted member of al Qaida." He has maintained it was an employer/employee relationship and nothing more.

Publically available documents relating to Zahir are sparse. There are documents from his Combatant Status Review Tribunal (statement and transcript) in 2004, and then nothing until 2008 when there is a two-page summary of an Administrative Review Board (the lack of a transcript suggests he did not attend). There is also a WikiLeaked Joint Task Force Guantanamo Detainee Assessment. In other words, we only 'hear' his side of the story once – in 2004.

According to the section of the Assessment which is supposed to be the detainee's account of events, he told his interrogators he had been looking for work in 1997 and got a job looking after the guesthouse of a friend of a childhood friend who was then working with the Taleban military. The work was unsalaried, but there was an adjacent building where he and his family could live and he was given occasional hand-outs from his friend. That friend introduced him to Abdul Hadi al-Iraqi (an al Qaeda commander) who took him on to work at his guest-house in the Wazir Akbar Khan area of Kabul. After a year working there, he began to work exclusively for Abdul Hadi. Zahir told his Combatant Status Review Tribunal in 2004 that:

> *"At the time, I didn't know that Mr. Hadi was a member of Al Qaida. I worked for him as peasant or employee, not a member of the group. My work was to support from my family and children. It was only for employment. It was very simply employment and had no political affiliations."*[145]

He also said: "I was an employee when the Taleban was the government of Afghanistan."[146] According to Zahir, he did not live at the guest-house, but when he was there, he was "usually sitting with the doorman and the other Afghan workers. I could not talk to the Arabs because Mr Hadi would not allow anyone to talk to the Arabs."[147] Zahir moved on to translating for Abdul Hadi. In his Assessment, Zahir is reported as saying he learned Arabic at school.[148] Although not as commonly a spoken second language as Urdu, some Afghans do master Arabic, either learning it in a religious school, or while working in the Gulf or elsewhere in the Middle East. Zahir said his translating jobs involved, "basic stuff, relating to simple matters in Kabul. They [the Arabs] had to deal with the government, the Taliban, like paperwork for cars, that they had to work with the government for, on the lower level."[149] Abdul Hadi told interrogators Zahir had translated when he discussed "operational matters with Taliban commanders… during most of his operational Taliban government meetings and frontline battles."[150]

Zahir also said he had received money belonging to Abdul Hadi al-Iraqi when the commander fled Afghanistan after the fall of the Taleban – about forty thousand dollars in a mixture of currencies. This, he said, he was given to look after by another

[142] Zahir Assessment, 2008, 4.
[143] Zahir Guantanamo Detainee Profile, Periodic Review Board, 3 February 2015, http://www.prs.mil/Portals/60/Documents/ISN753/20160203_U_ISN_753_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf.
[144] Zahir Assessment, 2008, 4.
[145] Zahir CSRT, transcript, 2004, 1.
[146] Zahir CSRT, transcript, 2004, 1.
[147] Zahir CSRT, transcript, 2004, 2.
[148] Zahir Assessment, 2008, 2.
[149] Zahir CSRT, transcript, 2004, 4.
[150] Zahir Assessment, 2008, 5.

person.[151] The US has publically described him as an "al Qaeda paymaster."[152]

Abdul Hadi al-Afghani himself, after his capture in 2007 (rendered by the CIA, but not, according to the Senate report, tortured) allegedly told his interrogators he had hired Zahir because of:

> *"… the complexity of the conversation when discussing operational matters with Taliban commanders. IZ-10026* [Hadi al-Iraqi] *stated detainee worked with him from 1999 until 2002, and translated for him during most of his operational Taliban government meetings and frontline battles. Detainee was paid approximately $35 to $40 US a month to translate."*[153]

From the author's experience of living in Afghanistan during those years, Zahir's account is plausible. Unemployment was high and poverty rife; working with the government or even with Arab fighters was not evidence of ideological commitment. Zahir's testimony that the Arabs kept their distance from Afghan employees also rings true. This was also the case for one Arab media organisation operating at that time, according to Afghan colleagues who described a segregated work place. Abdul Hadi paid Zahir a very poor wage, but, combined with housing, it would have been enough to live on.

It is worth stressing that Arab-Afghan relations – where they existed – were messier and often more ordinary than hindsight might imagine. Inside Taleban-controlled Afghanistan, al Qaeda was not referred to as such; people usually referred to 'the Arabs' or 'the Taleban's guests'. Most foreign fighters, including some Arabs, were not part of bin Laden's group, although, subsequently, all have tended to be lumped together as 'al Qaeda' (see page 7).[154]

According to Hadi al-Iraqi, Zahir had been present on the battlefield translating for him. If that was true, the question would then be whether Zahir's role as translator amounted to "planning, authorizing, or committing," or "aiding" the terrorist attacks that occurred on September 11, 2001, or "harbouring the organizations or persons" [who did authorise, commit or aid the attacks] (text from the AUMF) or that he gave them "substantial support" (Obama's amendment of his authority to detain). He was certainly an employee, but the evidence does not back up the US contention that he was a significant person.

As to his post-2001 actions, his Assessment said Zahir admitted to being "a member of ACM [Anti Coalition Militia] group that formed at the end of March 2002, operating in both Afghanistan and Pakistan," acting as its financial courier, responsible for collecting and disbursing funds to the group.[155] Yet, he vehemently denied this at his Combatant Status Review Hearing in 2004, his first chance to speak publically. He also denied participating in the one specific attack he was accused of – being an accomplice when, in March 2002, a grenade thrown from a car he was riding in into another car left Canadian journalist Kathleen Kenna seriously wounded.[156]

> *"This is a complete lie. I've never taken part in any bomb attacks or any kind of operations. I knew the people who did the bomb attack and how this got around is because I told the Americans the names of those who did the attack. There is no proof, and I have never taken part in the operation, only provided information* [to interrogators]."[157]

Legal proceedings

In April 2006, Military Commission trial proceedings began; Zahir was charged with conspiring to commit war crimes, aid the enemy and attack civilians. The US state alleged he was an al Qaeda paymaster who served as a Taleban translator and was involved in the attack on the foreign journalists, although it accepted that Zahir himself had not thrown the grenade.[158]

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[151] Zahir CSRT, transcript, 2004, 4.

[152] 'Pending court ruling hangs over Guantanamo case', Reuters, 5 April 2006, http://www.oneindia.com/2006/04/05/pending-court-ruling-hangs-over-guantanamo-case-1144202597.html.

[153] Zahir Assessment, 2008, 5.

[154] The author knows three Afghans with Arab friends or acquaintances at this time, driven by curiosity or the opportunity to learn Arabic. All three went on to be journalists; one also worked as an interpreter with US SOF and another has taught at an American university.

[155] The admissions look, from his Assessment, to have been made in an interrogation made just before he left Bagram and possibly again a year after he arrived in Guantánamo. There is a little other detainee testimony on this. Zahir Assessment, 2008, 7-8.

[156] 'A Nation Challenged: Journalists; Reporter Hurt in Afghan Attack', *The New York Times,* 5 March 2002,http://www.nytimes.com/2002/03/05/world/a-nation-challenged-journalists-reporter-hurt-in-afghan-attack.html.

[157] Zahir CSRT transcript, 2004, 3.

[158] 'Pending court ruling hangs over Guantanamo case', Reuters, 5 April 2006, http://www.oneindia.com/2006/04/05/pending-court-ruling-hangs-over-guantanamo-case-1144202597.html, Joel Roberts, 'Alleged Qaeda Member Faces Tribunal', 4April 2006, Associated Press, http://www.cbsnews.com/news/alleged-qaeda-member-faces-tribunal/.

In legal terms, the pre-trial proceedings were wholly unsatisfactory. Zahir's military defence counsel asked which laws were applicable, but, reported the Associated Press, the judge refused to be pinned down. "'Obviously military law is going to have some application," [he] said. "I suppose we will look at military criminal law and federal criminal laws and procedures," and, when pressed, he added: "I'm not going to speculate as to what [set of laws] is or what is not controlling."[159] The Pentagon, although producing copies of documents in English, Arabic and Pashto, reportedly failed to produce them in Zahir's native language, Persian. The judge also had to 'borrow' the defence's interpreter because the court had failed to organise a Persian translator.[160] A short way into proceedings, the Supreme Court ruled that the president lacked the constitutional authority to hold such tribunals. Zahir's trial was stopped.[161]

US plans for Zahir

The 2010 Task Force decided Zahir should be referred for prosecution.[162] There has, however, never been any movement on his case. On 11 July 2015, the Periodic Review Board decided he should be transferred, with some sort of an admission that mistakes had been made:

> *In making this determination, the Board considered the detainee's candor in discussing his time in Afghanistan and involvement with the Taliban, the detainee's limited role in Taliban structure and activities, and the assessment that the detainee was probably misidentified as the individual who had ties to al-Qaeda weapons facilitation.*[163]

Zahir is still in Guantánamo. According to his Assessment, he has "chronic lower back pain, sciatica," and has gone through "hunger striking not requiring enteral feeding, and has a history of major depressive episodes."[164]

4.2.3 Case 3: Obaidullah (ISN762), 14 Years in Guantánamo

- Place of Birth: Dusarak Haiderkheil Village, Khost
- Year of Birth: 1980-1983 (different dates given)
- Detained by US forces in house raid, 21 July 2002 and held in Chapman Forward Operating Base (FOB), Khost; transferred to Bagram, 2 August 2002, transferred to Guantánamo, 28 October 2002
- 2010 Task Force ruled he should be prosecuted. Cleared for transfer by Periodic Review Board, 19 May 2016. Transferred to UAE, 14 August 2016
- Guantánamo Documents: http://projects.nytimes.com/guantanamo/detainees/762-obaidullah/documents/11

Summary

In 2002, after a tip-off about an al Qaeda bomb-making cell in Khost, a number of men were detained, all of whom, except Obaidullah[165] and his former business partner, Boston Karim (case 4), were released many years ago. Obaidullah had confessed to being a member of the cell and also implicated Karim, but retracted this soon after arriving in Guantánamo, saying he had been tortured. In later court testimony, there was some corroboration, that Obaidullah had been subject to sleep deprivation and physical abuse at FOB

[159] Joel Roberts 'Alleged Qaeda Member Faces Tribunal', Associated Press, 4 April 2006, http://www.cbsnews.com/news/alleged-qaeda-member-faces-tribunal/.
[160] 'Pending court ruling hangs over Guantanamo case', Reuters, 5 April 2006, http://www.oneindia.com/2006/04/05/pending-court-ruling-hangs-over-guantanamo-case-1144202597.html
[161] See pages 18-19 for detail on military commission trials. The wounded reporter wrote about her very mixed feelings about the trial system and her long wait for justice. Kathleen Kenna, 'The justice I want for Captive 783', *The Star,* 27 December 2009, http://www.thestar.com/news/insight/2009/12/27/the_justice_i_want_for_captive_783.html.
[162] Letter from US Department of Justice to Savage, [See FN 89].
[163] Zahir Final Determination, Periodic Review Board, 11 July 2015, http://www.prs.mil/Portals/60/Documents/ISN753/20160203_U_ISN_753_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf.
[164] Zahir Assessment, 2008, 1.
[165] The US uses both Obaidullah and Obaydullah in its documents.

Chapman and a service member had been punished for having another service member photograph him as he struck Obaydullah in the head with a rifle. The state later dropped evidence rather than contest his torture claim.

During Obaidullah's long-running habeas petition, much of the evidence against him was shown to be dubious, untrue or obtained under torture, yet the judge continued to believe state assertions and also allowed the state to use secret evidence. The evidence against Obaidullah pointed to him having possibly been a low-level insurgent. Beyond the hearsay evidence of the original informant, whose identity is still unknown, there is no proof that either Obaidullah or Karim had an al Qaeda link. As to Karim, there is no evidence that he was an insurgent at all. The accusation against each man, however, has been used to help 'prove' the other's guilt. The judge in Obaidullah's case said that his "long-standing personal and business relationship with at least one al Qaida operative," was one reason why he must also have been a member;[166] the judge in Karim's case quoted his fellow judge, saying that Obaidullah was more likely than not "a member of an al Qaeda bomb cell committed to the destruction of [US] and Allied forces," as evidence against Karim.[167] Obaidullah and Karim's cases highlight how hollow the habeas process became as judges failed to scrutinise state evidence in any meaningful way.

After Periodic Review Board hearings in 2016, both men were cleared for transfer and Obaidullah was recently sent to the UAE.

Capture

In July 2002, the CIA[168] received a tip-off from 'a walk-in source', i.e. a previously unknown informant, that an al Qaeda IED cell was operating from the house of Obaidullah, a shopkeeper aged 19-22.[169] The raid "netted 23 active anti-tank mines of both Italian and Russian manufacture [and] seven empty mine shells" buried in three feet (about one metre) of earth.[170] US forces also observed two cars, one with dried blood on the back seat[171] (it was contended in later court hearings, although not at his boards or in his Assessment, that Obaidullah had used this car to ferry wounded members of the cell to hospital). They also found, on Obaidullah's person, a notebook with "schematics... for explosive devices."[172]

Obaidullah was detained, along with two cousins who also lived there.[173]

In some of the US military documents, the US asserted the tip-off had specified both Obaidullah and Bostan Karim.[174] However, years later, in 2011, the testimony of the US colonel in charge of the raid was presented in court and he referred throughout to the second man as 'Karim', i.e. in scare quotes.[175] The team rejected the possibility that Obaidullah's brother, Faizel Karim, could have been the second man and made two more raids looking for 'Karim', whom the informant had said also had mines stored at his home. One of the raids was on Boston Karim's house. It found no mines, but US forces did detain his nephew, Shams Ullah, who had shot at them, thinking his home was under attack from personal enemies.[176]

Meanwhile, a month later, Pakistani police detained two Afghans in the tribal areas as they travelled by bus from Khost to Peshawar: Bostan

[166] Judge Leon in denying Obaidullah's motion for relief (i.e. denying his appeal based on what his lawyers said was new, exculpatory evidence. Obaydullah v. Obama, No. 08-1173 (RJL), slip. op. (D.D.C. 30 January 2013). https://lawfare.s3-us-west.amazonaws.com/staging/s3fs-public/uploads/2013/01/ISN-762-60b2-denial.pdf.

[167] Bostan v. Obama, 05-883 (RBW), (D.C.C 12 October 2011), (habeas denied), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv0883-287, 15.

[168] Obaidullah's Assessment gives 'TD', i.e. the CIA, as the source for details on the tip-off and Obaidullah's capture and interrogation. Obaidullah Assessment, 2008, 3-5. Court documents described the raid as carried out by "a military unit which included American Special Operations Soldiers." Bostan Karim, habeas denied, 2011, [see FN 167], 3.

[169] Various dates of birth and ages are given in different military documents.

[170] Obaidullah Assessment, 2008, 3.

[171] Karim Assessment, 2008, 6.

[172] Obaidullah reportedly said the writings and drawings in the book were for a generator, but the colonel recognised they were for "explosive devices" and "[t]he linguist accompanying Colonel's unit also confirmed that that the notebook was a bomb-making manual because "the word ['']bomb['] or ['']mine['] was written on it." Bostan Karim, habeas denied, 2011, [see FN 167], 4.

[173] Osman (ISN 763) and Shir Ali Khan (ISN 764) were taken to Bagram and later released.

[174] For example, "US forces were informed that detainee [Obaidullah] was an Afghan al-Qaida member working with a second al-Qaida member, AF-975 [Bostan Karim], and that the two were planning mine attacks against US forces operating in the Khowst area." Obaidullah Assessment, 2008, 3.

[175] Bostan Karim, habeas denied, [see FN 167], 3-8.

[176] Shams Ullah's CSRT said he had "fought against US and its coalition partners." He had actually just fired on US and Afghan forces raiding his home at night with his Kalashnikov rifle. Shams Ullah CSRT, ISN 783, 2004, 2, http://projects.nytimes.com//detainees/783-shams-ullah/documents/2.

Karim, a seller of plastic flowers, who was also Obaidullah's former business partner, and Abdullah Wazir (ISN 976), the owner of a tyre and car battery shop, both from Khost. After seven months, they handed the pair over to US forces, alleging they were al Qaeda operatives. (For more details on this, see Karim's case, especially pages 42-43.) The US took Karim to Bagram (where he said he was prevented from sleeping for 15 days) and then to Guantánamo. It decided he was the 'Karim' mentioned in the tip-off. Of the seven detainees all supposedly belonging to the same IED cell and held at either Guantánamo or Bagram, the other five have long been released. Obaidullah and Karim's cases are integrally linked. The evidence against Karim was always meagre and what might look at first to be compelling pieces of evidence against Obaidullah – the mines, the notebook and the blood-stained car – have all been questioned, undermined or had to be discarded because of subsequent revelations.

Torture

The US military called Obaidullah a "self-professed member of al Qaeda" and an "admitted associate of an al Qaeda explosives cell leader."[177] In detention, he testified against both himself and Karim. Yet, at the first chance he got to speak publically, his Combatant Status Review Tribunal in 2004, Obaidullah accused the US of having tortured him in Afghanistan and forcing both confession and accusations from him.

> *The evidence says I admitted to being an associate of an Al-Qaida explosive cell leader, I never admitted to that. When the Americans captured me, they bound me to the American area* [sic] *and they began punishing me. They put a knife to my throat, tied my hands and put sandbags on my arms. At the airport in Khost I was walked around all night with the sandbags on my arms. They took me to Bagram where the interrogation and punishment increased. I was very young at that time, so whatever they said, I agreed to.*[178]

The US military has insisted he recanted because of fear of Karim, who arrived in Guantánamo six months later. Obaid said that, after a few months when he knew he wasn't going to be punished in Guantánamo, he "began telling the truth."[179] The dates of his interrogations tend to back up his claim.[180] The military has described Obaidullah as evasive, with an ever-changing testimony, a characterisation of him which judges hearing his habeas petition have accepted (more of which below). However, given what we know of the torture and procedures used by the US military and CIA at this time, (see pages 14-15), Obaidullah's allegations of abuse are credible. Moreover, the state would later drop the testimony it had obtained from him at FOB Chapman in Khost, rather than contest it in court.

Allegations and evidence

There are two accusations against Obaidullah: that he was making bombs and that he was doing this for al Qaeda. If Obaidullah had been making IEDs independently or as a member of a small, unaligned group, the authority to detain him under the Authorisation of the Use of Military Force would not apply. There is some evidence that he might have been a low-level insurgent, but none that he was a member of al Qaeda.

In Obaidullah's public sessions at his Combatant Status Review Tribunal and Administrative Review Boards, his narrative was consistent. He believes he was subject to a malicious tip-off.[181] He also provided what he said were explanations of the evidence against him.

His family, returning refugees from Pakistan after the fall of the communists (Khost fell in 1991, the government in Kabul in 1992), had discovered the land mines when they returned home; they believed the mines belonged to an Afghan army commander, Ali Jan, who had lived in their house during the communist era and also built watch-towers, bunkers and a basement in the house. Obaidullah said that he, then a 7-11 years old boy, and his mother, a widow, had moved the mines away from the house and buried them "on a useless area of our land… about 300 meters from our house."[182] There was no established government at the time, only "warlords", so they had buried the mines because they were afraid they would be punished for possessing them.

[177] See, for example, Obaidullah ARB 2, 2005, 2 and Obaidullah CSRT, 2004, 1-2.
[178] Obaidullah CSRT, transcript, 2004, 2.
[179] CSRT, transcript, 2004, 5.
[180] Obaidullah arrived in October 2002 and Karim in March 2003. About half of Obaidullah's allegations against Karim were made before he arrived at Guantánamo and the rest mainly on the day he arrived, or soon after. The last is dated 22 September 2003, when Karim was already in Cuba. Karim Assessment, 2008.
[181] He named the alleged informers in his first Administrative Review Board, transcribed as "Anwhar and Midwis" [probably Anwar and Mirwais]. ARB 1 transcript, 2005, 10.
[182] Obaidullah CSRT, 2004, 2, 7.

Later, they "even hid them from the Taliban. If I showed them to the Taliban I would have been put in prison."[183] In 2002, when Obaidullah was detained, the United Nations Mine Action Programme for Afghanistan called the country "one of the most mine and unexploded ordnance (UXO)-affected countries in the world."[184] An estimated 850 square kilometres were contaminated by mines and 500 square kilometres was littered with UXO. Every month in 2002, 150-300 people were killed or injured by stepping on mines or UXO. Moving landmines without specialised training or equipment would be dangerous, but could have seemed the only option if they were in the house.

The question of whether or not the landmines were evidence of bomb-making or just leftover ordnance should have been relatively easy to clear up: what did the mines look like? Were they old and deteriorated or were they packed ready to be cannibalised for IEDs? This question does not seem to have been asked. Instead, arguments have centred on variations in Obaidullah's and the military's testimony (how many mines, from which country, buried how many metres from the house? etc.) and whether the variations showed evidence of Obaidullah's lying or were reasonable.

As to the notebook, Obaidullah said he had been forced to join the Taleban in August 2001 and, being too young for the frontline, had been sent to a 'technical school' to learn how to lay landmines for use against the Northern Alliance. After just two days, he said his mother forced him to leave the course. There had been no books, he said, so they were asked to take notes which would be explained to them later in more detail.[185] He still carried the notebook around because, he said, it also had notes and accounts from his shop in it. Lending some weight to his account, Obaidullah's interrogator thought he did not understand what was in the notebook:

> *During a second interview on 21 September 2004, ISN 762* [Obaidullah] *was asked about several references found in the same notebook that held the schematics for detonating land mines. It was apparent to the interviewers that* [Obaidullah] *knew little of what was written in the notebook and the notebook probably belonged to someone else. It appears the notebook either belonged to detainee* [Wazir] *or ISN 975* [Karim].[186]

The interrogator's conclusion has never been mentioned in any of the military reviews or court cases involving Obaidullah, but appears in the WikiLeaked Assessment of one of the other alleged members of the IED cell, Abdullah Wazir,[187] as evidence that he might have written the notes. Because the interrogator's alternative assessment was made in a classified document that was unlawfully disclosed, his defence lawyer could not present it in court. It would also be useful to know what exactly the schematics in the notebook showed: were they for "detonating land mines" (as in the quote above) or "wiring designs for building lethal improvised explosive devices"?[188] Both versions appear in US documents; the first lends weight to Obaidullah's story; the second backs up the state's accusations. There are problems with this evidence, therefore. Even so, the notebook remains the strongest proof that Obaidullah had been intent on making IEDs.

The al Qaeda accusation

As to the second US accusation, that Obaidullah was "a member of al-Qaida… an explosives expert for an IED cell in Khowst, [Afghan] subordinate to senior al-Qaida operative, Abu Layth al-Libi (deceased),"[189] the evidence is insubstantial – his own confession plus testimony from two other detainees speaking under interrogation in Guantánamo, much later, in 2005.[190] Many of the details of this alleged membership are far-fetched, for example that, during the Taleban era, when Obaidullah was a teenager or possibly just into his twenties, he "helped coordinate the movement and activities of various foreign al Qaida operating

[183] Obaidullah CSRT, 2004, 2, 4.
[184] *The United Nations Mine Action Programme For Afghanistan 2002 Annual Report* (emailed to author by a former head of the agency), 7.
[185] Obaidullah CSRT, 2004, 3-4.

[186] This appears in Wazir's Assessment, 2005, http://projects.nytimes.com/guantanamo/detainees/976-abdullah-wazir/documents/11, 5.
[187] Wazir was the other passenger on the bus also questioned and detained by Pakistani police who had handed the broken Thuraya satellite phone to Bostan Karim (case study 4) and was subsequently sent to and released from Guantánamo.
[188] Obaydullah v. Obama, No. 08-1173 (RJL), slip op. 8-9 (D.D.C. 19 October 2010) (habeas denied), https://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2010/10/2010-10-19-Obaydullah-RJL-Slip.pdf, 2.
[189] Obaidullah Assessment, 2008, 1.
[190] They were Adel Zamel Abd al-Mahsen al-Zamel (ISN 568), subsequently released, from interrogations on 20, 26 and 30 October 2005 and Mohammad Kamin (ISN 1045), from an interrogation on 7 November 2005, Obaidullah Assessment, 2008, 5, 6.

in the Khowst area."[191] Or that he hid and relocated to Pakistan 18 Arab al Qaeda members at the start of the allied bombing campaign in 2001; the foreign militants fled later and quite openly.[192] One other association is seen by the military and judges as damning, that is, the short time Obaidullah spent with a missionary organisation, Jamat al-Tabligh (JT) of which Bostan Karim was a committed member. The US military has miscast Jamat al-Tabligh as a "terrorist support entity," even though millions of Muslims in South Asia are members in wholly uncontroversial ways (see pages 43-44). It assessed, therefore, that Obaidullah's "story about travelling to Pakistan under JT auspices" was "a cover story, which is commonly used to facilitate Islamic extremist activities and travels throughout the Middle East."[193]

Legal proceedings: The Military Commission trial

Obaidullah filed his petition for habeas corpus on 7 July 2008. (See pages 40-41 for a timeline of legal proceedings.) This was followed, however, by the US state filing charges for a Military Commission trial (10 September 2008). Despite the Supreme Court having ruled that such trials were not an adequate substitute for habeas corpus, legal proceedings around the trial – which never took place – caused his habeas plea to be suspended for almost two years.

Obaidullah was not charged with any actual attack, rather that he:

> *… did conspire and agree with other individuals, both known and unknown, to commit offenses triable by military commission, to wit: intentionally causing serious bodily injury to one or more persons in violation of the law of war, murder in violation of the law of war, and providing material support to terrorism…"*[194]

The charge sheet cites only his "concealing and storing" the mines and "concealing" the notebook, as the "overt act[s]" which he "knowingly committed" to "effect the conspiracy." There is no more detail. The charge sheet is not only short, but also strange, legally. "Providing material support to terrorism" did not appear in the 2006 Military Commission Act, so Obaidullah was being charged of something which was not a criminal offence.[195] Moreover, nowhere has it been alleged that Obaidullah was preparing to attack anyone except US forces. Such an action would not violate "the law of war" (i.e. International Humanitarian Law), which does not ban attacks on combatants.

The new Obama administration, which came into power in January 2009, was not sure if it wanted to continue with the trial and the judge in Obaidullah's habeas case, Richard J Leon, ruled it should have time to decide what to do. Eventually, the Court of Appeal, on 16 June 2010, ordered Leon to hold the hearing. (The Military Commission charges would later be dropped, on 7 June 2011, without prejudice, meaning the case could be reopened.)

Obaidullah's habeas petition

Before the habeas hearing, on 17 August 2010, Obaidullah's lawyers sought to get the court to compel the government to disclose information about the walk-in source, and whether he was paid money for the intelligence that led to the raid on Obaidullah's home. Judge Leon refused, accepting the government's contention that the information was too sensitive for even Obaidullah's security-cleared counsel to read. The words of this source remain the lynch-pin for the state's assertion that Obaidullah was a member of al Qaeda and therefore had to stay in detention.

The habeas hearing went ahead (30 September and 1 October 2010) and, on 19 October, Judge Leon found that Obaidullah's detention was lawful under Congress' Authorisation of the Use of Military Force (AUMF). He was not convinced by Obaidullah's explanations about the landmines or the notebook. He agreed with the government's contention that Obaidullah had "repeatedly given false and implausible explanations regarding his knowledge of, and involvement with, these explosives, this notebook, and this automobile."[196] He also noted Obaidullah's long-standing personal and business relationship, including their

[191] Obaidullah ARB 2, 2006, 1, and Obaidullah ARB 3 summary, 2007, 1.
[192] Obaidullah ARB 1, 2005, 1; repeated in Obaidullah ARB 2, 2006, 2 and Obaidullah ARB 3, 2007, 2. Arab and other foreign fighters fled on mass through Khost city to the border in November 2001 after Kabul had fallen. Author interviews with eye-witnesses for BBC radio, July 2002. No URL available.
[193] Obaidullah, Assessment, 2008, 6.
[194] U.S. v. Obaydullah, *Charge Sheet*, 9 September 2008), https://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2012/03/Obaidullah_Government_Sworn_Charges.pdf.
[195] For detail, see *The Manual for Military Commissions,* 18 January 2007 (http://www.loc.gov/rr/frd/Military_Law/pdf/manual-mil-commissions.pdf) (Section 4, 18).
[196] Obaidullah habeas denied, 2010, [see FN 188], 8, 9.

involvement in Jamat al-Tabligh, with Bostan Karim whom he described as having "alleged ties to al Qaeda."[197]

> *… the combination of the explosives, the notebook instructions and the automobile with dried blood all fit together to corroborate intelligence sources placing both the petitioner and Boston at the scene aiding fellow bomb cell members who had been accidentally injured while constructing an IED. Combining all the evidence and corroborated intelligence, the mosaic that emerges unmistakeably supports the conclusion that it is more likely than not that* [he] *was in fact a member of an al Qaida cell committed to the destruction of U.S. and Allied forces.*[198]

The term 'mosaic' is important; it is a reference to the theory that, even if individual pieces of evidence are questionable, if they combine to form a convincing case, then judges can overlook the weakness of the individual pieces.[199] The weakest piece of this 'mosaic' was the government's claim that Obaidullah was a member of al Qaeda. It is also the most implausible aspect of the case. The chances of an *Afghan* being a member of al Qaeda at this time are so small that it would need a lot more explanation and evidence than just a tip-off from a walk-in source (see page 7).

Habeas appeals

Obaidullah has made several attempts to appeal. The District Court denied his initial request, made on 24 March 2011. His lawyers then filed an appeal to the Court of Appeals on 17 May 2011 and, on 8 February 2012, based on newly-discovered evidence which they said showed he was not guilty, also filed to reopen the District Court (Judge Leon's) decision.

A three-judge panel of the Court of Appeals heard the appeal (23-24 April 2012,[200] partly in closed session[201]) and, on 3 August 2012, upheld the District Court's ruling that his detention was legal. It rejected Obaidullah's claim that "the pre-raid intelligence reports linking him to al Qaeda are not reliable and have not been sufficiently corroborated," saying the notebook and mines corroborated the al Qaeda allegation.[202] The court agreed that the allegation of ferrying IED cell members to hospital may have been mischaracterised, but said that, even if that evidence was eliminated, the case against Obaidullah would still stand. The government chose to withdraw the statements obtained from him at FOB Chapman and Bagram, rather than contest his allegation that he had been tortured. However, the court rejected Obaidullah's assertion that his statements during the raid had been coerced or mistranslated and rejected his objections to the use of hearsay evidence by saying that precedence had been made during an earlier habeas case[203] that the court "may apply a preponderance of the evidence standard and may admit hearsay evidence."[204] The court, in rejecting Obaidullah's appeal, said:

> *… the intelligence linking Obaydullah to an al Qaida bomb cell is corroborated by the fact that he had a notebook with diagrams of explosives in his pocket. While it is possible that the bombs and notebook can be explained by other circumstances, or that Obaydullah was some sort of "freelance" bomb-maker not linked to al-Qaida – the district court's conclusion that these circumstances sufficiently corroborated the pre-raid intelligence* [i.e. the walk-in source's accusation] *falls well within the realm of reasonableness."*[205]

Being considered a member of al Qaeda, rather than a 'freelancer' is, of course, crucial here, as an independent insurgent would not be covered by the presidential authority to detain.[206]

New evidence or 'a re-hash' of the old?

Meanwhile, new revelations were being made about the case by Lieutenant Commander Richard

[197] Obaidullah habeas denied, 2010, 13, [see FN 188] 13.
[198] Obaidullah habeas denied, 2010, [see FN 188], 13, 14.
[199] Wittes, *The Emerging Law of Detention,* [see FN 73], 112-121.
[200] Benjamin Wittes, Raffaela Wakeman 'Oral Argument Preview: Obaydullah v. Obama' Lawfare Blog, 23 April 2012, https://www.lawfareblog.com/oral-argument-preview-obaydullah-v-obama.
[201] Benjamin Wittes 'Obaydullah Oral Argument Summary', Lawfare Blog, 24 April 2012, https://www.lawfareblog.com/obaydullah-oral-argument-summary
[202] Obaydullah v. U.S., No. 1:08-cv-1173, 15 (D.C. Cir. 3 August 2012) (rejecting habeas appeal), 15.
[203] Al Sabri, 2012, WL 2895585.
[204] Obaydullah rejection of habeas appeal [see FN 202], 27.
[205] Obaydullah rejection of habeas appeal [see FN 202], 17 (legal citations omitted from quotation).
[206] The AUMF authorises military action against "al Qaeda and its associates." "The government must do more than just prove that the detainee was an 'independent . . . freelancer.'" Bostan Karim habeas denied, [see FN 167] and quoting Sulayman v. Obama, 729 F. Supp. 2d 26, 33 (D.D.C. 2010) (alteration in original)), 9.

Pandis of the US Naval Reserve. Obaidullah's military defence counsel in his Military Commission trial had tasked Pandis with investigating the evidence against his client as the case was still officially active. Pandis travelled to Afghanistan and, after investigating the various strands of the state's case against Obaidullah, came up with some interesting new evidence:

- People from Obaidullah's village, wrote Pandis in his declaration to the court, "identified two males who were not originally from the same village, but had lived there for a period, and who were rumoured to have sold false information to Americans. It was stated that those two men later disappeared and it is not known whether they are alive."[207]
- The blood in the car, supposedly from Obaidullah's injured comrades, was reported to have been from Obaidullah's wife. A few days before his arrest, she had gone into labour and, because of multiple checkpoints, had been forced to give birth in the back of the car, on the roadside, with the seats folded down. Obaidullah, it was contended, had not explained this to his interrogators because he considered it taboo to speak about his wife's pregnancy and labour.[208] The car had also actually belonged to someone else (Pandis interviewed the owner). US forces had eventually given the car to the local militia which guarded their base, said Pandis, and Obaidullah´s family were forced to sell land to compensate the owner. Witnesses said they had never seen Obaidullah driving a car or seen the car with the blood stains parked in Obaidullah's compound before the birth of his daughter.[209] Obaidullah had only previously driven tractors.[210]
- Non-family witnesses confirmed that the communist commander, Ali Jan, had lived in Obaidullah's house and one witness said landmines had been stored there. US and Afghan witnesses led Pandis to believe they were buried not 30 metres from house, as claimed by the US military, but 140-160 metres.[211]
- Family and non-family witnesses said Obaidullah had not associated with the Taleban apart from the few days he was forced to go to the Khost Mechanical School. They gave detail about Taleban conscription. Witnesses also said he had only spent a few days there and then had hid from the Taleban.[212]
- As to Obaidullah's allegations of torture, Pandis concluded that "detainees at Bagram during this period in 2002, including Obaydullah, were subject to extraordinarily coercive methods which cause me to question the reliability of resulting statements."[213] He also concluded, "Obaydullah was subject to sleep deprivation and physical abuse while at FOB Chapman." According to US witnesses with personal knowledge, said Pandis, one service member was punished for having another service member photograph him as he struck Obaydullah in the head with a rifle, and the camera was destroyed by US personnel.[214]

The evidence collected by Pandis, although gathered for the Military Commission trial, was presented by Obaidullah's lawyers to request a re-opening of the District Court's decision to reject Obaidullah's appeal.[215] Yet, Judge Leon upheld his earlier decision. He said the elimination of the allegation that Obaidullah had been ferrying insurgents in his car made no difference to the contention that Obaidullah was an al Qaeda member. The judge complained that the lawyers had brought "unidentified witness reports, some second or third-hand, pertaining to events that occurred almost a decade earlier." On 28 January 2013, he dismissed Pandis' evidence as "simply a rehash of evidence that I already considered and dismissed when denying his petition" and said, "Put simply, [Obaidullah] cannot make a silk purse out of a d's ear!"[216]

An attempt to get the Supreme Court involved

On 26 February 2013, Obaidullah's lawyers petitioned the Supreme Court for a 'writ of certiorari',[217, 218] i.e. a request to review the lower

[207] Declaration of Richard Pandis, 8 February 2012, https://s3.amazonaws.com/s3.documentcloud.org/documents/291075/obaydullah-pandis-decl.pdf, 3.
[208] Pandis, [see FN 207], 6.
[209] Pandis, [see FN 207] 6.
[210] Pandis, [see FN 207], 6-7.
[211] Pandis, [see FN 207], 9.
[212] Pandis, [see FN 207], 7-8.
[213] Pandis, [see FN 207], 9, paras 31-32.
[214] Pandis, [see FN 207], 9.
[215] Under Rule 60(b)(2) of the Federal Rules of Civil Procedure.
[216] Obaydullah Denial of Motion for Relief, 30 January 2013, [see FN 146].
[217] They also tried to get the Court of Appeal to reconsider the case (petitioned 17 September 2012, refused, 29 November 2012) on procedural grounds.
[218] A *writ of certiorari* is an order for a judicial review, sent by a higher court to a lower court to review its record of a case ('certiorari' means 'to be more fully

courts' decisions. The writ was based on three issues: Obaidullah's indefinite detention violated the constitution, International Human Rights Law and International Humanitarian Law and could not be justified by declaring a 'War on Terror' that has no end, especially when there was no evidence to suggest that Obaidullah was a present danger; lower courts had presumed government intelligence documents were accurate so he could not dispute the sometimes contradictory evidence used to justify his detention and; the source linking Obaidullah to al Qaeda had not been disclosed, was unknown and could not be verified.[219] As the Lawfare website reported, the writ was a "relatively non-noteworthy development":

> *"… the* [Supreme] *Court has turned away over a dozen different appeals in such cases to date, leaving the impression that they're not at all interested in supervising the merits of the D.C. Circuit's jurisprudence in this field… But, if nothing else, here's one more opportunity for the Justices to not let the D.C. Circuit have the last word, especially as (1) it looks less and less likely that Guantánamo will ever be closed; and (2) we get further and further away from 9/11 and the AUMF."*[220]

Indeed, the Supreme Court did refuse to review Obaidullah's case.[221] His lawyers, however, did not give up. Before the main case had gone to appeal (it was rejected on 3 August 2012), they had already asked for a reconsideration of Judge Leon's decision to reject Pandis' new evidence as a "re-hash" of old evidence (28 January 2013). This thread of the habeas petition came before the Appeals Court in January 2014[222] and Obaidullah's plea that his detention was unlawful was again rejected.[223]

What Obaidullah's failed habeas case shows

Obaidullah's long and tortuous attempts to use the US courts to show that his detention was not legal revealed that the judges were unwilling to question the accuracy of the state's assertions about him. Even as more and more elements of the government's case fell away, Judge Leon and the appeals court judges still presumed the government's evidence and its interpretation of events were accurate. The revelation that Obaidullah had been tortured made no dent in their acceptance of the state's case. Consideration of the two sides' evidence was also skewed. Judge Leon's complaint that Pandis' evidence was based on years-old second and third-hand testimony, for example, was in marked contrast to his acceptance of very similar testimony from the state, for example, what a staff sergeant, who testified in 2006 and 2010, had said he remembered a translator told him Obaidullah had said during the raid years earlier. Judges accepted the government's view that Obaidullah was evasive and duplicitous because of variations in his testimony during different interrogations, while overlooking rather similar inconsistencies in the state's case. Elements of the tip-off that were not true made no impact on the court's acceptance of it overall. Most crucially, the judges failed entirely to question the al Qaeda accusation. This contention still rests entirely on the words of a person who may have been paid for his information and whose identity the court has ensured would be kept secret.[224]

US plans for Obaidullah

The 2010 Guantánamo Task Force decided Obaidullah should be prosecuted, although no

informed'). A denial of the writ means the Supreme Court is content for the lower court decision to stand.

[219] Cindy Panuco, 'HSRR files Petition to Supreme Court for Guantanamo Detainee', Hadsell Stormer & Renick LLP, 1 March 2013, http://www.hadsellstormer.com/blog/2013/03/hsrr-files-petition-to-supreme-court-for-guantanamo-detainee.shtml.

[220] Steve Vladeck 'The Obaydullah Cert. Petition: One More Shot for the Supreme Court…' 1 March 2013, Lawfare, https://www.lawfareblog.com/obaydullah-cert-petition-one-more-shot-supreme-court.

[221] 'Certiorari – Summary Dispositions' (ORDER LIST: 570 U.S.) 12-8932 Obaydullah v. Obama, 24 June 2013, http://www.supremecourt.gov/orders/courtorders/062413zor_n7ip.pdf.

[222] Raffaela Wakeman, 'Oral Argument Recap: Obaydullah v. Obama, Round Two', Lawfare, 15 January, 2014, https://www.lawfareblog.com/oral-argument-recap-obaydullah-v-obama-round-two.

[223] Raffaela Wakeman, 'D.C. Circuit on Obaydullah: New Evidence Unhelpful to Detainee's Case', Lawfare, 24 January 2014, https://www.lawfareblog.com/dc-circuit-obaydullah-new-evidence-unhelpful-detainees-case.

[224] In March, 2013, the UN Working Group on Arbitrary Detentions ruled that Obaidullah's detention was unlawful. 'United Nations Human Rights Council Working Group on Arbitrary Detentions, Opinions adopted by the Working Group on Arbitrary Detention at its 66th Session, 29 April-3 March 2013' (No 10/2013 USA), https://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2013/07/WGAD-Obaidullah-Opinion-No.-10-2013.pdf.

charges were ever made.[225] On 19 April 2016, Obaidullah had his Periodic Review Board hearing and, despite a repetition of all the old assertions that he had received explosives training, fought for al Qaeda, and had answered to the late Arab commander, Abu Leith al-Libbi,[226] the Board decided, on 19 May 2016, to clear him for transfer.[227] On 14 August 2016, he was sent to the UAE.

The Board said it had "some concern with the detainee's failure to demonstrate sufficient candor related to events prior to detention," but was satisfied that any risk could be mitigated, saying Obaidullah had been a compliant detainee, not expressed anti-American sentiment and taken advantage of educational opportunities in Guantánamo. His military lawyer, Marine Major Derek Poteet, said that, not only was he innocent of war crimes, but Obaidullah did not speak Arabic before he got to Cuba, making him an unlikely al Qaida fighter.[228]

Legal timeline for Obaidullah

12 June 2008. Supreme Court (*Boumediene v. Bush)* rules that the removal of the federal courts' jurisdiction to hear petitions for habeas corpus by Guantánamo detainees, under the 2006 Military Commission Act was an unconstitutional suspension of habeas corpus. Detainees can petition for habeas in federal court in a "prompt" hearing.

7 July 2008. Obaidullah files habeas writ in US District court (Judge Leon).

9 September 2008. Charged with conspiracy and providing material support for terrorism for trial by Military Commission (under Military Commissions Act of 2006).

12 November 2008. Government asks for stay or dismissal of habeas proceedings until after trial and any appeals.

2 December 2008. Court grants a stay.

20 January 2009. New Obama administration asks for a 120-day stay in proceedings of Military Commission trials.

24 February 2009. Obaidullah seeks to resume habeas proceedings (to 'vacate the stay'); government opposes.

22 April 2009. Court denies Obaidullah's request, but demands the government submit a status report on Obaidullah's Military Commission case by 17 July 2009.

9 July 2009. Obaidullah again requests a resumption of habeas proceedings.

17 July 2009. Government tells the court the Review Panel has not made a decision on Obaidullah's Military Commission trial.

6 August 2009. Court denies Obaidullah's renewed request to resume habeas proceedings.

10 September 2009. Obaidullah appeals to the Court of Appeals for DC Circuit to resume habeas proceedings.

6 January 2010. Government tells Court of Appeals that Obaidullah's case is appropriate for military commission prosecution. (However, convening authority had not referred the case for trial.)

16 June 2010. Court of Appeals rules there is no reason to deny Obaidullah a "prompt habeas corpus hearing."

17 August 2010. Lawyers file motion of discovery in District Court to compel the government to reveal information on the source, credibility and intelligence of the 'walk-in' source whose tip-off led to Obaidullah being detained.

30 August 2010. Court refuses to compel government to reveal information about the tip-off.

20 September 2010. Obaidullah files his Traverse – his formal response to the government's Factual Return (which lays out its case as to why he should remain in detention).

30 September-1 October 2010. Court hears habeas petition

30 November 2010. Court rules Obaidullah's detention is lawful under the Authorisation of the Use of Military Force (AUMF).

24 March 2011. Court denies motion to reconsider his decision to deny Obaidullah's habeas corpus petition.

17 May 2011. Obaidullah's lawyers file notice of appeal against the court's decision on habeas ruling to Court of Appeals.

[225] Letter from US Department of Justice to Savage, [see FN 89].
[226] Obaidullah Detainee Profile, Periodic Review Board, 23 November 2016, http://www.prs.mil/Portals/60/Documents/ISN762/20151123_U_ISN_762_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf.
[227] Obaidullah Final Determination, Periodic Review Board, 19 May 2016, http://www.prs.mil/Portals/60/Documents/ISN762/160519_U_ISN762_FINAL_DETERMINATION_PUBLIC.pdf.
[228] Carol Rosenberg, 'Guantánamo parole board OKs release of Afghan Obaidullah', *The Miami Herald, 20 May 2016,* http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article78908327.html#storylink=cpy.

7 June 2011. Military Commission charges dismissed without prejudice. Case is still active so defence team continue to investigate and prepare a defence.

8 February 2012. Obaidullah's lawyers file a motion in District Court asking the court to reconsider Obaidullah's petition in the light of new evidence obtained by Richard Pandis of the Naval Reserve operating under guidance of Obaidullah's military defence counsel.

23–24 April 2012. Court of Appeals considers Obaidullah's appeal based on Pandis' investigations, in closed session, then open.

3 August 2012. A three-judge panel at the Court of Appeals upholds the lower court's decision that Obaidullah is lawfully held under AUMF. Redacted version of verdict released on 8 August 2012.

17 September 2012. Obaidullah's lawyers petition Court of Appeal to reconsider his case.

29 November 2012. Court of Appeals refuses to reconsider its decision.

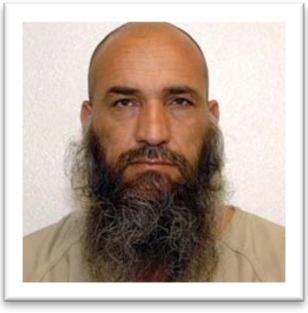
26 February 2013. Lawyers appeal to US Supreme Court to consider the case.

24 June 2013. Supreme Court refuses.

28 January 2013. Habeas appeal based on Pandis' new evidence is denied by the court; judge calls it a "re-hash" of old evidence.

24 January 2014. Court of Appeals rules that the court's rejection of the new evidence and its upholding of the decision to deny Obaidullah's habeas petition was correct and his detention is lawful.

4.2.4 Case 4: Bostan Karim (ISN975), 14 Years in Detention



- Place of Birth: Paktia Province
- Date of Birth: 1970
- Detained by Pakistani soldiers or police (accounts in the US documents differ) at the Khurgi checkpoint in the Pakistani Federally Administered Tribal Areas (FATA), 13 August 2002, and taken to a prison in Islamabad; transferred to US forces, February 2003; transferred to Guantánamo, 6 March 2003.
- The 2010 Task Force ordered his indefinite detention. Cleared for transfer by Periodic Review Board, 2 June 2016; still in Guantánamo.
- Guantánamo Documents: http://projects.nytimes.com/guantanamo/detainees/975-bostan-karim

Summary

Of all the eight cases, that of Bostan Karim, a seller of plastic flowers accused of leading an al Qaeda IED cell, contains the most garbled accusations and factual mistakes. His file is littered with gross inaccuracies, ahistorical assertions and fantastical connections between himself and bin Laden and other insurgent leaders. He was detained by Pakistani police in 2002; they handed him over to the US, saying he matched a description of an al Qaeda terrorist and had possessed a Thuraya satellite phone which, they said, was being used as a detonation device for IEDs. Despite satellite phones being in reasonably common usage in the under-serviced border areas of Afghanistan and Pakistan, neither the US military or judges ever questioned why his possession of one automatically pointed to terrorism. The US military believed he was the second man mentioned by the anonymous informant, whose tip-off led to Obaidullah (case 3) being detained. Obaidullah, almost certainly after being tortured, had accused Karim, his former business partner, of leading the cell. There is no evidentiary basis for the state's assertions that Karim was a member of al Qaeda or even that he was an insurgent, apart from hearsay and double hearsay from other detainees and the assertion, accepted by the judge ruling on his habeas petition, that the quietist missionary organisation to which Karim and millions of other South Asians belong, Jamat al-Tabligh, is a front for al Qaeda. Accused of being a member of both the Taleban and al Qaeda, he told his Combatant Status Review Tribunal in 2004:

> *First of all, I am not a member of the Taleban and I'm not a member of al-Qaida. I'm a business man. I have two stores. In one store, I sell plastic flowers. In the other store, I rent furniture and dishes for special occasions. I am a missionary; I go house-to-house, village-to-village, spreading my religion.*[229]

[229] Karim CSRT transcript, 2004 1.

Capture and torture

Boston Karim was detained by Pakistani police in the tribal areas as he travelled from Khost to Peshawar.[230] The police had asked another man, Abdullah Wazir, to leave the bus for questioning and he had slipped a broken Thuraya satellite phone to Karim, whom he knew from the missionary organisation, Jamat el-Tabligh. Wazir would later tell his US interrogators he had feared the Pakistani police would steal it. If true, this would have been an entirely reasonable concern. Seven months later, Pakistan handed the two men over to US forces saying that Bostan Karim matched the description of an al Qaeda bomb-maker,[231] that the satellite phone was a detonator for landmines and that Wazir had had a suspiciously large amount of money on him (actually only $2,700). This was at a time when bounties were available for such handovers.

Wazir said he had the money so he could buy stock for his shop and had taken the phone to get it repaired.

> *The glass of my cellphone was broken and I was going to get it repaired when I got to Pakistan… Most shopkeepers or wealthy people have a satellite phone. The regular phone is not readily available and most people have a satellite phone. For communication, they must have one.*[232]

No one, including the judge in Karim's habeas petition years later, asked if claiming to be taking a satellite phone to be mended in Pakistan was actually so implausible that it amounted to evidence of terrorist intent. The phones may have been commonly in use by al Qaeda and other extremists, as alleged,[233] but also by anyone else in Afghanistan with money and the need to communicate. Mobile phones did not arrive in Khost until 2005.[234] No one has ever explained either why a Thuraya phone might be used as a detonator, or why an insurgent would want to take a detonator *out* of Afghanistan.

The US kept Karim initially in Bagram, where he said he was prevented from sleeping for 15 days and then to Guantánamo. It had decided he was the leader of an al Qaeda IED cell, the 'Karim' mentioned by the informant whose tip-off led to Obaidullah (case 3) being detained in Khost. From this point onwards, instead of being linked to Wazir (who was subsequently released), Karim's fate came to be bound up with Obaidullah's who, almost certainly under torture, had confessed to being a member of the cell and said Karim had led it. (For more details on this, see pages 33-35.)

Allegations and evidence

According to Karim's Joint Task Force Guantanamo Detainee Assessment, he is:

> *… assessed to be an al-Qaida operative and leader of an improvised explosive devices (IED) cell in Khowst, Afghanistan. Detainee worked directly for senior al-Qaida member and operational planner … Abu Layth al-Libi. Detainee planned IED attacks against US and Coalition forces in the Khowst area. Detainee is a veteran extremist who has a long association with the Taliban and other ACM* [Anti-Coalition Militia] *groups. Detainee is an admitted member of the Jamaat Tablighi (JT), through which he probably made contact with al-Qaida.*[235]

Despite the fact that Obaidullah retracted his testimony saying it was made under torture (see pages 34 and 39), it has remained the foundation of the state's case against Karim. Obaidullah had testified that, among other things, Karim had taught him how to make bombs and showed him where to plant them, had been planning attacks including getting a suicide bomber to drive a large truck full of explosives to Kabul, and had fought in the jihad with 'Jalaluddin' (assessed to be Jalaluddin Haqqani). There is little internal logic to the accusations.[236] Only double hearsay links him to his supposed commander, Abu Leith al-Libbi,[237] although this is asserted as fact in his Assessment and Administrative Review Boards. Finally, Karim has scarred hands, consistent, said a doctor with

[230] For linked details to this case, see case study 3, especially pages 33-35.
[231] Karim Assessment, 2008, 3.
[232] Wazir CSRT transcript, 2004, 5.
[233] An analyst said in his Assessment they were "common communication devices for al-Qaida and extremist organizations operating in Afghanistan… A standard ploy of extremist was to break the front plate thinking exploitation of the phone is compromised if the plate is unreadable." Karim Assessment, 2008, 3.
[234] Information from a director of the mobile phone company which established the first cellular network in the province. Email communication with author, 10 July 2016.
[235] Karim Assessment, 2008, 1,2.
[236] For example, Obaidullah allegedly told his interrogators the Taleban had forced him to undergo training (August 2001) and, to gain their trust, he had allowed Karim to bury landmines in his yard. Why getting the Taleban regime's trust was needed is not explained, nor why they wanted him to bury landmines in a private compound at least a day's travel from any frontline. Karim Assessment, 2008.
[237] Karim ARB 4, 6.

an explosive injury, or, as Karim says, with a crawling infant touching a burning hot stove.[238]

Nowhere does the US claim Karim carried out any specific attacks. The assertions in this respect are particularly weak and vague, for example:

> *The detainee is said to have told several people that he was preparing to conduct command-detonated mine attacks on US forces. Shortly after this threat, US Forces discovered and destroyed in place two apparently command-detonated probably plastic shelled, anti-tank mines that had been placed in holes on a highway in Afghanistan.*[239]

Far-fetched accusations: Jamat al-Tabligh and veteran extremism

Karim's file contains multiple instances of factual errors and misunderstandings. The most damning of these is the US military's insistence that the missionary organisation, Jamat al-Tabligh, is a front for al Qaeda, a "priority 3 terrorist support entity,"[240] which "support[s] Islamic terrorist organisation [sic] in south and Southeast Asia under the cover of conducting religious activities [and] is closely aligned with other Pakistani terrorist groups and the al-Qaeda network." The Jamat al-Tabligh 'accusation' comes up in several files, but is the most damning for Karim.

Al Qaeda and Jamat al-Tabligh are actually at polar extremes of Islamic organisations. Jamat al-Tabligh regularly comes in for criticism and even persecution from jihadist groups because of its quietist outlook, as Arsalan Khan, an academic and specialist on the movement, explains:

> *Jamat-e Tablighi elders often take a stance against jihad from the pulpit: one can easily find recordings of these speeches (bayan) at any Tablighi center. Their general stance is that this is the age of preaching (dawat) and not the age of jihad, and that the terrorism of Al Qaeda etc does not meet the legal criteria for proper jihad anyway.*
>
> *That said, the Jamati Tabligh is a very large and open network so the idea that extremists might infiltrate it is of course entirely possible. Literally, anyone can participate in it. I imagine that where you have an insurgency and where jihadist militancy is thriving, the boundaries between Tablighis and militants could become more blurry. But, still, the idea that participation in the Jamati Tabligh is necessarily evidence for militant extremism is really quite absurd... Hundreds of thousands of people participate in the Jamati Tabligh in Pakistan. If indeed a causal link could be made between Jamati Tabligh and terrorism, we would be in some serious trouble.*[241]

In Swat in 2007, when the Pakistani Taleban (TTP) took over, they targeted the Jamat al-Tabligh and banned its activities. The group also had a difficult relationship with the Afghan Taleban when they were in government. It banned or tried to clamp down on its meetings,[242] as Karim recalled from his own experience:

> *The Taleban came in and tore down our tents and speakers... The Taleban told us we were not strong because we weren't fighting against Americans. Therefore the Taleban gave us a hard time. The Taliban were upset because no one attended their meeting and people from all over attended our missionary meeting.*[243]

Karim told the same military panel, that, as far as he knows, it is not illegal, even in the US, for people to preach – but to no avail. Having miscast Jamat al-Tabligh as an extremist, al Qaeda-linked organisation, Karim's membership of it is, alone, enough to incriminate him. Further evidence that Karim is "a veteran extremist" gets even stranger, however, for example:

> *A source, who was a Hezb-e-Islamic commander, stated the individual the detainee's uncle worked for was the leader of Hezb-e Islami during the Afghan-Russian war, his uncle was with Hezb-e Islami, one of the seven Al Qaida terrorist groups operating in Pakistan.*[244]

Comment: Hezb-e Islami was one of the seven *Afghan mujahedin* groups operating in *Afghanistan,* during the Afghan-Soviet war. The US backed it at the time. This was years before al Qaeda was founded.[245]

[238] Karim Assessment, 2007, 3.

[239] Karim's response was: "I am not aware of this and I don't understand this. I have not told anyone anything. It is not a fact; it is not real. I am a poor shopkeeper. These things are too far away from me. I hate these things." Karim ARB 1 Transcript, 2005, 4.

[240] Karim Assessment, 2008, 2.

[241] Email correspondence with author 30 September 2015. Arsalan Khan is visiting assistant professor in anthropology at Union College, Schenectady, New York, USA.

[242] Author interview with former civil servant in the Taleban foreign ministry, Kabul, 28 September 2016.

[243] Karim CSRT Transcript, 2004, 1.

[244] Karim ARB Round 3, 2007, 1.

[245] Karim corrects the ARB saying his uncle was actually a small sub-commander with a different group, Hezb-e Islami Khales. Karim ARB 2 transcript, 2006, 6.

In the same Administrative Review Board in 2007, the military asserted the following 'connections':

> *The detainee admitted meeting an individual* [a reference to Jalaluddin Haqqani] *during the time of the Taliban when all the shops in the bazaar were closed for a meeting that the individual attended.* [This] *individual... and a second individual* [a reference to Gulbuddin Hekmatyar] *were identified as forming an alliance with support, guidance and funding provided by al Qaida and the Jamat Ulma Islami* [sic]*. The second individual... founded Hezb-e Islami Gulbuddin as a faction of the Hezb-e-Islami party in 1977. Hezb-e Islami Gulbuddin... had long established ties with Usama Bin Laden. A source stated the Jamiat-Ulmar-Islam* [sic] *political organization was a Pakhtoon tribe* [sic] *from Pakistan, which regularly recruited from a mosque in Abdabot* [sic]*, Pakistan. After Friday prayers, members of the organization solicited for volunteers to fight in the jihad.* [Which jihad? When? What does this have to do with Karim?][246]

Comment: Karim's attendance at a presumably obligatory shop-keepers' 'town hall' meeting in Khost city with the then paramount commander in the province, Jalaluddin Haqqani, is used to link him to Haqqani, Hekmatyar, bin Laden and the Pakistani jihadis. Along the way, the military gets the name of the Pakistani religious party, Jamat-e Ulema-ye Islami, wrong twice and calls it a tribe, misspells Abbottabad and creates a fantasy alliance between Haqqani and Hekmatyar, and fantasy ties between Hekmatyar and bin Laden.

From the same review board, we also have this similarly bizarre string of 'connections':

> *The JT* [Jamat al-Tabligh] *is a terrorist, AQ aligned group* [sic]*. A source said Bostan was a member of JT* [he is open about being a member]*. A source observed the detainee trying to recruit men to join JT. A source said it was "common knowledge" that JT was responsible for assisting foreigners in Afghanistan. A source stated that on 1 January 2001... JT members provided assistance to him and other unarmed Taliban Arab fighters. The Jamat-el-Tabligh members transported Taliban Arab fighters across the border from Zormat Afghanistan to Lahore Pakistan. Jamat-al-Tabligh also provided the source housing in Lahore, Pakistan.*[247]

The date is wrong. In January 2001, the Taleban were still in power. Arabs generally left Kabul through Khost to the border *en masse* around 13 November 2001 when Kabul fell.[248] Anyway, the border was then open; there was no need to smuggle anyone. There is no border crossing at Zormat and anyway it is in the neighbouring province of Paktia. The Taleban did not have Arab members.

Karim repeatedly tries to use the hearings to get justice, answering questions, trying to clarify misunderstandings and repeatedly demanding that the boards provide evidence for their allegations and allow him witnesses. "You don't have any proof that I was al Qaida," he says in his first hearing, "because I wasn't."[249]

The evaluation of Karim's intelligence value in his 2008 Assessment was that he could "provide operational details about al-Libi, who is currently involved in al-Qaida terrorist planning, and possibly other al-Qaida and ACM leaders."[250] Note the present tense used for al-Libbi, who by this point was four months dead,[251] as indeed had been pointed out on the front page of the Assessment. Scraping the barrel, surely, the US also believed Karim could be exploited for information on "ethno-linguistic groups in Afghanistan."[252]

Legal proceedings: The habeas petition

Karim petitioned for habeas corpus on 3 May 2005. The case was heard by Judge Reggie B Walton of the District Court of Colombia over six years later, on 12 October 2011. He ruled that Karim's detention had been lawful under the Authorisation of the Use of Armed Force.[253] The judge accepted the US state's interpretation of its evidence, that the Thuraya telephone was a bomb detonator without question. Even though Obaidullah has a brother called Faizel Karim, and no IEDs were found in Bostan Karim's house (the original tip-off had said there were two IEDs in "Karim's house"), Judge Walton said it was immaterial to the case whether Bostan Karim was the Karim identified by the anonymous source. Instead, he ruled that Karim was detainable because of "the following facts, all of which are admitted to by the petitioner":

[246] Karim ARB 3, 2006, 3.
[247] Karim ARB 3, 2007, 3.
[248] Eye-witnesses account who described the mass exodus of Arabs through Khost city on to the border in November 2001 after Kabul had fallen. Author interview for BBC radio, July 2002. No URL available.
[249] Karim CSRT transcript, 2004, 2.
[250] Karim Assessment, 2008, 9.
[251] Al-Libbi was killed in an "explosion on 29 January 2008 in the FATA" Karim's Assessment, 2008, 1.
[252] Karim Assessment, 2008, 10.
[253] Bostan Karim, habeas denied, 2011, [see FN 167].

> *(1) that the petitioner was a member of the Jamaat al-Tablighi;*
>
> *(2) that the petitioner met Obaidullah and Wazir through the Jamaat al-Tablighi;*
>
> *(3) that immediately prior to his and the petitioner's capture by Pakistani authorities, Wazir was in possession of a broken cellular telephone and a large sum of cash while riding on a bus from Miram Shah to Peshawar;*
>
> *(4) that Wazir gave the telephone to the petitioner as he was exiting the bus to be searched by Pakistani authorities;*
>
> *(5) that the petitioner attempted to hide the telephone upon receiving it from Wazir; and*
>
> *(6) Wazir's explanation to the Pakistani authorities that "he was carrying a broken phone" because "the phone could only be repaired in (Pakistan), since no one" in Afghanistan could repair the device.*
>
> *As the Court explains below, these facts, when viewed collectively, demonstrate that the petitioner was more likely than not a 'part of' al-Qaeda.*[254]

The judge said he acknowledged "the Circuit's statement that there may be individuals associated with the Jamat al-Tabligh 'who are not affiliated with al Qaeda,'" but pointed to Karim's 'admission' of membership and of his relationships with Obaidullah and Wazir having resulted from their involvement with the organisation. "This is not an insignificant fact," said the judge, as Obaidullah had been found "by Judge Leon of this Court" to be, more likely than not, "a member of an al Qaeda bomb cell committed to the destruction of [United States] and Allied forces." Given Karim's possession of a possible "detonation device," the judge found "the petitioner's involvement with the Jamaat al-Tablighi to be hardly innocuous."[255]

The court decided there could be no reason for Wazir giving his phone to Karim unless it was a device to set off bombs and there could be no reason for Karim to hide it "from the Pakistani authorities," unless it was being used as a "detonating device."[256] The judge dismissed his fear that the Pakistani police would steal it. "Wazir's possession of the telephone," the judge says, "not only implicates him as part of al Qaeda; it also inculpates the petitioner."[257] (Wazir, by this time had been deemed safe enough to be sent home to Afghanistan.)

> *To be sure, it is perhaps possible that an innocent reason, or several innocent reasons, might explain the petitioner's involvement with a Terrorist Support Entity. His unexplained chance encounter with an acquaintance from that organization at a bus stop, the other individual's possession of a large sum of money and an inoperable cellular telephone, that individual's decision to give possession of the telephone to the petitioner rather than his money to avoid its seizure by government security officials, and the petitioner's decision to conceal the telephone. But,* [and here the judge quotes another case, Uthman v. Obama] *'the far more likely explanation for* [this] *plethora of damning circumstantial evidence is that* [the petitioner] *was part of al Qaeda.'*[258]

Karim's case underlines how extremely easy it was in 2002 for an Afghan to be denounced as a member of al Qaeda, and to be handed over by Pakistan and others to US forces. It also shows how difficult it could be for the US military and US courts, to interrogate this accusation in any meaningful way.

US plans for Karim

The 2010 Task Force deemed it was necessary to continue to detain Karim indefinitely.[259] No reasons were given. The detainee profile presented at his Periodic Review Board hearing on 3 May 2016 couched all the allegations against him with the word 'probably'.[260] On 2 June, the Board, despite believing he presented "some level of threat in light of his past activities and associations," decided to transfer him, noting he had been "highly compliant while in detention, has not expressed any intent to reengage in extremist activity or espoused any anti-US sentiment that would indicate he views the US as an enemy."[261]
He is still in Guantánamo.

[254] Bostan Karim, habeas denied, 2011, [see FN 167], 12-13. Omits court citations of evidence.
[255] Bostan Karim, habeas denied, 2011, [see FN 167], 14-15.
[256] Bostan Karim, habeas denied, 2011, [see FN 167], 17.
[257] Bostan Karim, habeas denied, 2011, [see FN 167], 16.
[258] Bostan Karim, habeas denied, 2011, [see FN 167], 17-19.
[259] Letter from US Department of Justice to Savage, [see FN 89].
[260] Karim Guantanamo Detainee Profile, Periodic Review Board,23 November 2015, http://www.prs.mil/Portals/60/Documents/ISN975/20151123_U_ISN_975_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf.
[261] Karim Final Determination, Periodic Review Board, 2 June 2016, http://www.prs.mil/Portals/60/Documents/ISN975/20160602_U_ISN_975_FINAL_DETERMINATION.pdf.

4.2.5 Case 5: Mohammad Kamin (ISN 1045), 13 Years in Detention

- Date of birth: 1978
- Place of birth: Plasai Inzarkai village, Khost
- Detained by Afghan forces, 14 May 2003; transferred to Guantánamo, 21 November 2003
- 2010 Task Force ordered his indefinite detention; cleared for transfer by Periodic Review Board, 11 February 2016. Transferred to the UAE, 14 August 2016
- Guantánamo Documents: http://projects.nytimes.com/guantanamo/detainees/1045-mohammed-kamin/documents/9

Summary

The case against Mohammed Kamin, that he was a militant with al Qaeda and other groups, is flimsy in the extreme; it shows how easy it was in 2003 to end up in Guantánamo and to be left lingering there. He was detained by Afghan forces in Khost city, allegedly with a GPS device with suspicious grid points stored on it. As to whether he actually possessed this GPS, the evidentiary chain is missing. From hints in various documents, it looks likely he was detained by an Afghan force which, up to the present day, is notorious for human rights abuses, including the torture of detainees. Whoever picked Kamin up, the allegations against him are garbled. He is accused of being a member of, or affiliated to five different terrorist groups, Afghan, Arab and Pakistani, to have participated in weapons, explosives and operational training and to have worn a suspicious make of watch. All the detail of the allegations comes from what he allegedly confessed to. Some of it is clearly impossible, for example, smuggling metre-long rockets through checkpoints under a burqa.

Capture

Kamin, a 25-year-old imam, and alleged al Qaeda militant, chose to stay silent during military boards and did not try to petition for habeas corpus. This means we only have the US version of events, which is full of holes, including concerning his capture. He was reportedly detained on 3 May 2003, at a checkpoint in downtown Khost with a handheld GPS device with "stored grid points of key target locations along the Afghan/Pakistan border." An analyst noted: "It is rare for an Afghan or a lower-level individual to possess a GPS device." Kamin reportedly said he was transporting the device for someone else, an Abdul Manan. The Assessment notes: "No further capture information is available."[262]

We do not know who captured Kamin; his Assessment uses the passive voice: "…detainee was stopped… he was detained."[263] However, from pieces of information in other documents, it later became apparent that Kamin was picked up by Afghan forces who handed him over to the US military. His later Administrative Review Boards claimed that Kamin "led an Afghan Army Unit to the buried location" of rockets, which were "originally intended to be used in the attack on a coalition force compound."[264] His defence lawyer at a military court, held years later in Guantánamo, would reveal more information about his initial capture:

> *Captain Clay West, who acts as co-defense counsel, raised yet another thorny issue: two Afghan men who initially interrogated Kamin can not be found by the U.S. government for questioning. West suggested that these men, who were on the U.S. payroll, may have "softened up" Kamin and they ought to be questioned by investigators to determine what role any abuse may have played in subsequent statements.*[265]

In 2015, documents for his Periodic Review Board said "Afghan authorities captured him."[266] The most likely force looks to have been the 25th Division of the army which was then made up of former PDPA (communist regime) soldiers. There was a national scheme to get rid of militias in these years, but the 25th escaped being disarmed, demobilised and reintegrated (DDR) because of its strong ties to US forces. Instead, it was rebranded as the Khost Protection Force, one of the ad hoc

[262] Kamin Assessment, 2005, 2.
[263] Kamin Assessment, 2005, 2.
[264] Kamin ARB 2, 2006, 2; Kamin ARB 3, 2007, 4.
[265] David Danzig, 'If You Believe Guantanamo Makes Us Safer You Should Have Been Here Today' *The Huffington Post,* 18 November 2009, http://www.dailykos.com/story/2008/10/27/643972/-The-Defendant-Who-Wasn-t-There#.
[266] Kamin Guantanamo Detainee Profile, Periodic Review Board, 23 April 2015, http://www.prs.mil/Portals/60/Documents/ISN1045/150423_U_ISN1045_GOVERNMENT'S_UNCLASSIFIED_SUMMARY_PUBLIC.pdf.

militias known as 'campaign forces' which answer to US Special Operations Forces or the CIA, rather than to an Afghan government chain of command. The Khost Protection Force has been the subject of numerous accusations of human rights abuses, including the torture of detainees (this, according to the United Nations),[267] up to the present day.[268] Kamin's place of origin appears to be in the Zazi Maidan district of Khost, the same district and tribe of the two senior men in the 25th Division, Khail Baz and Habib Nur, an indication that local rivalries may have been behind his detention.

Allegations and evidence

Kamin is accused of affiliation with a multiplicity of terrorist organisations, not all of which have existed.

> *It is assessed detainee is a key member of the Anti-Coalition Militia (ACM) and/or the Al-Qaida Network. Detainee has participated in weapons trafficking, explosives training, operational planning, and attacks against US and Coalition forces in support of the Al-Qaida network. Detainee is affiliated with Al-Qaida, the North African Extremist Network (NAEN), Taliban, and Jayshe-Mohammed (JEM) terrorist Organizations and leaders; further more detainee has admitted ties to the Harakat ul-Mujahidin (HUM).*[269]

Such a list is not unusual in the Assessments, yet nowhere is it explained why or how one man could be affiliated with so many groups. From intelligence and legal perspectives, such allegations of multiple, overlapping memberships of disparate (Afghan, Arab and Pakistani) organisations make absolutely no sense. Usually, it is chains of command which form the basis for both trying to understand an enemy like al Qaeda or the Taleban, and for making a case for war crimes having been perpetrated. Particularly perplexing – and it happens throughout the Assessments – is the use of 'ACM', Anti-Coalition Militia, written in capitals as if it were an actual group rather than a description of a type of organisation, and NAEN, the North African Extremist Network, which also only exists as a US intelligence acronym.

Reading on through the detail of Kamin's Assessment and the other Guantánamo documents, however, it becomes clear that the evidence of his involvement in terrorism lies in his own statements made under interrogation. It is this which places him as, for example, having been working with al Qaeda, the Taleban, JEM, HUM, NAEN and ACM, as buying and selling weapons to and from "ACM personalities," learning to make IEDs, looking over maps with al Qaeda commander Abu Laith al-Libi, and receiving payment for carrying out attacks.

The lack of *any* corroborating evidence for the detail of the allegations against Kamin make them look, at best, flimsy and vague, and, at worst, fantastical.

Curiously, the minutiae of allegations made against Kamin grew while he was in Guantánamo. By 2006, the summary of his Administrative Review Board hearing (which he appears not to have attended) has all sorts of fresh details about him, which are far-fetched enough to make one wonder if he was deliberately making them up as a form of private resistance. For example: "The individual met with the Taliban Supreme Leader after the war against the Soviets…"[270] Kamin, at this time, was aged between 11 and 16; Mullah Omar was a village mullah in Sangisar, Kandahar, several days' journey away, through a war zone. Kamin also apparently told his interrogators that, around March 2003, he and four others bought "eight BM-12 Russian-made rockets" for five dollars each (extraordinarily cheap) and then: "…he and three individuals wore women's burqas to smuggle the rockets through a

[267] In its 2015 report into the torture of conflict-related detainees, UNAMA said it "found that five detainees who had been arrested by the Khost Protection Forces (KPF) together with international military forces and detained at the US military base in Khost (CIA Base Camp Chapman) were subjected to ill-treatment by the US-created and funded local security force." *Update on the Treatment of Conflict-Related Detainees in Afghan Custody: Accountability and Implementation of Presidential Decree 129,* United Nations Assistance Mission in Afghanistan United Nations Office of the High Commissioner for Human Rights, February 2015, http://www.ohchr.org/Documents/Countries/AF/UNAMA_OHCHR_Detention_Report_Feb2015.pdf, 72.

[268] The group is still operating under CIA command, reported *The Washington Post*, "The highly secretive paramilitary unit has been implicated in civilian killings, torture, questionable detentions, arbitrary arrests and use of excessive force in controversial night raids, abuses that have mostly not been previously disclosed." Sudarsan Raghavan, 'CIA runs shadow war with Afghan militia implicated in civilian killings', *The Washington Post,* 3 December 2015, https://www.washingtonpost.com/world/cia-backed-afghan-militias-fight-a-shadow-war/2015/12/02/fe5a0526-913f-11e5-befa-99ceebcbb272_story.html. See also David Jolly, 'Civilian Deaths Raise Questions About C.I.A.-Trained Forces in Afghanistan' *The New York Times, 3 December 2015, http://www.nytimes.com/2015/12/04/world/asia/afghanistan-civilian-casualty-khost.html*.

[269] Kamin Assessment, 2005, 1.

[270] Kamin ARB 3, 2007, 1.

checkpoint before traveling to Landar Village."[271] Each rocket being a metre long, it is difficult to picture how a burqa could have helped conceal them.

The final piece of evidence against Kamin was his make of watch, a Casio model F_91, which "has been used in bombings that have been linked to al Qaida and radical Islamic terrorist improvised explosive devices."[272] This model of watch has been cited as evidence in the cases of more than fifty of the Guantánamo detainees, as it can be used as a timer in bomb-making. The appeals court also decided that possessing it was evidence, in itself, of terrorist intent.[273] The Casio F_91 is also a global bestseller, a cheap watch owned by millions.[274]

Legal proceedings: The Military Commission trial

Kamin's Military Commission trial (under the Bush era 2006 Military Commissions Act) was a slipshod affair legally, but did provide the one opportunity where we could hear a little of his side of the story. Forcibly extracted from his cell to attend a pre-trial hearing on 22 May 2008, as Jamil Dakwar from the American Civil Liberties Union (ACLU) reported, he arrived in the court room with minor bruises across his face and neck, cuffed and in shackles; the judge said Kamin had tried to spit and bite one of the guards.

> *Throughout today's hearing... Kamin asserted in his native language, Pashto, that he is innocent, that he has no links to al Qaeda, and that all the allegations against him are false. Kamin said at his hearing that before his arrival in Guantánamo he was held in Bagram, the notorious U.S. military air base in Afghanistan. He also said, surprisingly, that he came to Guantánamo of his own free will. He explained that he made this decision after he was told that people at Guantánamo would help him. Soon after Kamin's arrival at Guantánamo, he realized that his situation had gone from bad to worse. He told his military lawyer that it was like moving from under the pouring rain to being placed under the gutter.*[275]

Three months earlier, Kamin had been charged:

> *… that between January and May of 2003,* [he] *provided material support to terrorism by joining the terrorist organization al Qaeda and receiving training at al Qaeda training camps on making remote detonators for improvised explosive devices (IEDs), in modifying military ammunition, and on use of small arms for attacks against American and Coalition forces.*[276]

The charge of 'providing material support to terrorism' always looked like an attempt to get round the fact that the US had no evidence that detainees like Kamin had actually carried out any specific attack, whether harming civilians or US forces. That year and the next, pre-trial issues rumbled on amid continuing confusion, as the court tried to sort out rules and procedures. On 27 October 2008, the judge gave the state more time to produce the documents, saying, "This is not a situation where you have a guy in pre-trial confinement or awaiting charges so he can get on with his life." This highlighted "the bizarre nature of the proceedings," reported another representative from the ACLU, "in which Kamin has been detained for more than five years and can remain detained even if he were found not guilty."[277] A year later, at another pre-trial hearing on 18 November 2009, the defence was still waiting for state evidence.

> *The prosecution, more than 1.5 years into formal legal proceedings against Kamin, recently provided an interrogation log which shows that he has been interrogated 17 times, yet summaries and/or transcripts of what was said at those meetings have only been provided to the defense for four sessions. "This is elemental stuff,"* [Kamin's defence attorney, Navy Lieutenant Commander Richard] *Federico told the court. Moreover, as one observer, described it, rules were unclear so there was, "a making-it-up-as-we-go feel to these proceedings which is inevitable for a*

[271] Kamin ARB 2, 2006, 2.
[272] Kamin ARB 3, 2007, 3.
[273] Al Odah v. United States, 2009, [see FN 126].
[274] Denise Winterman, 'Casio F-91W: The strangely ubiquitous watch', *BBC News Magazine,* 26 April 2011, http://www.bbc.com/news/magazine-13194733.
[275] Jamil Dakwar, Director, ACLU Human Rights Program, 'Boycott', American Civil Liberties Union website, 22 May 2008, https://www.aclu.org/blog/national-security/boycott.
[276] 'Charges Sworn Against Detainee Mohammed Kamin', News Release No: 195-08, Department of Defence website, 12 March 2008, http://archive.defense.gov/releases/release.aspx?releaseid=11748.
[277] Judy Rabinovitz, 'The Defendant Who Wasn't There' 27 October 2008, American Civil Liberties Union website, https://www.aclu.org/blog/speakeasy/defendant-who-wasnt-there.

system of trials for which the Congress, courts and executive keep changing the rules."[278]

On 11 December 2009, the charges were dropped (without prejudice, meaning the case could be re-opened). Pentagon officials said they would re-file the charges, but never did. It is not known why the charges were dropped, or why they were not re-filed.[279] The charge of 'providing material support to terrorism' would be thrown out as non-indictable in a 2012 ruling by an appeals court which said it was not a war crime and new laws could not retrospectively punish actions not illegal at the time.[280]

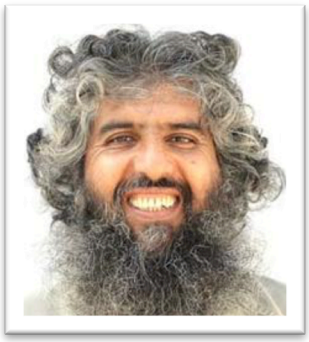
US plans for Kamin

The Guantánamo Task Force decided in 2010 that Kamin should be held indefinitely and without trial.[281] In 2015, Kamin became the first Afghan to go in front of the Periodic Review Board which heard the same allegations against him, of belonging to al Qaeda and other groups and of being a cell leader and explosives expert. There was as an acknowledgment, finally, that "[i]nformation about AF-1045's activity before detention is derived entirely from his own statements, some of which contradict each other."[282] Rather than challenge the 'facts' of his case, however, his lawyers took the tactic of humanising Kamin, emphasising his weakness and absence of threat and the support he had received from family, Afghan politicians and US military officers.[283] The strategy worked.

… the Board appreciated the detainee's high degree of candor regarding his past activities and acknowledgement of mistakes that led to his detention. The Board noted that the detainee has been one of the more compliant detainees at Guantanamo and there is an absence of evidence that the detainee has expressed extremist views while in the camps.[284]

Kamin is a man who, in the words of one of his defence attorneys, "almost no one in the western world has ever heard of."[285] Yet, he has spent more than a third of his life in US incarceration and, according to the statement of another lawyer made to his Periodic Review Board in August, desires nothing more than to "return to life with his extended family, his elderly father, and wife and young son in Afghanistan." He hopes, she said, to become a grocer.[286] On 14 August 2016, Kamin was transferred to the UAE.

4.2.6 Case 6: Hamidullah (ISN 1119), 13 Years in Detention



- Date of birth: 1963
- Place of birth: Tara Khel village, Deh Sabz, Kabul
- Detained by Afghan National Army, 31 July 2003; handed over to NDS and US (undated); transferred to Guantánamo, 21 November 2003
- 2010 Task Force ordered his indefinite detention; cleared for transfer by Periodic Review Board, 11 February 2016. Transferred to UAE, 14 August 2016.
- Guantánamo Documents: http://projects.nytimes.com/guantanamo/detainees/1119-hamidullah/documents/6

[278] Danzig, 'If You Believe…', [see FN 265].
[279] Carol Rosenberg, 'U.S. OKs one, dismisses another war crime case', *Miami Herald,* 7 January 2010, http://www.miamiherald.com/latest-news/article1934621.html
[280] Hamdan v. U.S., 696 F.3d 1238 (D.C. Cir. 2012), https://www.cadc.uscourts.gov/internet/opinions.nsf/722A4A4B384D5EC985257A99004D77C0/$file/11-1257-1399811.pdf.
[281] Letter from US Department of Justice to Savage, [see FN 89].
[282] Kamin Guantanamo Detainee Profile, Periodic Review Board, [see FN 266].
[283] Shayana Kadidal, 'Prosecutors Dropped His Case Long Ago. Military Officers Support His Release. So Why Is Mohammed Kamin Still in Guantanamo?' Center for Constitutional Rights website, 2 September 2015, http://ccrjustice.org/home/blog/2015/09/02/prosecutors-dropped-his-case-long-ago-military-officers-support-his-release-so.
[284] Kamin Final Determination, Periodic Review Board, 28 September 2015, http://www.prs.mil/Portals/60/Documents/ISN1045/20150928_U_ISN1045_FINAL_DETERMINATION_PUBLIC.pdf 1.
[285] Danzig, 'If You Believe…' [see FN 265].
[286] Kamin Personal Representative Opening Statement, Periodic Review Board, 18 Aug 2015, http://www.prs.mil/Portals/60/Documents/ISN1045/150818_U_ISN1045_Opening_Statements_of_Detainees_Representatives_PUBLIC.pdf.

Summary

The case against Hamidullah was always one of the strangest: he was accused of working as a terrorist with multiple Afghan factions, including ones which are enemies of each other, and another always described as the most moderate armed faction ever, which anyway had put down its weapons in 1992. Many of his alleged co-conspirators are pro-US intervention, establishment figures, either pro-government or members of the government. His documents are littered with factual errors and gross misunderstandings. He is accused only of planning attacks or meeting alleged co-conspirators, accusations never backed up by any evidence. His detention, made in 2003 by Afghan forces then under the control of his faction's historical rivals, always looked like a clear case of the US being duped into detaining someone else's factional enemy. Military boards repeatedly failed to recognise that the accusations against him were fantastical. In 2016, however, the Periodic Review Board cleared him for transfer, noting that the bulk of the allegations against him had come from the Afghan intelligence agency, the NDS; his lawyer said his real enemy had been, not America, but the Northern Alliance. On 14 August 2016, Kamin was transferred to the UAE.

Capture

Hamidullah told his interrogators he was initially detained in November 2001 by "the Northern Alliance." It seems he was using Northern Alliance as a synonym for Jamiat-e Islami, especially the network of Jamiat commanders from the Shomali Plains and Panjshir Valley, just to the north of Kabul, known as Shura-ye Nizar. It had captured Kabul on 13 November 2001 and its leaders had captured the defence, interior and foreign ministries and the NDS. Hamidullah said they objected to his attempts to support the return of the former king, Zahir Shah, to Afghanistan (a strange claim and one that will be returned to). He said he managed to escape.[287] According to his Assessment, he was detained again, on 31 July 2003, by the "Afghan National Army" (just about possible, although it barely existed at that time) and handed over to "the NDS and US forces." By this time, Hamed Karzai had been in office for 18 months, but the Shura-ye Nizar network was still the dominant faction in the capital.[288] Jamiat had a decades-long, murderous rivalry with Hamidullah's faction, Hezb-e Islami – he comes from a prominent Hezbi family from a village on the outskirts of Kabul. There were arrests of prominent Hezbi members on spurious grounds at this time.[289] The evidence that Hamidullah was an insurgent did not stack up and the accusations against him were outlandish.

Allegations and evidence

The US accuses Hamidullah, along with various members of his family, of having fought with Hezb-e Islami, led by Gulbuddin Hekmatyar, against the Soviet occupation in the 1980s. He freely admits to this and also points out, in his Combatant Status Review Board in 2004, that in the 1980s, America also supported Hezb-e Islami:

> *If I'm guilty, or did the wrong thing to join HiG* [Hizb-e Islami Gulbuddin]*, then the whole world was helping us, and for this reason, America was guilty, too.*[290]

Still, the Hezb-e Islami connection keeps coming up. At his second Administrative Review Board in 2006, he again tries to explain to the US military officers on the board that things were different in the 1980s:

Designated Military Officer:

> *The Hezb-I-Islami Gulbuddin was founded by Gulbuddin Hekmatyar as a faction of the Hezb-I-Islami party in 1977. It was one of the major mujahedin groups in the war against the Soviets and has long established ties with Usama Bin Laden* [sic].

Detainee (through translator):

> *What does this have to do with me? This has nothing to do with me. The whole world knows that Gulbuddin was the leader of Hezb-I-Islami once during the time of the Mujahedin…*

Presiding Officer:

> *We understand. This is a statement more about HIG than it is about you. However, because we previously mentioned that you worked for HIG for ten years, we are trying to show a connection between you, the HIG, and what it stands for.*

Detainee (through translator):

> *During that time it was different. The people were used to working for Gulbuddin during the*

[287] Hamidullah Assessment, 2008, 4.

[288] Shura-ye Nizar formally lost the Ministry of Interior when Yunis Qanuni was replaced as minister in June 2002, but the faction continued to dominate senior ranks, and in Kabul, junior officers and policemen as well.

[289] See FN 9..

[290] Kamin ARB 2, 2004, 2.

> *time of Mujahedin. Now they are ministers of the current government, the big knowledgeable minister. When he* [Gulbuddin] *changed his direction and did a lot* [of] *bad things, everyone became upset with him.*[291]

Some far-fetched accusations

However, the US also links Hamidullah with another mujahedin faction – and this is where the allegations get very strange indeed:

> *Detainee was associated with numerous extremists involved in ACM* [Anti-Coalition Militia] *activities, including former members of the Mahaz-e-Milli, aka (National Islamic Front (NIF)* [the standard abbreviation is NIFA, short for the National Islamic Front of Afghanistan].[292]

This may well have been the first time in history that the word 'extremist' was associated with Mahaz-e Milli (NIFA). It was famously the most liberal and secular-minded of the mujahedin parties of the 1980s, jeered at as westernised 'Gucci guerrillas' by more hardline factions like Hezb-e Islami. It was led by the western-friendly head of a Sufi network, Pir Gailani, and was royalist, advocating for the former king, Zahir Shah, to return to power. However, the tale gets even stranger:

> *In November 2001 detainee worked with NIF to recruit and organize supporters for King Zahir Shah following the fall of the Taliban.*[293]

The US does not explain why organising for the return of the former king was the action of an insurgent. Zahir Shah would return to Afghanistan in June 2002 – to much fanfare and then to a quiet life. That Hamidullah, with his Hezb-e Islami background, should have been working to bring back the former Afghan king is very strange. Hezb-e Islami was always anti-monarchist (in the late 1980s, in Peshawar, for instance, the faction was accused of murdering those supporting Zahir Shah).[294] Hamidullah is also alleged to have had several co-conspirators: Rahim Wardak (who is a royalist, pro-American member of Mahaz-e Milli and would go on to become Afghanistan's defence minister), Mullah Ezatullah and Haji Almas (now MPs, both former commanders from Jamiat-e Islami, which, like Hezb-e Islami, was always anti-monarchist) and General Tufan (another former Jamiat commander):

> *Detainee stated Mullah Ezat Ullah, a (Hizb-e Islami Gulbuddin) operative and detainee's friend, worked with detainee on aiding the return of former King Shah. On 14 January 2006, Ullah, aka (Izatullah), was identified as an Iranian intelligence affiliated Taliban sub-commander in Kabul responsible for many terrorist attacks against coalition interests. Mullah Ezat Ullah is believed to be responsible for the 12 October 2005 rocket attacks on the Canadian Ambassador's residence in Kabul.*
>
> *Detainee admitted ACM members Haji Almas and General Zulmei Toufon, aka (Tufan), assisted detainee in performing duties for NIF… Haji Almas provided protection for a combined effort of al-Qaida, Taliban, and HIG members organized to disrupt Afghan's Interim Administration (AIA). On 18 January 2006, Haji Almas was reported to be involved in numerous criminal activities to include the extortion of third-party nationals working for US interests at Bagram Airfield...*
>
> *Detainee admitted NIF leader Rahim Wardak gave him three Thuraya mobile phones when he tasked him to gather support for King Zahir Shah. Detainee gave one phone to Haji Almas and the other to Mullah Ezat Ullah.*[295]

Looking at Hamidullah's alleged co-conspirators, the strangeness of this tale comes sharply into focus:

Mullah Ezatullah (referred to in the Assessment as 'Ullah', i.e. 'God' in Dari and Arabic) has never belonged to Hezb-e Islami or the Taleban.[296] He fought with Jamiat-e Islami from the earliest days of the jihad in the 1980s, against the Soviets, and later against Hezb-e Islami (1992-1996) and the Taleban (1996-2001). Since 2001, he has transformed himself into a businessman with, among other concerns, setting up the Kabul golf course. He became an MP in 2005 and, generally, has become a pillar of the post-2001 establishment. When AAN interviewed him about this case, he said he remembered Hamidullah coming to see him three or four times with his father, Mullah Tarakhel, whom he described as "one of the top 500 *ulama* [clerics] in the country." They had sought his protection after the fall of the Taleban because they were living in his area. He

[291] Hamidullah ARB 2, 2008, 5.
[292] Assessment, 2008, 2.
[293] Hamidullah Assessment, 2008, 10.
[294] Afghanistan Justice Project, *Casting Shadows*, [see FN 2], 57-59.
[295] Hamidullah Assessment, 2008, 10-11.
[296] For biographical information, see Michael Semple *Intimidating, Assassinating, and Leading: Two Early Mujahidin Commanders Reflect on Building Resistance Fronts,* 19 April 2012, Middle East Institute, http://www.mei.edu/content/intimidating-assassinating-and-leading-two-early-mujahidin-commanders-reflect-building.

said he gave it to them and to others. He was mystified as to why anyone might think he had been fighting against the Karzai government and the Americans or working with the Taleban: "I was the one who fought the Taleban," he told AAN, "till the last bullet."[297]

Ezat said he had been asked by Hamidullah's brother to make enquiries after Hamidullah's arrest and, speaking to a contact in the NDS, had been told that the detention was a joint US-NDS operation; he said he was warned off pursuing the matter further.[298]

The two other men alleged to be Hamidullah's co-conspirators, Haji Almas (formerly a police general and now an MP) and Zalmai Tufan, are also former Jamiat commanders who have benefitted hugely from the 2001 US intervention. Why any of these three very rich and well-connected men would need to be given a Thuraya phone – as alleged – is not clear, nor why they would want the former king back, be enemies of the Americans, or allies of Rahim Wardak. He *is* a veteran royalist and former Mahaz-e Milli commander. A respectable politician who studied at military academies in Afghanistan, Egypt and the US, he was a colonel in the Afghan army at the time of the communist coup of 1978. At the time of Hamidullah's arrest, he was the deputy minister of defence and would go on to become the minister in December 2004. The politics of this supposed conspiracy make no sense whatsoever.

Factual errors

Other factual mistakes about Afghanistan in Hamidullah's file are legion. His Assessment said:

- *In September 1996, the Taliban gained de facto control of Afghanistan, and expelled HIG* [Hezb-e Islami Gulbuddin] *members from Kabul. A majority of these HIG members joined the Northern Alliance against the Taliban regime.*[299]

  Comment: Few Hezb-e Islami fighters joined the Northern Alliance. Although their leader Gulbuddin Hekmatyar opposed the Taleban, many of his fighters were absorbed into Taleban ranks.

- *NIF (Mahaz-e Mili), along with Harakat-e-Inqelab Islami (Islamic Revolutionary Movement) and the Jebh-e-Milli (National Liberation Front) led by Muhammad Nabi Muhammadi and Sibaghatullah Mojadeddi, respectively, defined the formative roles in the resistance movement against the Taliban. Raheem Wardak was the Defense Minister of Afghanistan. Zahir Shah's cousin ousted King Shah in 1973 in a bloodless coup while King Shah was in Europe for medical reasons*.[300]

  Comment: Harakat-e Enqelab fighters and commanders, far from fighting the Taleban, formed the nucleus of the new movement when it emerged in the mid-1990s. The other two mujahedin factions mentioned, Jebha-ye Milli and Mahaz-e Milli, stopped fighting in 1992 when the communist regime fell, two years *before* the Taleban emerged. Rahim Wardak would become defence minister eighteen months after Hamidullah's arrest, so this statement eventually became true.

- *Detainee identified Mullah Abd al-Kabir, former HIG operative and Taliban Governor of Jalalabad, AF. Al-Kabir served for a short time in the ANA in late 2002.*[301]

  Comment: Mawlawi Kabir was never with Hezb-e Islami Gulbuddin, but another mujahedin faction. He was posted to Jalalabad, but as the Taleban's head of security for the eastern zone. He was one of the most prominent and best-known Taleban leaders and it is scarcely likely he could have joined the Afghan National Army without anyone knowing, especially as the ANA was only set up December 2002.

- *Detainee's father is a HIG leader and founding member of the Taliban. Detainee admitted his father, Mawlawi Sayeed Agha, is a highly respected religious and political leader with extensive ties to the government.*[302]

  Comment: Hamidullah's father was not a founding member of the Taleban. It is difficult to imagine how a Hezb-e Islami leader from Kabul could have been present in Kandahar in 1994 to be among the founding members, given how very locally the Taleban started and how war-torn and dangerous the roads were. Hamidullah's father was, however, a prominent scholar and Hezb-e Islami stalwart, although why this is something anyone would have to admit to is not clear.

Not accused of actual attacks

Looking through the other 'reasons for continued detention' in his Assessment, another pattern,

[297] Mullah Ezat interview, Kabul, 31 March 2016.
[298] Mullah Ezat interview, Kabul, 2016, [see FN 297].
[299] Hamidullah Assessment, 2008, 3.
[300] Hamidullah Assessment, 2008, 3, 4.
[301] Hamidullah Assessment, 2008, 9.
[302] Hamidullah Assessment, 2008, 6.

familiar from other detainees' files, emerges. Hamidullah is not actually accused of carrying out any specific attacks, rather of planning (mostly failed) attacks and meeting people.[303] He and his relatives are accused of having fought with Hezb-e Islami in the 1980s (the US, too, backed it at this time) and he is accused of having welcomed the Taleban in the 1990s (many Afghans did). After 9/11, it said he had a close association with both factions concurrently (usually, it would be one or the other). Yet, during the Emirate, he said, the Taleban arrested him because he was Hezb-e Islami:

> *When the Taliban were in power I did not work for them. Now they have fallen apart* [and you say] *I am helping them now? That is not right because the Taliban were my enemy and they put me in jail...*[304]

Hamidullah is not the only detainee who struggles to understand the justice system he is facing. Faced with assertions made by un-named sources and based on misunderstandings, he repeatedly asks his captors to show him proof of his wrong-doing:

Detainee (through translator):

> *I am asking you your basis for my capture. If you have any documents, records, or papers please let me know. Don't just tell me that someone told you... If you captured weapons with me and then said that I was using it against you, then that would be a correct statement. If you have any documented telephone conversations indicating that I had done certain things please show me. Even if you capture someone or arrest someone and they confess that I am a bad guy and have done anything against the Americans, let me know. I am surprised because you have asked me questions and I have answered them... You say I am al Qaida and I say I am not. Do you have proof of anything? It is up to you to show me the proof.*[305]

US plans for Hamidullah

The 2010 Task Force decided that Hamidullah needed to be detained indefinitely.[306] His Periodic Review Board took a different line. Finally, after 12 years detention and repeated scrutiny of his file, the Board said there was "a lack of clear information regarding his involvement with al-Qa'ida or the Taliban." The "body of reporting" which tied him to "extremists and involvement in militant activities against US interests," it said, was mostly from NDS sources.[307]

Hamidullah's always seemed a clear case of detention because of local enmity, where one mujahedin faction had gained control of the Afghan intelligence agency and used it and the United States to target an enemy. The dearth of any actual evidential basis for the claims against Hamidullah and the outlandish accusations in themselves should have rung warning bells years ago. The Board noted that Hamidullah did not support a "jihadist ideology," had been a "highly compliant" prisoner who had "sought to moderate the behaviour of others." [308] Why Hamidullah, a non-extremist and by 2016, sick old man should need to be put into a de-radicalization programme has not been explained.

He has asked to be resettled somewhere other than Afghanistan or Pakistan where he could live safely. "[To] the extent any of these allegations suggest there was an adversary of Mr. Hamdullah," said his counsel, "his adversary was the Northern Alliance, not the United States."[309] On 14 August 2016, he was transferred to the UAE.

[303] Detainee was said to have attempted to "smuggle US-made man-portable air defense systems (MANPADS) into the region surrounding Kabul International Airport," "recruit a HIG member to transport the missiles to the airport for an attack against Hamid Karzai's presidential aircraft," planned attacks against US helicopters using multiple Chinese MANPADS acquired by Hekmatyar," "planned a coordinated attack with Taliban operatives to assassinate Imam Mullah Fayaz" [a reportedly moderate imam]; reporting noted that he "attended monthly meetings between HIG and Taliban members to discuss future operations" and linked him to an ISI "initiative to create an office in Peshawar combining elements of the Taliban, HIG, and al-Qaida." Hamidullah Assessment, 2008, 6-7.

[304] Hamidullah ARB 2, transcript 2006, 10.

[305] Hamidullah ARB 2, transcript, 2006, 8.

[306] Letter from US Department of Justice to Savage, [see FN 89].

[307] One question here: are the NDS sources here current or historical? Hamidullah Guantanamo Detainee Profile, Periodic Review Board, 1 November 2015, http://www.prs.mil/Portals/60/Documents/ISN1119/20151112_U_ISN1119_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf.

[308] Hamidullah Final Determination, Periodic Review Board, 11 February 2016, http://www.prs.mil/Portals/60/Documents/ISN1119/160211_U_ISN1119_FINAL_DETERMINATION_PUBLIC.pdf.

[309] Hamidullah Personal Representative Statement, Periodic Review Board, 12 January 2016, http://www.prs.mil/Portals/60/Documents/ISN1119/20160112_U_ISN1119_OPENING_STATEMENTS_OF_DETAINEES_REPRESENTATIVES_PUBLIC.pdf.

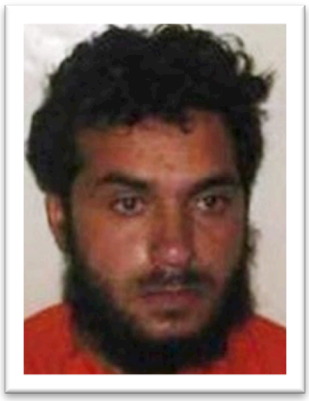
4.3 Cases 7 and 8: Harun and Rahim, a Different Type of Case

The cases of the last two Afghans, Harun Gul (case 7) and Mohammed Rahim (case 8), both accused of being al Qaeda facilitators, are different from the first six studied in this report. They were both detained in 2007 when there was a real insurgency by militants who were working across the Pakistani/Afghan border. Moreover, whereas an Afghan working for the Arab commanders of al Qaeda before the fall of the Taleban could justly claim he was only doing a job and was ignorant of his employer's ideology, aims and modus operandi, this was no longer possible.

The US military had also reconfigured its intelligence operations and was less gullible when it came to assessing threats, and less dependent on the NDS; that agency, itself, was also somewhat less factionalised. There are pointers, however, that, although it was better, there were still problems with US intelligence. A study by this author of the US intelligence used as the basis for one targeted killing in 2010 revealed gross and possibly systemic errors in intelligence gathering, especially in human intelligence.[310] Allegations cannot be assumed to be true even for the later detentions.

Finally, there is far less publically available information about these two men than the earlier detainees. There are no published Combatant Status Review Boards or Administrative Review Boards and a WikiLeaked Assessment for Harun only. The US state has made serious allegations against both men, but neither has had an opportunity to defend himself publically or answer accusations, even in the limited ways open to other detainees. Rahim is also classed as a 'high value' detainee which means the substance and much of the detail of the allegations against him is secret. Rahim was certainly tortured and Harun has alleged he was. With the other detainees, it was possible to assess the evidentiary basis of the assertions made by the US state. With Rahim and Harun, this is more difficult, although in Rahim's case, it can be seen that the US bases its case on confession, hearsay and unverified intelligence reports.

4.3.1 Case 7: Harun Gul (ISN 3148), Nine Years in Detention



- Place of Birth: Sherzad, Nangarhar Province
- Date of Birth: 1981
- Detained: US says NDS detained Harun, 4 February 2007 and handed him over (denied by then director of NDS); transferred to Guantánamo, 22 June 2007
- 2010 Task Force decided to refer him for prosecution (no legal movement on case since). Periodic Review Board ordered his indefinite detention, 14 July 2016
- Guantánamo Documents: Guantanamo Joint Task Force Assessment only[311]

Summary

Harun[312] was detained in Nangarhar in 2007 and accused of being a senior commander with Hezb-e Islami, of associating with "high level militants," and as having "admitted to acting as a courier for al Qaeda Senior Leadership." Among the eight cases studied in this report, information about Harun is the scarcest, but from his WikiLeaked Assessment, it can be seen that all the allegations

[310] The US military assessed that a SIM card belonging to a civilian was being used by a Taleban commander; they then targeted the civilian and his companions, killing ten civilians in a targeted killing which relied on signals information (SIGINT) only, without any human intelligence (HUMINT) checks having been made. Kate Clark, 'The Takhar attack: Targeted killings and the parallel worlds of US intelligence and Afghanistan', Afghanistan Analysts Network, 10 May 2011, https://www.afghanistan-analysts.org/publication/Afghanistan Analysts Network-papers/the-takhar-attack-targeted-killings-and-the-parallel-worlds-of-us-intelligence-and-afghanistan/.

[311] Harun's Assessment, 2007, can be read at WikiLeaks, https://wikileaks.org/gitmo/pdf/af/us9af-003148dp.pdf, (some pages missing) or *The Guardian,* http://www.theguardian.com/world/guantanamo-files/US9AF-001348DP, although it has redacted some names and identifying numbers.

[312] Harun is named in his documents as 'Harun al-Afghani'. This is tantamount to saying he was working with foreign militants. There would be no need for an Afghan to call him or herself 'Afghani' and anyway, the term is used by Afghans to refer to their currency, not their nationality (which is 'Afghan'). This report therefore uses his given name, as supplied by his lawyer. Interview, telephone, 14 July 2016.

against him are sourced to his own testimony or that of other detainees. In his habeas petition, Harun has alleged he was tortured in Afghanistan and Guantánamo. The methods he described are consistent with those used by US forces at this time. The information available suggests that, even if the allegations against Harun are true, he would have been only a very junior commander and, at his level, Afghan couriers working with al Qaeda are many. The rationale for holding him in Guantánamo is not apparent. The Periodic Review Board decided in August 2016 to keep him in detention.

Capture

Harun's Assessment says he was detained by the Afghan intelligence agency, NDS, in the Hadda Farms area, Chaparhar District, Nangarhar Province, on 4 February 2007, along with six other men also allegedly suspected of being Hezb-e Islami, none of whom (judging by the absence of ISN numbers) were held at either Bagram or Guantánamo. The then director of the NDS, Amrullah Saleh, told AAN that his agency did not hand over Harun or any other Afghan national to the US authorities.[313] Harun was transferred to Guantánamo on 22 June 2007.[314]

Torture

Harun has alleged that he was tortured in Afghanistan and Cuba:

> *During his captivity in a military facility in Afghanistan, Mr. Gul's captors blindfolded, shackled, and hung him by the arms while they were still cuffed behind his back, stripped and tortured him. He was kept alone and naked in a cell without even a bucket as a toilet… During interrogations* [in Guantánamo] *prison authorities shackled Mr. Gul for up to twelve hours without water or food in a position that allowed him to neither fully stand nor sit, preventing any sleep. That sleep deprivation torture still plagues his nights nine years later.*[315]

The allegations are consistent with methods known to have been practiced.

Allegations and evidence

Harun's capture was announced in a US Department of Defence press release as the detention of a "senior commander of Hezb-e-Islami/Gulbuddin":

> *Harun al-Afghani, who was captured as a result of our ongoing efforts in the Global War on Terror, is known to be associated with high-level militants in Afghanistan, and has admitted to serving as a courier for al-Qaeda Senior Leadership (AQSL).* [He] *commanded multiple HIG terrorist cells that conducted improvised explosive device (IED) attacks in Nangarhar Province. He is assessed to have had regular contact with senior AQ and HIG leadership.*[316]

Documents supplied to his Periodic Review Board hearing, held on 16 June 2016, give a little more detail to the allegations: he had worked, the US military said, as a courier for Abd al-Hadi al-Iraqi (ISN 10026) until 2004 or 2005 and "provided logistics support to fighters aligned with al-Qa'ida and HIG, and probably collaborated on operational matters with leaders of other anti-Coalition groups."[317] Harun's Assessment has strings of allegations sourced almost entirely to Harun himself or other detainees. However, until we have heard his side of the story, it is impossible to judge how plausible they might be.

One indication that the US may have played up its captive comes in the only other publicly available document about Harun, a 90-page 'terrorist interrogation report' (TIR) which was presented as part of the government's rebuttal of a habeas petition by another Afghan detainee, Muhammed Rahim (case 8).[318] After 2001, it said, Rahim was in charge of six armed groups in Nangarhar province, each with just three to five men, and a total operational budget for each one for three months of just 20,000 to 40,000 Pakistani rupees (roughly 200-400 US dollars).[319] This is the description not

[313] Email exchange 24 February 2015.
[314] Harun Assessment, 2007, 5.
[315] Petition for Habeas Corpus, Gul v. Obama, No. 16-cv-01462, (D.D.C. 15 July 2016), http://www.reprieve.org/wp-content/uploads/14_06_2016-Haroon-Gul-Habeas-Corpus-Petition.pdf, 11.
[316] 'Terror Suspect Transferred To Guantanamo' News Release No 779-07, US Department of Defence, 22 June 2007, http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/prisoner-testimonies/dod_newsrelease_779-07.pdf.
[317] Harun Guantanamo Detainee Profile, Periodic Review Board, I March 2016 http://www.prs.mil/Portals/60/Documents/ISN3148/20160301_U_ISN3148_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf
[318] 'ISN 3148 TIR Roll-up (Feb. 15, 2007)', redacted, presented as evidence on 1 July 2010 in Rahim v. Obama, No. 1:09-cv-01385 (PLF), 6-7 (D.D.C. 7 January 2010). AAN has seen a copy of this document, but has not located it online.
[319] Harun TIR, [see FN 319], 5, 12.

of a senior commander, but someone at the lowest level of command in Afghanistan. The TIR also says Harun was a senior student leader before the 9/11 attacks, who, just before his detention, had been allegedly tasked with overseeing the creation of a militant Hezb-e Islami student organisation. It also alleged he had a couriering role, passing on letters from the provincial Hezbi commander to Arab members of al Qaeda – actually low-level work.

One is left wondering why Harun was taken to Cuba and why he is still there. Detaining such junior players can be of practical importance for disrupting operations or getting intelligence. However, the US authorities have not only still to back up their case that the allegations against Harun are true, but also, if they are true, that he is so dangerous he needs to be held in indefinite military detention without trial.

US plans for Harun

The 2010 Task Force recommended that Harun be considered for trial.[320] The charges were not specified and there has been no known movement on this. Harun had a Periodic Review Board hearing on 16 June 2016. The board decided to keep him in custody, citing his "lack of credibility and truthfulness, as well as his evasiveness and vague answers." However, it also encouraged him to "continue to work with his family and representatives on his future plans and to be forthcoming with the Board in future reviews," a hint possibly that at a future hearing, the Board might decide to transfer him.[321]

4.3.2 Case 8: Muhammad Rahim (ISN10029), Nine Years in Detention

- Date of Birth: 1965
- Place of Birth: Sirkari Qala village, Chaparhar District, Nangarhar
- Detained by ISI, 25 June 2007; rendered by CIA to Afghanistan and tortured; transferred to Guantánamo, March 2008
- Classified as 'high value'
- 2010 Task Force ordered his indefinite detention; Periodic Review Board hearing, 4 August 2016, decided to indefinitely detain him
- No Guantánamo documents

Summary

Muhammad Rahim,[322] detained by the Pakistani ISI and handed over to the US, was the last known detainee of any nationality to be rendered and tortured by the CIA and the last Afghan to be taken to Guantánamo Bay. It seems Pakistan had told the US he might know the whereabouts of bin Laden although, despite using torture – the CIA forcibly shackled Rahim in a standing position for days at a time to prevent him sleeping – interrogations produced "no disseminated intelligence report."[323] Even so, the US announced it had captured a senior associate of bin Laden.[324] Later, it would say Rahim was one of the few Afghans in al Qaeda's inner circle, privy to plans for attacks, including those on 9/11.

One of the few publically available documents about him, the state's rebuttal of his habeas petition, shows the evidential basis of this accusation as insubstantial. Rahim 'confessed' only to working as a translator with Arab militants before the fall of the Taleban and on non-military matters. The more serious allegations from this period – and all allegations thereafter – were made by two fellow detainees, one of whom has alleged he was tortured, and unverified and unprocessed 'Intelligence Information Reports' (IIRs) (see Box 2 on page 20). Rahim has had no opportunity to rebut the government's claims. Moreover, he has been classified as a 'high value' detainee which means the detail and much of the substance of the US case is secret. His lawyer has said he cannot publically say why he believes Rahim is innocent because to do so would reveal classified information. In October, the Periodic Review Board decided to keep him in indefinite detention.

[320] Letter from US Department of Justice to Savage, [see FN 89].
[321] Harun Final Determination, Periodic Review Board, 14 July 2016, http://www.prs.mil/Portals/60/Documents/ISN3148/160714_U_ISN3148_FINAL_DETERMINATION_PUBLIC.pdf.
[322] Like Harun, Rahim is called 'Rahim al Afghani' in his US documents. This would be a foreigner's nickname for an Afghan, so using it means accepting the al Qaeda allegations against him. See FN 313.
[323] Senate Report on CIA torture, [see FN 47], 167.
[324] 'Defense Department Takes Custody of a High-Value Detainee' US Department of Defence press release (number 206-08), 14 March 2008, http://www.defense.gov/releases/release.aspx?releaseid=11758.

Capture

Rahim was detained by the ISI on 25 June 2007[325] and transferred to the CIA, which rendered him to Afghanistan for interrogation and then to Guantánamo in May 2008. The small print of the Senate report on the CIA's use of torture revealed why the CIA was initially interested in Rahim:

> *Based on reports of debriefings of Rahim in foreign government custody and other intelligence, CIA personnel assessed that Rahim likely possessed information related to the location of Usama bin Laden and other al-Qa'ida leaders.*[326]

Torture

The CIA held Rahim in what the Senate report referred to as "DETENTION SITE BROWN," believed to be one of the CIA's black sites in Afghanistan. The report, citing CIA records, said that Secretary of State Condoleezza Rice personally signed off on what methods the CIA could use – she banned the use of nudity, but signed off on (1) sleep deprivation, (2) dietary manipulation, (3) facial grasp, (4) facial slap, (5) abdominal slap, and (6) the attention grab (when the interrogator forcefully grabs the shirt front of the prisoner and shakes him[327]).[328] While being forcibly deprived of sleep, Rahim was given almost no solids to eat, just water and liquid meals. The report said that, as an incentive to cooperate, "CIA interrogators would provide Rahim with a cloth to further cover himself."[329]

From the Senate report, we know that the information obtained by the CIA through the use of torture was generally unreliable and that the agency was sloppy in its work and duplicitous in its reporting, with low standards dipping even further towards the end of its rendition project – when it held Rahim. The Senate report said the CIA employed "individuals with no applicable experience or training in senior detention and interrogation roles," and that, furthermore, these employees were "provided inadequate linguistic and analytical support to conduct effective questioning."[330] Numerous CIA officers, it said, had "serious documented personal and professional problems – including histories of violence and records of abusive treatment of others."[331] At the Salt Pit, one of the agency's other facilities in Afghanistan (codenamed COBALT in the Senate report), the CIA "kept few formal records of the detainees… Untrained CIA officers at the facility conducted frequent, unauthorized, and unsupervised interrogations of detainees using harsh physical interrogation techniques that were not—and never became—part of the CIA's formal 'enhanced' interrogation program."[332]

The Senate report says the CIA lied to Congress, the executive and the media when it claimed torture was necessary. "'Enhanced interrogation techniques,'" it concluded, were not effective in "acquiring intelligence or gaining cooperation from detainees." Indeed, it says, multiple CIA detainees "fabricated information, resulting in faulty intelligence."[333]

Rahim was forcibly kept awake by being shackled in a standing position; he was also made to wear a diaper so that toilet breaks would not interrupt the sessions and, probably, as a further means of humiliation. After a first session of 104.5 hours – more than four days – without sleep, he started suffering hallucinations and was allowed to sleep for eight hours. Then, after a psychiatrist determined he had been faking the hallucinations, he was forcibly prevented from sleeping for another two and a half days. In all, he suffered eight sessions of sleep deprivation, including three which lasted for more than four days and one, the last, which lasted for almost six (138.5 hours).[334]

More detail on how Rahim was kept awake came in an internal document released by the Obama administration and reported on by the Associated Press in 2009. It described a sleep-deprived prisoner, believed to be Rahim, kept awake by being forced to stand with his arms chained above heart level.

> *According to the documents, the prisoner was monitored by closed-circuit television. If he*

[325] "I asked for US custody," he wrote in a letter to his lawyer, "because I believed that the US was a country of law and justice. I thought the ISI [Pakistani military intelligence] would kill me, I thought I could prove my innocence in the US. I was wrong." 'Rahim on Justice', posted on Jenifer Fenton, '"Detained but ready to mingle": Gitmo's lonely heart on Tinder and Trump', al Jazeera, 11 September 2015, http://america.aljazeera.com/articles/2015/9/11/gitmo-prisoner-detained-but-ready-to-mingle.html.

[326] Senate Report on CIA torture, [see FN 47], 168.

[327] Brian Ross and Richard Esposito 'CIA's Harsh Interrogation Techniques Described', 18 November 2005, ABC News, http://abcnews.go.com/Blotter/Investigation/story?id=1322866.

[328] Senate Report on CIA torture, [see FN 47], 163.

[329] Senate Report on CIA torture, [see FN 47], 165.

[330] Senate Report on CIA torture, [see FN 47], 10.

[331] Senate Report on CIA torture, [see FN 47], 11.

[332] Senate Report on CIA torture, [see FN 47], 10.

[333] Senate Report on CIA torture, [see FN 47], 2.

[334] Senate Report on CIA torture, [see FN 47], 165.

> *started to fall asleep, the chains jerking on his arms would wake him up. If a prisoner's leg swelled — a condition known as edema, which can cause blood clots and stroke — interrogators could chain him to a low, unbalanced stool or on the floor with arms outstretched.*[335]

The effects of sleep deprivation have been well documented, including by US courts. Hernan Reyes, a specialist in the medical effects of detention working with the International Committee of the Red Cross (ICRC), writing about psychological torture for the ICRC Journal quoted a 1944 case in America *(Ashcraft v. Tennessee):*

> *Although* [the defendant] *Ashraft was only subjected to 36 hours of sleep deprivation, the court ruled it to be both physical and mental torture. In a ruling not only categorizing sleep deprivation as torture but further emphasizing the unreliability of any information obtained in such a way, US Justice Hugo Black stated that ''deprivation of sleep is the most effective torture, and certain to produce any confession desired.''*[336]

After two nights without sleep, according to a psychoanalyst working with victims of torture who was quoted by Reyes, "the hallucinations start." After three nights, people dream while awake, "a form of psychosis," the psychoanalyst says. "By the week's end, people lose their orientation in place and time – the people you're speaking to become people from your past; a window might become a view of the sea seen in your younger days. To deprive someone of sleep is to tamper with their equilibrium and their sanity."[337]

Rahim did not just undergo sleep deprivation, but other forms of abuse as well, including slapping, and three techniques also mentioned in the ICRC report on psychological torture – hooding, solitary confinement and dietary manipulation.

Allegations and evidence

When Rahim was transferred to Guantánamo, the CIA announced that they had captured "a tough, seasoned jihadist" who had "bought chemicals for one attack on U.S. forces in Afghanistan," a man who was "best known in counter-terror circles as a personal facilitator and translator" for bin Laden and who had "helped prepare Tora Bora as a hideout for bin Laden in December 2001."[338] His capture, claimed CIA director General Michael Hayden, was "a blow to al Qaida, the Taleban and other anti-Coalition militants in Afghanistan."[339]

It is difficult to square these claims about Rahim with what was revealed in the Senate's 2012 report on the CIA's use of torture. It said the CIA's interrogation of Rahim had, "resulted in no disseminated intelligence report."[340] The questioning was such a failure that a post-interrogation review of CIA´s methods was triggered, even before Rahim was transferred to Guantánamo:

> *The summary documents emphasized that the primary factors that contributed to Rahim's unresponsiveness were the interrogation team's* ***lack of knowledge of Rahim****, the decision to* ***use the CIA's enhanced interrogation techniques*** *immediately after the short "neutral probe" and subsequent isolation period,…* ***the team's inability to confront Rahim with incriminating evidence****, and the use of multiple improvised interrogation approaches despite the lack of any indication that these approaches might be effective. The summary documents recommended that future CIA interrogations should incorporate rapport-building techniques, social interaction, loss of predictability, and deception to a greater extent [emphases added].*[341]

Thus, before starting its interrogation, the CIA team had lacked information about Rahim and held no "incriminating evidence." Indeed, it looks possible that the only information it had about him were the ISI's allegations.

The state's case against Rahim now (as seen in its response to his petition for habeas corpus, the

[335] Pamela Hess and Devlin Barret, 'Memos: CIA pushed limits on sleep deprivation' Associated Press, 27 August 2009, http://www.webcitation.org/query?url=http%3A%2F%2Fwww.google.com%2Fhostednews%2Fap%2Farticle%2FALeqM5iOTk5mUIVTPTRGU5hoR5JJrr38BAD9AB36L00&date=2009-08-27.

[336] Hernan Reyes 'The worst scars are in the mind: psychological torture', *International Review of the Red Cross*, Vol 89, No 867, 591-617, September 2007 https://www.icrc.org/eng/assets/files/other/irrc-867-reyes.pdf, 610. The psychoanalyst was working with the Medical Foundation for the Victims of Torture in London.

[337] Reyes, 'The worst scars…', [see FN 337], 610.

[338] Jonathan Karl, 'CIA: We got Bin Laden Translator', ABC News, 14 March 2008, http://abcnews.go.com/Blotter/story?id=4453407&page=1.

[339] Jonathan Karl, 'CIA: We got Bin Laden…', [see FN340].

[340] Senate Report on CIA torture, [see FN 47], 167.

[341] Senate Report on CIA torture, [see FN 47], 167.

Factual Return)[342] rests on what looks to be weak sourcing. There is Rahim's confession that he translated for Arab commanders from 1996 to November 2001. Because of the fact of the torture, even though his statements were eventually made to the FBI after he arrived in Guantánamo, they cannot be considered safe. More than that, however, all serious allegations against Rahim from that period, as well as the allegation that he continued working for al Qaeda after 2001 are sourced not to him, but to two fellow detainees and, especially for the post-2001 period, to Intelligence Information Reports (IIRs) – these are a "generalized reporting vehicle[s] that collect unprocessed and unverified summaries of claims made to U.S. intelligence agencies, usually by foreign sources."[343]

The case against Rahim

Rahim was born in 1965 in Chaparhar village in Nangarhar and fled with his family over the border to Pakistan when the Soviet Union invaded Afghanistan in 1979. Rahim said he returned once or twice to fight the invaders, a war that killed two of his brothers; he moved back permanently to Afghanistan once the Soviets withdrew in 1989 (up to here, the US account pretty well accords with that of his family, more on which below).

The US state alleges Rahim then "began working for the mujahedeen in Jalalabad and later travelled to Kandahar to help the Taleban movement when it arose in the mid-1990s."[344] Bin Laden and his Arab comrades fled from Sudan to Rahim's home province of Nangarhar in May 1996 and were welcomed initially by mujahedin, i.e. non-Taleban commanders from the multi-factional Eastern Shura. Among them were Rahim's jihad-era commander, Engineer Mahmud, [345] also from the Hezb-e Islami Khales group. According to Rahim's Factual Return, he told the FBI (in an interview in Guantánamo in May 2008) that it was during this period that he began working for 'the Arabs', first part-time, then full-time. He told the FBI it was "a respectable job and he needed the money" and that he "spoke to hospitals and doctors on behalf of the Arabs," to Afghan workers at their compound in Jalalabad[346] and translated for bin Laden on "several occasions."[347] He is reported as telling his interrogators that "it was a respectable job and he needed the money."[348]

The Taleban captured Jalalabad in September 1996, 'inheriting' bin Laden and other foreign jihadists, and in March 1997 asked bin Laden and his group to relocate to Kandahar. The US said Rahim moved with them, living outside their compound. He reportedly said he that he "performed a variety of… tasks for the Arabs, such as grocery shopping, maintenance, taking them to a nearby clinic, and facilitating the leasing of their homes."[349] In 1998, according to the US, Rahim left for his home village in Chaparhar and, the following year, went to Kabul to look after his sick father; it said that, in both locations, he worked as a translator and driver for the Arabs.

The US, largely citing two other detainees at Guantánamo, including Harun Gul (case 7) who has said he was tortured (see page 55) and "other witnesses," alleges that Rahim was trusted by bin Laden, that he worked as his driver and "financial advisor" and that he was an arms dealer for al Qaeda. It said he visited Egypt, Iran and Pakistan (although why an Afghan would need to go to Iran or Egypt to purchase weapons is not explained; Afghanistan and Pakistan are full of weapons dealers and Iran, at this time, was supplying arms to the Northern Alliance).

In late September 2001 after the 9/11 attacks, according to the US, Rahim said he went to his home village and was approached by a contact who asked him to guide a group of Arabs to Tora Bora; he then, reportedly, said he spent some time there, translating for the Arabs, and being paid for this. He also reportedly negotiated a ceasefire with America's local Afghan forces which allowed many of the Arabs to escape to Pakistan.[350] After this, Rahim allegedly told his interrogators, he slipped into Pakistan and had no further contact with al Qaeda; he said he lived first in Peshawar and then in Lahore, running a business buying and selling honey and vegetables.

The US alleges that Rahim remained active with al Qaeda. Here the allegations are sourced to

[342] Factual Return, Rahim v. Obama, No. 1:09-cv-01385 (PLF), 6-7 (D.D.C. 7 January 2010), redacted.
[343] Wali Mohammed Traverse, 28, [see FN 81], quoting former intelligence officer.
[344] Rahim Factual Return, [see FN 343], 6, 7.
[345] Rahim's brother, Jan Muhammad, said Rahim had fought with Engineer Mahmoud during the anti-Soviet jihad of the 1980s. Author interview, 17 January 2016, via Skype. For an account of mujahedin support for bin Laden, see Kevin Bell, *Usama Bin Ladin's "Father Sheikh": Yunus Khalis and The Return Of Al-Qa`Ida's Leadership To Afghanistan,* The Combating Terrorism Center At West Point, 14 May 2013, https://www.ctc.usma.edu/v2/wp-content/uploads/2013/05/CTC_Yunus-Khalis-Report-Final1.pdf.
[346] Rahim Factual Return, [see FN 343], 8.
[347] Rahim Factual Return, [see FN 343], 8.
[348] Rahim Factual Return, [see FN 343], 9.
[349] Rahim Factual Return, [see FN 343], 9.
[350] Rahim Factual Return, [see FN 343], 14-18.

unverified and unprocessed intelligence information reports (IIRs) and, to some degree, to other detainees. The US says that Rahim was an al Qaeda courier who personally transported "tens of thousands of dollars" for the 9/11 mastermind Khalid Sheikh Muhammad, travelled to Iran to help Gulbuddin Hekmatyar re-enter Afghanistan (strange because he belonged to a different mujahedin faction), coordinated "the movement of bin Laden's wives and families" and ordered al Qaeda supporters to assassinate the US ambassador in Afghanistan.[351]

By March 2016 when the US government summed up its case against Rahim for his Periodic Review Board hearing, the allegations had filled out and included some new accusations which we do not know the sourcing for. It said Rahim was "one of a small number of Afghans to become trusted members of al-Qa'ida… a translator, courier, facilitator, and operative for the group's senior leadership, including Usama Bin Ladin," had facilitated the movement of al-Qa'ida leaders and rank and file between Afghanistan and Pakistan, particularly after the arrival of US forces, had "advance knowledge" of many of al-Qa'ida's major attacks, including 9/l I, and paid for planned and participated in attacks in Afghanistan against US and Coalition targets by al-Qa'ida, the Taliban, and other anti-Coalition militant groups.[352]

The brother's version of events

In order to try to get a sense of what Rahim's side of the story might be, the author spoke to Rahim's brother, Jan Muhammad, who now lives in London.[353] He gave some more biographical details: Rahim had fought against the PDPA communist regime until it fell in 1992 and had then worked with the United Nations Office on Drugs and Crime (UNODC) in Jalalabad (1993-5). His brother said he lost his job when the Taleban took over and wanted 'their people' working there. After that, his brother set up his own business selling cars, import-export, in Jalalabad.

Their father, Muhammad Jamal, was a "very busy tribal elder" in their home district of Chaparhar, who donated acres of land for primary and high schools, a health clinic, a veterinary clinic and a district office. When he died in 2000, Rahim took his place. He also said Rahim spoke six or seven languages: Persian, Pashto, Urdu, English, Arabic and Russian and had started learning French.

After 2001 and the influx into the province of commanders who had allied themselves with the US, he said Rahim refused to join the "American coalition." He also faced "jealousies" from other mujahedin commanders which dated back to the 1980s jihad; his brother believes it was they who denounced Rahim to the American military who put him on their wanted list. He said Rahim was forced to flee to Pakistan and alleged that it was the US which "pushed the ISI to find him." Jan Muhammad was also arrested, in 2005, and taken to Bagram where he said he was questioned about his brother during 45 days at *Tor Jail* (the Black Jail), which was run by the Joint Special Operations Command (JSOC) and the CIA and where abuses were alleged up till 2013.[354]

Jan Muhammad said he has signatures from leaders of all the tribes and from all 29 districts, of Nangarhar asking for his brother to be released. "I did this in two days," he said. "Tribal leaders came to me and said, 'We want to sign this.'"

Defending a 'high value' detainee

Rahim, is one of 17 detainees at Guantánamo classified as 'high value'; all were rendered by the CIA and almost all – 14 – were tortured during their interrogation. To put these numbers into context: the Senate Report lists 119 men who were rendered by the CIA and says that 39 of them were tortured.[355] This means that between a quarter and a third of all those who are known to have been tortured by the CIA are at Guantánamo, classified as 'high value' detainees.[356] Rahim

[351] Rahim Factual Return, [see FN 343], 19-21.
Ben Fox 'Mohammed Rahim, Guantanamo Bay Prisoner, Sends Quirky Letters', Associated Press, 31 December 2012, http://www.huffingtonpost.com/2012/12/31/mohammed-rahim-al-afghani_n_2389243.html.

[352] Rahim Guantanamo Detainee Profile, Periodic Review Board, 28 March 2016, http://www.prs.mil/Portals/60/Documents/ISN10029/160428_U_ISN10029_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf.

[353] Interview Jan Muhammad [see FN 346]. The brother also filled in a few more biographical details. The family is from the village of Sirkari Qala. Their oldest brother, who fought with Hezb-e Islami, Gulbuddin, was captured by Soviet forces in 1983 and disappeared. The other brothers (including another who was killed) all fought with the Khales faction under Engineer Mahmud. Jan Mohammad said the family stayed in Afghanistan apart from three or four months in 1980 when they were refugees in Pakistan.

[354] Kate Clark, The 'Other Guantanamo' 6: Afghans still struggling for sovereignty at Bagram, 25 July 2013, AAN, https://www.afghanistan-analysts.org/the-other-guantanamo-6-afghans-still-struggling-for-sovereignty-at-bagram/.

[355] For names, see Senate Report on CIA torture, [see FN 47], 458-461.

[356] Others who were tortured by the CIA include: Rahmat Gul who died in the 'Salt Pit' (see page 13), two Tunisians

believes this torture is the real reason for his classification, i.e. not what he did, but what was done to him and what he might speak about: "I am not high value," he said in a letter to his lawyer. "They call me high value because the CIA tortured me."[357]

Because of his classification, the detail and much of the substance of US allegations – even more so than for ordinary detainees – is secret from Rahim and the public. Rahim has had no opportunity of getting his voice heard, even in the limited ways other detainees have had. His lawyer, Carlos Warner, who represents various detainees at Guantánamo, is not allowed, because of security restrictions, to speak about the details of Rahim's case. He cannot publically say why he believes his client is innocent, even though the government can say what they want about him. Warner has written extensively about what he calls the unconstitutional abyss that defence lawyers find themselves in, when trying to represent detainees in Guantánamo.

> *… this is a system where as counsel I usually cannot share the Government's allegations with my own client. I cannot investigate the charge because I cannot share the allegations with the subject of the investigation. Imagine trying to get to the bottom of a bar fight that resulted in a death. I can't tell my client who was killed or why the Government says he's involved. I can't even tell him when the assault occurred or in what bar the assault took place. I certainly cannot interview or cross-examine his accusers. Moreover, I can't visit the bar or talk to any other witness to the fight. I am also prohibited from speaking with the coroner or any of the investigating officers. Sometimes, the Government will say "we have important evidence about your client regarding our allegation, but we can't tell you what that evidence is." Sometimes, the Government just tells the judge without telling or notifying me at all. All of my communications with my client are observed and recorded. All of my legal correspondence is read and inspected by the Government. Guantanamo has been referred to as "Kafka-esque," and that reference is right. "Catch-22" also aptly describes the legal malaise that is currently called Guantanamo habeas corpus. Nothing in my legal training prepared me for this endeavor.*[358]

Warner petitioned for habeas corpus on Rahim's behalf (presumably to get attorney access) on 27 July 2009. The state released its Factual Return on 2 December 2009 and there were then a good number of filings (144), as the defence team sought and failed to see state evidence (motions to 'compel discovery'). In February 2016, the habeas petition was stayed.

Having seen the way habeas petitions have been dealt with by judges, Warner came to the conclusion that they were pointless: they currently provide, he has said, no "meaningful judicial review."[359] In a context where the Bush administration's description of those at Guantánamo as 'the worst of the worst'[360] has stuck, Warner decided to "adapt his strategy" and publish some of Rahim's letters. It was an attempt to humanise his client for the American public.

Rahim's letters

Bearing in mind that the sentiments expressed in these letters have also not been subject to the rigour of a courtroom, they appear to show a man with a quirky sense of humour who sounds human, despite his torture and long, indefinite incarceration in the maximum security facility at Guantánamo (Camp 7). He jokes about the local wildlife and discusses pop culture and American TV stations, for example, expressing his support for the transgender reality TV star, Caitlyn Jenner: "I am happy for her because people are born how they are."361 He calls John McCain a "war hero," Donald Trump an idiot and a "war zero" and thinks Hilary (Clinton) "has a chance."362 Rahim talks about having registered with the online dating site, Match.com, and comments on the online infidelity promotion site, Ashley Maddison, being hacked

held at Bagram until 2015 when they were freed after being handed over to the Afghan authorities; non 'high-value' detainees still at Guantánamo, including men cleared for release, but still there; men who have been released and; two men who were detained despite working for friendly foreign spy agencies.

[357] Rahim to Warner, letter 'Rahim on justice' 21 January 2015, posted with Fenton 'Detained but ready to mingle…', [see FN 326].

[358] Warner, 'Navigating a "Legal Black Hole"…', [see FN 77].

[359] Warner, 'Navigating a "Legal Black Hole"…', [see FN 77].

[360] See, for example, 'Obama admin set to transfer up to 24 more detainees from Gitmo, Fox News Politics, 25 May 2016, http://www.foxnews.com/politics/2016/05/25/obama-admin-set-to-transfer-up-to-24-more-detainees-from-gitmo.html.

[361] Rahim to Warner, letter 'Rahim on Caitlyn Jenner' 21 June 2015, posted with Fenton 'Detained but ready to mingle…', [see FN 326].

[362] Rahim to Warner, letter 'Rahim on Donald Trump' 21 June 2015, posted with Fenton 'Detained but ready to mingle…', [see FN 326].

into.363 In the letters, he also reflects on his time in detention:

> *In 9 months the CIA treated me like an animal – only animals were treated better, they did not let me shower or use the toilet for months, they fed me animal food. They would not let me pray unless I confessed to untruths – and I was praying for my life. Doctors and psychiatrists got rich off my blood. Are they still harming people? I have dignity. Those who humiliated and hurt me do not. I pray for them now.* [364]

Rahim says he wants his day in court:

> *I am innocent. I was hung from the ceiling until I was dead… How can we undo this injustice? Give me a trial. Let me be free. I am not your enemy and never have been.*[365]

The case against Rahim

Rahim's is the only one of the eight cases where the accusations *somewhat* coherently point to an Afghan working with the al Qaeda leadership before the fall of the Taleban.[366] Proof that he played a role after this is far less evident. Rahim's narrative, that he was an ancillary with al Qaeda, i.e. a translator, courier and driver, who happened (according to the US accusation) to do some of his work for the seniors is a role which has been played by many Afghans. All the serious allegations against him both pre and post-2001 are tied to other detainees, including one who has said he was tortured, and include some secondary hearsay. The most serious allegations are largely cited to unverified intelligence reports which may include the original claim by the ISI. The allegation that he had advanced knowledge of al Qaeda attacks, including 9/11, only appears in his Periodic Review Board Profile. There is nothing, therefore, in the public domain to help assess whether the US accusations against Rahim are actually true, rather than just somewhat coherent. The sourcing of the allegations in the period up to the fall of the Taleban is inadequate; after 2001, it is parlous. Most significantly, Rahim was tortured. His confession is unsafe. Subsequently, he has been given no chance to answer the accusations that have left him in indefinite detention.

US plans for Rahim

The Guantánamo Task Force decided in 2010 that Rahim should be kept in indefinite detention.[367] The Periodic Review Board decided on 19 September 2016 that he was a trusted member of al-Qa'ida who worked directly for senior members" and that after 2001, he had "progressed to paying for, planning, and participating in the attacks in Afghanistan against U.S. and Coalition targets."[368] "[His] lack of candor and credibility regarding the specifics of his activities prior to detention," it said, "make his current mindset and intentions difficult to assess."[369] It made no mention of the torture he suffered. The board ruled he should remain incarcerated.

5. CONCLUSION

The intelligence on which the cases of the eight Afghans rest has been shown to be seriously flawed. The Bush administration's decision not to give Guantánamo detainees the minimum protections allowed for under either criminal or military law meant there was never a meaningful review of their cases. This is troubling in itself. However, when there was a possibility for the courts to hold the executive to account through habeas corpus petitions, the courts were found entirely lacking as well.

The legal processes underpinning Guantánamo resemble not only Kafka, but also Charles Dickens' *Bleak House* and the "monstrous maze" of that novel's legal case, which lasted decades and ate up lives and where "the lawyers mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities… making a pretence of equity with serious faces." At Guantánamo, it is not the lawyers who have acted wrongly. Whether civilian or military, they have

[363] "Trapped in legal limbo, detainees at Guantánamo Bay find a way to communicate with the outside world," reported CNN. "The writings provide a fascinating window into their grasp of American culture (complete with references to Charlie Sheen and match.com!)." 'Stories from Gitmo', CNN, 5 July 2013 http://security.blogs.cnn.com/2013/07/05/stories-from-gitmo/.

[364] Rahim to Warner, letter 'Rahim on Dignity', 21 June 2015, posted with 'Detained but ready to mingle…', [see FN 326].

[365] Rahim to Warner, letter 'Rahim on justice' 21 January 2015, posted with Fenton 'Detained but ready to mingle…', [see FN 326].

[366] Zahir (case 2) could also be included here.

[367] Letter from US Department of Justice to Savage, [see FN 89].

[368] Rahim Final Determination, Periodic Review Board, 9 September 2016, http://www.prs.mil/Portals/60/Documents/ISN10029/20160919_U_ISN10029_FINAL_DETERMINATION_PUBLIC.pdf.

[369] Rahim Final Determination, Periodic Review Board, [see FN 369].

struggled immensely to represent their clients. Rather, it has been the US executive, particularly under President Bush, but also under President Obama, and the judges who have been at fault. At present, the courts of the District of Colombia are not ruling in favour of detainees in habeas cases, despite, as this study has shown, systemic problems with government cases. Rather, America's courts have shown themselves repeatedly unable or unwilling to stand up to the executive. They have failed both to question what the government asserts and to protect individuals against the arbitrary power of the state. For there to be "meaningful judicial review" as called for by the Supreme Court in 2008, the Supreme Court itself, said Rahim's lawyer, Carlos Warner, would have to change the rules of the habeas proceedings:

> *The accused should have the right to confront and challenge evidence. Unreliable evidence should not be relied upon by the fact-finder. The Government should carry some burden of proof when a person's liberty is at stake. When the court declares that someone should be released, they should be released.*[370]

Leaving aside the overarching issue of whether military detention without trial should be used at all for War on Terror detainees who are not uniformed and are alleged combatants in a war with no end in sight, there are two critical issues concerning the detention of the last eight Afghans to be held at Guantánamo (including those recently transferred to and, for the moment, still believed to be in detention in the UAE):

- Does the evidence back up the allegations against them?
- Do they pass the threshold for being held at Guantánamo? Is Cuba an appropriate place to hold minor or even mid-ranking insurgents?

The publically available evidence against the first six Afghans does not back up the view that they are guilty of what has been asserted against them – four look to be innocent, while Obaidullah and Zahir may have been very junior insurgents. There is no evidence linking any of them to al Qaeda, except Zahir's employee status during the Taleban era. In recent weeks and months, the Periodic Review Board has reached similar conclusions about these six men, that the cases against them were flawed or, at least, the risk involved in transfer was not great.

As for the last two detainees, Harun and Rahim, what we can see of the evidence against them points to the same worrying patterns as in the first six cases: a reliance on unverified intelligence reports, confessions and detainee testimony, coupled with the use of torture and excessive secrecy. Neither man has had the opportunity to defend himself and, in Rahim's case much of the detail even of the allegations against him are secret.

Even if the allegations against Harun are true, he looks to have been playing a very junior role in the post-2001 insurgency; indefinite detention in Guantánamo would not seem to be merited. The case that Rahim facilitated al Qaeda activity, including with the senior leadership, before 9/11 is somewhat plausible, but not properly substantiated. As to the period after 2001, the sourcing of the allegations against him is parlous. Yet both remain in continuing detention.

The view that none of the eight are likely to have been major players in the insurgency is given credence by the fact that the Taleban leadership did not try to get any of them out in exchange for captured US serviceman, Bowe Bergdahl, concentrating instead on its four leaders who were still in Guantánamo and a fifth individual who appeared to have good ties to the Haqqani family (which was holding Bergdahl). If the allegations against the eight were true and their status was as per the US allegations against them, it is difficult to believe that the Taleban would not have pushed for their release as well. These men look to be small fish, if, indeed, they are 'fish' at all.

Even if all eight are finally released, the victory may be hollow. Hamidullah has requested resettlement in another country, believing he is still at risk from the Northern Alliance if he goes home. Zahir's life, his lawyer has said, is "irretrievably damaged."[371] "Prison usually damages people," said Shayana Kadial, the lawyer for Kamin. "[M]ost of our clients leave not angry but rather broken and depressed."[372] The three Afghans who recently left Guantánamo are in the UAE are not yet free men; nor are they home.

[370] Warner, 'Navigating a "Legal Black Hole"…', 46 [see FN 77].

[371] Zahir Personal Representative Statement, Periodic Review Board, 9 June 2016, http://www.prs.mil/Portals/60/Documents/ISN753/20160609_U_ISN_753_OPENING_STATEMENTS_OF_DETAINEES_REPRESENTATIVES_PUBLIC.pdf.

[372] Shayana Kadidal, 'Prosecutors Dropped His Case Long Ago. Military Officers Support His Release. So Why Is Mohammed Kamin Still in Guantanamo?' Center for Constitutional Rights website, 2 September 2015, http://ccrjustice.org/home/blog/2015/09/02/prosecutors-dropped-his-case-long-ago-military-officers-support-his-release-so.

The case studies of these eight Afghans, and the Afghan experience in Guantánamo generally, demonstrate the perilousness of the power to arbitrarily detain. In Afghanistan, it has led to miscarriages of justice for individuals and dire consequences for their families. It has left the US state still struggling, fourteen years on, with the question of what to do with its legacy of War on Terror detainees. Mass arbitrary detentions in the early years of the US-led intervention was a major factor driving some Afghans towards rebellion. It helped revive a conflict Afghans had hoped was finally over, one which they and the United States are still ensnared in.

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