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DEPUTY SECRETARY OF DEFENSE
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WASHINGTON, DC 20301-1010

JUL 02 2009

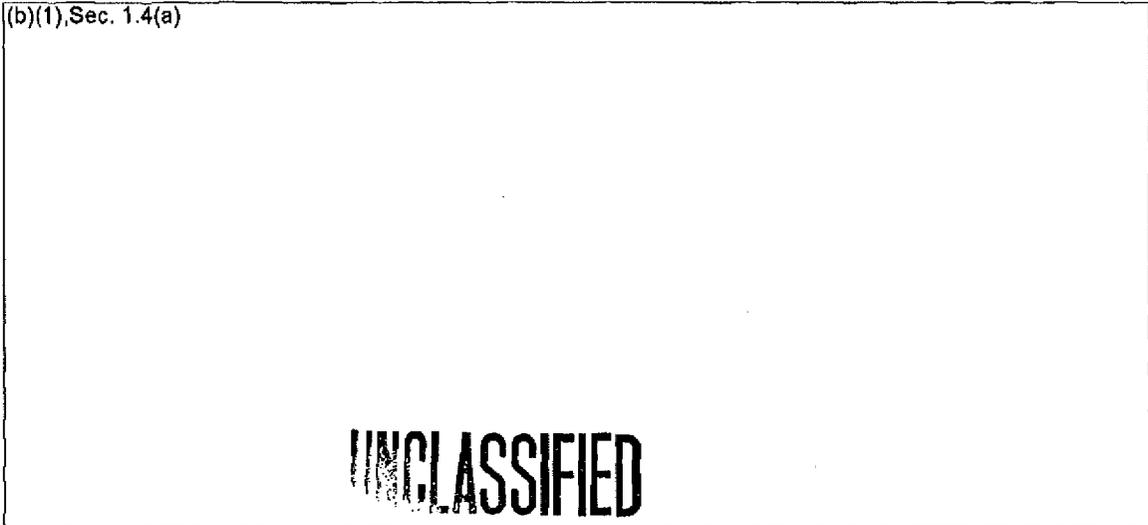
MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARY OF DEFENSE FOR POLICY
UNDER SECRETARY OF DEFENSE FOR INTELLIGENCE
COMMANDER U.S. CENTRAL COMMAND
COMMANDER U.S. SPECIAL OPERATIONS COMMAND

SUBJECT: Policy Guidance on Review Procedures and Transfer and Release Authority
at Bagram Theater Internment Facility (BTIF), Afghanistan (U)

~~(S//NF)~~ On April 27, 2009, Commander, USCENTCOM requested policy guidance concerning proposed changes to the Unlawful Enemy Combatant Review Board procedures in Afghanistan. Commander, USCENTCOM also requested new guidance in lieu of the 2004 "Global Screening Criteria" (GSC), specifically for detainee threat-level classifications that are not linked to criteria for transfers to detention facilities at Guantanamo Bay (GTMO). The attached policy guidance responds to that request.



(b)(1), Sec. 1.4(a)



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W. H. Edgum

Attachment: As Stated
Derived from Multiple Sources
Declassify on June 4, 2019

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OSD 76338-09



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Detainee Review Procedures at Bagram Theater Internment Facility (BTIF), Afghanistan (U)

Authority to Detain and Intern (U)

(U) U.S. Forces operating under Operation Enduring Freedom (OEF) authority are authorized to detain persons temporarily, consistent with the laws and customs of war (e.g., in self-defense or for force protection). Additionally, OEF forces are authorized to detain, and to intern at the Bagram Theater Internment Facility (BTIF), persons who meet the following criteria:

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

(U) Internment must be linked to a determination that the person detained meets the criteria detailed above and that internment is necessary to mitigate the threat the detainee poses, taking into account an assessment of the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society. If, at any point during the detainee review process, a person detained by OEF forces is determined not to meet the criteria detailed above or no longer to require internment to mitigate their threat, the person shall be released from DOD custody as soon as practicable. The fact that a detainee may have intelligence value, by itself, is not a basis for internment.

Capturing Unit Review (U)

(U) Commander, USCENTCOM, shall ensure that OEF detainee review procedures include a review by the capturing unit commander, with the advice of a judge advocate, to assess whether persons detained by the unit meet the criteria for detention. This review shall occur prior to requesting a detainee's transfer to the BTIF for internment, and normally within 72 hours of the detainee's capture.

Transfer Request (U)

(U) Commander, USCENTCOM, shall ensure that OEF detainee review procedures include a request, by the capturing unit commander, to transfer to the BTIF those detainees the capturing unit commander assesses may meet the criteria for internment. The capturing unit commander shall forward the transfer request to the BTIF commander for review.

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Review of Transfer Request (U)

(U) Commander, USCENTCOM, shall further ensure that OEF detainee review procedures include a review by the BTIF commander, with the advice of a judge advocate, to assess whether detainees whose transfer to the BTIF the capturing unit commander has requested meet the criteria for internment. This review shall occur prior to approving a request to transfer a detainee to the BTIF for internment, and normally within 14 days of the detainee's capture.

Initial Detainee Notification (U)

(U) Commander, USCENTCOM, shall ensure that detainees receive timely notice of the basis for their internment, including an unclassified summary of the specific facts that support the basis for their internment. Commander, USCENTCOM shall further ensure that detainees also receive a timely and adequate explanation of the detainee review procedures, including, at a minimum: the fact that the detainee will have an opportunity to present information and evidence to a board of officers convened to determine whether the detainee meets the criteria for internment; the projected dates of the detainee's initial and periodic review boards; and the fact that a personal representative will be appointed to assist the detainee before the review boards. Detainees shall receive such notice and explanation, in writing and orally in a language the detainee understands, within 14 days after the detainee's transfer to the BTIF whenever feasible.

Detainee Review Boards (U)

(U) Commander, USCENTCOM shall ensure that a board of officers reviews all reasonably available information to determine whether each person transferred to the BTIF meets the criteria for internment and, if so, whether the person's continued internment is necessary. These reviews shall occur within 60 days after the detainee's transfer to the BTIF and at least every six months thereafter.

(U) Commander, USCENTCOM shall designate a flag or general officer to serve as the convening authority for review boards.

(U) Review boards shall be composed of three field-grade officers authorized access to all reasonably available information (including classified information) relevant to the determinations of whether the detainee meets the criteria for internment and whether the detainee's continued internment is necessary. In order to ensure the neutrality of the review board, the convening authority shall ensure that none of its members was directly involved in the detainee's capture or transfer to the BTIF. The senior officer shall serve as the president of the review board. Another, non-voting officer shall serve as the recorder for the board proceedings.

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(U) The convening authority shall ensure that a judge advocate is available to advise the review board on legal and procedural matters.

(U) Review boards shall follow the procedures prescribed by AR 190-8, paragraph 1-6.e., as supplemented below:

- (U) The convening authority shall ensure that a personal representative, as described below, is appointed to assist each detainee before the review board.
- (U) Prior to each review board, appropriate U.S. military personnel shall conduct a reasonable investigation into any exculpatory information the detainee offers.
- (U) Review board proceedings shall follow a written procedural script in order to provide the detainee a meaningful opportunity to understand and participate in the proceedings (e.g., similar to the script used in Multi-National Force Review Committee proceedings in Iraq).
- (U) Members of the review board and the recorder shall be sworn. The recorder shall be sworn first by the president of the review board. The recorder will then administer the oath to all voting members of the review board, including the president.
- (U) A written record shall be made of the proceedings.
- (U) Proceedings shall be open except for deliberations and voting by the members and testimony or other matters that would compromise national or operational security if held in the open.
- (U) The detainee shall be advised of the purpose of the hearing, his or her opportunity to present information, and the consequences of the board's decision, at the beginning of the review board proceedings.
- (U) The detainee shall be allowed to attend all open sessions, subject to operational concerns, and will be provided with an interpreter if necessary.
- (U) The detainee shall be allowed to call witnesses if reasonably available and considered by the Board to have relevant testimony to offer, and to question those witnesses called by the review board, subject to any operational or national security concerns. Relevant witnesses serving with U.S. Forces shall not be considered reasonably available if, as determined by their commanders, their presence at the review board would affect combat or support operations. In these cases, written statements, preferably sworn, may be substituted and considered by the review board.

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The president of the review board shall determine whether witnesses not serving with U.S. Forces are reasonably available. At the discretion of the president of the review board, such relevant witnesses may testify by means of video teleconference, teleconference, or sworn written statement, if it would not be feasible for the witness to testify in person.

- (U) The detainee shall be allowed to testify or otherwise address the review board.
- (U) The detainee may not be compelled to testify before the review board.
- (U) The detainee shall be allowed to present reasonably available documentary information relevant to the determination of whether the detainee meets the criteria for internment and/or whether the detainee's continued internment is necessary.
- (U) Following the hearing of testimony and the review of documents and other information, the review board shall determine whether the detainee meets the criteria for internment, as defined above. The review board shall make this determination in closed session by majority vote. Preponderance of the evidence shall be the standard used in reaching the determination.
- (U) If the review board determines that the detainee does not meet the criteria for internment, the detainee shall be released from DoD custody as soon as practicable. If the review board determines that the detainee does meet the criteria for internment, the review board shall recommend an appropriate disposition to the convening authority. The review board shall make this recommendation in closed session by majority vote. Possible recommendations are as follows:
 - (U) Continued internment at the BTIF. Such a recommendation must include a determination not only that the detainee meets the criteria for internment, but also that continued internment is necessary to mitigate the threat the detainee poses.
 - (U) Transfer to Afghan authorities for criminal prosecution.
 - (U) Transfer to Afghan authorities for participation in a reconciliation program.
 - (U) Release without conditions.
 - (U) In the case of a non-Afghan and non-U.S. third-country national, possible recommendations may also include transfer to a third country for criminal prosecution, participation in a reconciliation program, or release.

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- (U) The review board's recommendations regarding disposition shall include an explanation of the board's assessment of the level of threat the detainee poses and the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society.
 - (U) In assessing threat, the review board shall further assess whether the detainee is an Enduring Security Threat, as defined in separate policy guidance regarding detainee threat assessment criteria and transfer and release authority at the BTIF. "Enduring Security Threat" is not a legal category, but rather an identification of the highest threat detainees for purposes of transfer and release determinations, as discussed below.
 - (U) In assessing potential for rehabilitation, reconciliation, and eventual reintegration into society, the review board shall consider, among other things, the detainee's behavior and participation in rehabilitation and reconciliation programs while detained by OEF forces. Information relevant to the assessment of potential for rehabilitation, reconciliation, and eventual reintegration into society may not be available for purposes of the detainee's initial review, but should be considered as it becomes available.
- (U) A written report of the review board determinations and recommendations shall be completed in each case.

(U) The recorder shall prepare the record of the review board within seven working days of the announcement of the board's decision. The record will then be forwarded to the first Staff Judge Advocate in the BTIF's chain of command.

(U) The record of every review board proceeding resulting in a determination that a detainee meets the criteria for internment shall be reviewed for legal sufficiency when the record is received by the office of the Staff Judge Advocate for the convening authority.

(U) Whenever possible, detainees shall receive notice of the results of their review boards, in writing and orally in a language the detainee understands, within 7 days after completion of the legal sufficiency review.

Personal Representative (U)

(U) The personal representative shall be a commissioned officer familiar with the detainee review procedures and authorized access to all reasonably available information (including classified information) relevant to the determination of whether the detainee meets the criteria for internment and whether the detainee's continued internment is necessary.

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(U) The personal representative shall be appointed not later than 30 days prior to the detainee's review board. The detainee may waive the appointment of a personal representative, unless the detainee is under 18 years of age, suffers from a known mental illness, or is determined by the convening authority to be otherwise incapable of understanding and participating meaningfully in the review process.

(U) The personal representative shall act in the best interests of the detainee. To that end, the personal representative shall assist the detainee in gathering and presenting the information reasonably available in the light most favorable to the detainee. The personal representative's good faith efforts on behalf of the detainee shall not adversely affect his or her status as a military officer (e.g., evaluations, promotions, future assignments).

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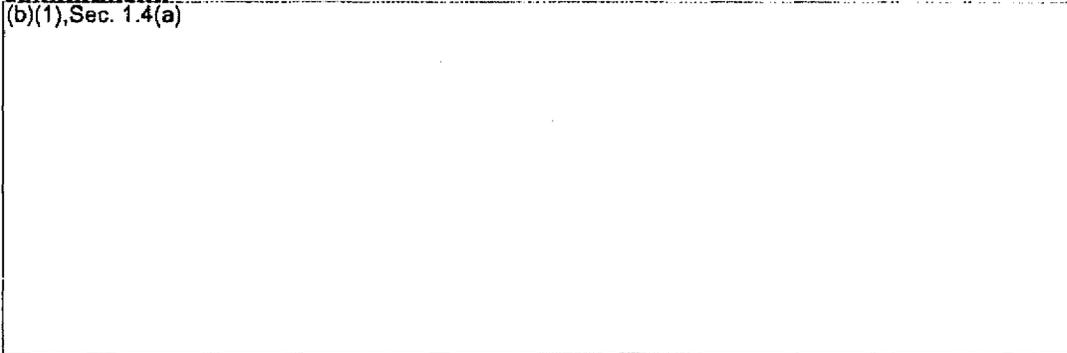
**Detainee Threat Assessment Criteria and Transfer and Release Authority at
Bagram Theater Internment Facility (BTIF), Afghanistan (U)**

Threat Criteria (U)

(U) In assessing whether internment is necessary to mitigate the threat that detainees pose, as is required by separate policy guidance regarding detainee review procedures at the BTIF, detainee review boards shall consider whether detainees meet the criteria for classification as an Enduring Security Threat. Although detainees who are not classified as an Enduring Security Threat can still be detained at the BTIF, there are limitations on the approval authority of a transfer or release decision for those classified as an Enduring Security Threat (see “*Transfer and Release Authority*” paragraph below).

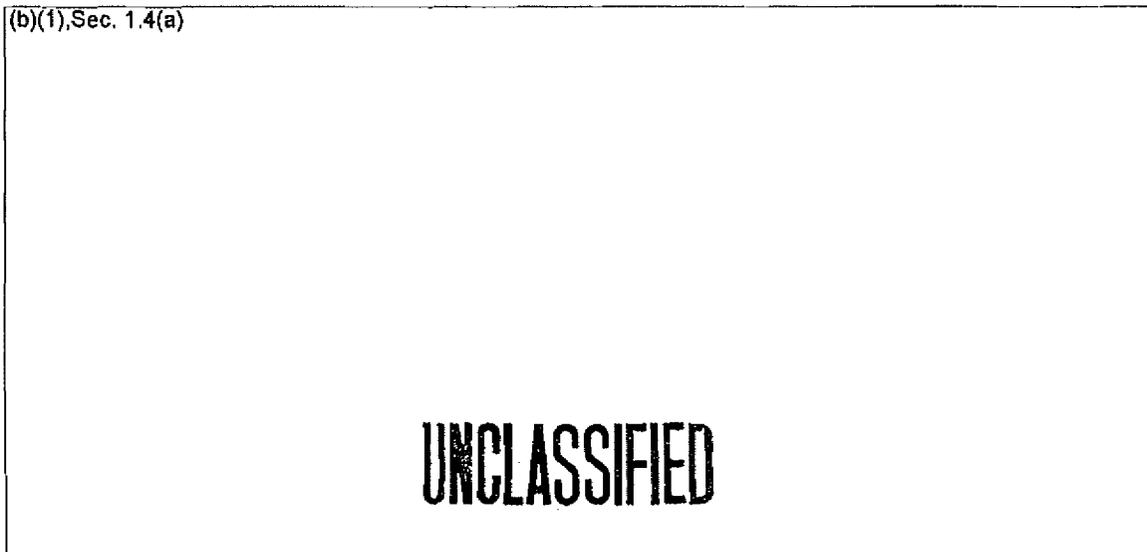
- ~~(S)~~ An “Enduring Security Threat” is an individual who, assessed by capability and commitment.

(b)(1), Sec. 1.4(a)



- ~~(S)~~ The following definitions apply when assessing a detainee’s status as an Enduring Security Threat:

(b)(1), Sec. 1.4(a)



(b)(1), Sec. 1.4(a)

Transfer and Release Authority (U)

(U) Commander, USCENTCOM, or his designee, is the approval authority for the transfer or release of detainees in Afghanistan, including transfers of third-country nationals, under the control of OEF forces, to Afghan authorities for criminal prosecution or any other lawful purpose.

(U) Commander, USCENTCOM, or Deputy Commander, USCENTCOM, is the approval authority for the transfer or release of detainees classified as Enduring Security Threats. This authority may not be further delegated. USCENTCOM shall ensure that the Under Secretaries of Defense for Policy and Intelligence are notified, in writing, through the Director, Joint Staff, at least 7 days prior to the release of a detainee designated as an Enduring Security Threat.

(U) The return of third-country nationals to their countries of origin, and the transfer of third-country nationals to countries other than Afghanistan, require approval by the Deputy Secretary of Defense, or his designee. Recommendations for such transfers shall be transmitted to the Under Secretary of Defense for Policy, through the Director, Joint Staff. OSD will ensure that recommendations are coordinated with the Department of State prior to seeking approval from the Deputy Secretary of Defense.

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Comparison of Detainee Process Models

	Article 5 (AR 190-8)	UECRB (existing)	UECRB (proposed)
Purpose	To determine whether person is EPW	To recommend combatant status and disposition	To determine whether detainee meets criteria for internment and recommend disposition
Nature	Non-adversarial	Non-adversarial	Non-adversarial
Standard	Article 4, GPW	Unlawful Enemy Combatant	Detainable Person, as defined in March 13, 2009 DOJ filing
Possible Findings	EPW, RP, innocent civilian, CI	<input type="checkbox"/> Status: HLEC, LLEC, NLEC <input type="checkbox"/> Disposition: GTMO, continued detention at the BTIF, transfer, release w/o conditions	<input type="checkbox"/> Status: does/does not meet criteria for internment, plus threat assessment <input type="checkbox"/> Disposition: continued internment at the BTIF, transfer for prosecution or reconciliation, release w/o conditions
Timing	Not specified	Capturing unit review within 72 hours; transfer request within 14 days; initial board within 75 days; periodic boards every 6 months	Capturing unit review within 72 hours (w/ JAG); transfer request within 14 days (w/ JAG); initial board within 60 days; periodic reviews every 6 months



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Comparison of Detainee Process Models (cont.)

	Article 5 (AR 190-8)	UECRB (existing)	UECRB (proposed)
Composition	<input type="checkbox"/> 3 officers, at least 1 field grade <input type="checkbox"/> Senior officer is President <input type="checkbox"/> Non-voting recorder (preferably JAG)	<input type="checkbox"/> 3 officers, at least 1 field grade <input type="checkbox"/> Senior officer is President <input type="checkbox"/> Non-voting recorder	<input type="checkbox"/> 3 field grade officers authorized access to all relevant information <input type="checkbox"/> Senior officer is President <input type="checkbox"/> Non-voting recorder
Legal Advisor	No	No	Yes
Personal Rep.	No	No	Yes; authorized access to all relevant information
Open/ Closed	Open except for deliberation and voting, security; person whose status is to be determined allowed to attend open sessions	Closed; detainee allowed to appear at initial board	Open except for deliberation and voting, security; detainee allowed to attend open sessions
Witnesses	Yes, if reasonably available	No	Yes, if reasonably available
Legal sufficiency review	Yes	No	Yes

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Policy Coordination Sheet

Subject: Policy Guidance on Review Procedures and Transfer and Release Authority at Bagram Theater Internment Facility (BTIF), Afghanistan (U)

USP Number: USP007105-09

<u>Title/Organization</u>	<u>Name</u>	<u>Date</u>
DASD, APSA/CEN	Mr. Sedney	May 18, 2009
GC	Mr. Johnson	May 21, 2009
USD(C)	Mr. Hale	May 22, 2009
Director, Joint Staff	LTG McChrystal	June 4, 2009

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