

Mr. McCONNELL. I have yielded the floor. The Senator can feel free to make a statement.

Mr. DURBIN. I was hoping to ask the Senator from Kentucky a question.

EXECUTIVE SESSION

EXECUTIVE CALENDAR

Mr. McCONNELL. Mr. President, I understand the majority leader was asking about clearing some military promotions earlier today. I wanted to indicate—and I see the assistant majority leader is here—we are clear with those and never had an issue with these particular promotions. Therefore, I suggest that we call them up and confirm them immediately.

Unless there is an objection from the other side, and having notified the other side, I ask unanimous consent that the Senate proceed to executive session to consider the following military promotions: Calendar Nos. 192, 193, and 194. I further ask unanimous consent that these nominations be confirmed en bloc, the motions to reconsider be laid upon the table, that the President be immediately notified of the Senate's action, and that the Senate then resume legislative session.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The nominations considered and confirmed are as follows:

IN THE AIR FORCE

The following named officer for appointment in the United States Air Force to the grade indicated while assigned to a position of importance and responsibility under title 10, U.S.C., section 601:

To be general

Lt. Gen. Douglas M. Fraser

IN THE ARMY

The following named officer for appointment in the United States Army to the grade indicated while assigned to a position of importance and responsibility under title 10, U.S.C., section 601:

To be general

Lt. Gen. Stanley A. McChrystal

IN THE NAVY

The following named officer for appointment in the United States Navy to the grade indicated while assigned to a position of importance and responsibility under title 10, U.S.C., section 601:

To be admiral

Adm. James G. Stavridis

LEGISLATIVE SESSION

The PRESIDING OFFICER. The Senate will now return to legislative session.

The Senator from Illinois.

GUANTANAMO

Mr. DURBIN. Mr. President, I want to make my comments about the minority leader's statement on the floor while he is still here. If he is willing to stay, we can engage in a dialog on this issue. I think it is time we do come to

the floor together, along with the Republican whip, and at least make it clear what our positions are on some of these issues related to Guantanamo because it has been a matter of concern and a lot of comment on the floor of the Senate over the last several weeks.

I was going to ask the Senator from Kentucky, the minority leader, whether I understood him correctly when he said he believed that this individual, Ahmed Ghailani, if found not guilty in a court in the United States, would be released in the United States to stay here in a legal status. I wish to ask the Senator, if that is what he said, what is the basis for that statement?

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. McCONNELL. Mr. President, I can only repeat what the President's spokesman himself said. I am responding to the question propounded to me by the Senator from Illinois. It is my understanding the President's spokesman yesterday refused to say what would happen to Ghailani if he were found not guilty. So there is some confusion about that.

Mr. DURBIN. There is no confusion. This is such a leap to argue that if this man, who is not a resident of the United States—if I am not mistaken, he is Tanzanian—that somehow if he is found not guilty in the courts of the United States, he is qualified to be released into our population. That is a statement—I don't know anyone could draw that conclusion. He would have no legal status to stay in the United States unless we gave him one.

By what basis does the Senator from Kentucky suggest that this man, who may have been involved in the killing of 12 Americans among 224 other people, is going to be released by President Obama into our communities and neighborhoods?

Mr. McCONNELL. Is the Senator asking me a question?

Mr. DURBIN. I am.

Mr. McCONNELL. Let me say I am only quoting the President's spokesman. He says he doesn't know what would happen if Ghailani is released.

Let me say to the Senator from Illinois, let's assume that he is sent back to the country from which he came. I ask, in what way is America safer if this terrorist subsequently, under this hypothetical release in the United States, goes back to his native country from which he potentially could launch another attack on the United States?

Mr. DURBIN. I say in response, my colleague from Kentucky is gifted at the political craft. He has decided not to answer my question but to ask a question of me.

I say first that his assertion that this man, Ahmed Ghailani, if found not guilty would be released in the communities and neighborhoods of America cannot be sustained in law or in fact. He made that statement on the floor. That is the kind of statement that has been made about these Guantanamo detainees.

I don't know what will happen to Mr. Ghailani if he is found not guilty. It is conceivable that he could be charged with other things. It is conceivable he could face a military tribunal. It is conceivable he may be subject to detention.

I will say this with certainty. President Obama will not allow dangerous terrorists to be released in the United States in our communities and neighborhoods. I hope everyone on both sides of the aisle would agree with that.

I also wish to ask, if the Senator from Kentucky is critical of President Obama for announcing that he was going to close Guantanamo before he had a plan, why didn't we hear the same complaint when President George W. Bush announced he was going to close Guantanamo before he had a plan? Is the difference partisan?

Mr. McCONNELL. I say to my friend from Illinois, he has made this point before, and I answered it before. I will answer it again.

I was against it when President Bush was in favor of it. I have been consistently against closing Guantanamo all along the way, no matter who the President was. At least you could say this about President Bush: He didn't put a date on it before he had an idea what he was going to do with them. And that is the core issue here.

Mr. DURBIN. The core issue is for 7 long years, the Bush administration failed to convict the terrorists who planned the 9/11 terrorist attacks—for 7 years. And for 7 long years, only three individuals were convicted by military commissions at Guantanamo, and two of them have been released. So to argue that the Guantanamo model is one that ought to be protected and maintained, notwithstanding all of the danger it creates for our servicemen overseas to keep Guantanamo open, is to argue for a plan under the Bush administration that failed to convict terrorists, failed with military tribunals and through the courts of this land.

I have to say that as I listen to the argument of the Senator from Kentucky, it is an argument based on fear—fear—fear that if we try someone in a court in America, while they are incarcerated during trial, we need to be afraid. There was no fear in New York for more than 2 years while Ramzi Yousef was held in preparation for trial and during trial because he was held in a secure facility.

Today we are told by the Department of Justice that there are 355 convicted terrorists in American prisons. I ask the Senator from Kentucky, does he believe we should remove them from our prisons, those already convicted, currently serving, such as Ramzi Yousef?

Mr. McCONNELL. I say to my friend from Illinois, maybe we found an area of agreement. He is critical of the Bush administration for not conducting military tribunals more rapidly. I agree with him. I think they should have been tried more rapidly. But that

is the place to try them, right down there in Guantanamo.

If my friend is suggesting it is a good idea to bring these terrorists into the United States and, if convicted, put them in U.S. facilities, the supermax facility has basically no room. There may be one bed. As far as I know, there is no room at supermax.

Not only do we have, if we bring them into the United States—I don't know why I am smiling. This is not a laughing matter. Say what you will about the previous administration, but we were not attacked again after 9/11.

Mr. KYL. Mr. President, will—

Mr. MCCONNELL. I don't have the floor, I say to my friend from Arizona. Maybe he can get the Senator from Illinois to yield for a question as well.

I don't think we want to complain about the fact we haven't been attacked again since 9/11, I say to my friend from Illinois. Containing terrorists at Guantanamo, going after terrorists in Iraq and Afghanistan, clearly something worked. And to argue we would somehow be made more safe in this country by closing down Guantanamo I find borders almost on the absurd.

Mr. DURBIN. With all due respect, the Senator failed to answer my question. I asked him this question: If it is a danger to America that if we put a convicted terrorist in our country, if that creates a danger, as he said repeatedly, in our communities and neighborhoods near this prison or in other places, then I asked the Senator from Kentucky, What would you do with the 355 convicted terrorists currently in prison, and the Senator didn't answer. He said: We haven't been attacked since 9/11. That is unresponsive.

We know there are facilities where these convicted terrorists can be held safely and securely. Marion Federal Penitentiary in my home State has 33 convicted terrorists. I just spent a week down there, not far from the Senator's home State. There was not fear among the people living in that area because 33 terrorists are being held at Marion. You know why? Because our corrections officers there are the best.

I went in to see them, and I sat down with them. They are concerned, angry, even insulted at the suggestion that they cannot safely hold dangerous people. One of the guards said to me: We held John Gotti. He was convicted of being involved in gangland activity. We are holding terrorists from Colombia in drug gangs. We are holding them safely. We are holding serial murderers safely. We know how to do this, Senator. And if your colleagues in the Senate don't believe it, have them come and visit Marion Federal Penitentiary.

They are doing their job and doing it well. To come to the floor of the Senate repeatedly and to suggest we are in danger as a nation because convicted terrorists are being held in our prisons I don't think adequately reflects the reality of what we have today.

Let me also say, I respect the Senator from Kentucky for saying he has

always been in favor of keeping Guantanamo open. I respect him for being consistent in his viewpoint. I disagree with that viewpoint. Among those who also disagree with his viewpoint is GEN Colin Powell, the former Chairman of the Joint Chiefs of Staff and former Secretary of State under President Bush. He believes it should be closed. General Petraeus, someone I know the Senator from Kentucky has praised on the floor of the Senate, believes Guantanamo should be closed. They are not alone. Robert Gates, Secretary of Defense under President Bush and now under President Obama, believes it should be closed. Senator MCCAIN on your side of the aisle stated publicly that Guantanamo should be closed. Senator LINDSEY GRAHAM, on your side of the aisle, has stated publicly it should be closed. Former Secretaries of State have made the same statements.

He is entitled to his point of view. I respect him for holding that point of view even if he doesn't have the support from the security and military leaders I mentioned. But to come to the floor and repeatedly say to the American people that we are in danger because we are trying terrorists in the courts of America I think goes too far.

I think the President has done the right thing. I think this man Ahmed Ghailani should stand trial. If 12 innocent Americans died, and they did, among 224 people, this man should be on trial, and I think the President was right to bring him to the court for trial. To suggest that he shouldn't be, that he should be put in a military tribunal which has had a record, incidentally, over the last 7 years—military commissions at Guantanamo, in 7 years tried three individuals and two have been released—it doesn't tell me that it is a good batting record when it comes to dealing with war criminals.

I trust the courts of our land, the same courts that convicted Ramzi Yousef. I trust those courts to give Ghailani a fair trial under American law. I trust at the end of the day that a jury, if it is a jury, will reach its decision.

I can tell you this for certain. The suggestion by the minority leader that at some point after this trial Ghailani is going to be turned loose in the communities and neighborhoods of America, I don't understand where that is coming from. That is the kind of statement that I think goes to the extreme. I wish my colleague would reflect on that. We are not going to turn loose this man who is not a resident of the United States, not a citizen of the United States if he is found not guilty. The President would never allow it. Our judicial system would never allow it.

Do you think the Department of Homeland Security is going to clear this man to move to Louisville, KY, if he is found not guilty, or Springfield, IL? I don't think so. In fact, I think it is beyond the realm of possibility.

I also want to make it clear that we have before us an important decision to

make. Are we going to deal with Guantanamo because it is a threat to the safety of our servicemen or are we going to keep it open so that some people who believe in it can have their political bragging rights?

I would rather side with those who believe closing Guantanamo brings safety to our men and women in uniform. Guantanamo is a recruiting tool for terrorists. That is not my conclusion alone. It is a conclusion that has been reached by many, as I look back and see those who have said it. For example, Chairman of the Joint Chiefs of Staff Mike Mullen:

The concern I've had about Guantanamo . . . is it has been a recruiting symbol for those extremists and jihadists who would fight us. . . . That's the heart of the concern for Guantanamo's continued existence. . . .

Same statement from General Petraeus, same statement from Defense Secretary Gates, same statement from RADM Mark Buzby and others. We have a situation with Guantanamo where it is not making us safer. The President has made the right decision, hard decision to deal with the 240 detainees he inherited. I think we should do this in a calm, rational, and not fearful way.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Republican leader.

Mr. MCCONNELL. Mr. President, let me say Senator MCCAIN and Senator GRAHAM can speak for themselves, but neither of them has ever been in favor of closing Guantanamo without a plan to do something. They want to see what the plan is to deal with these terrorists. Beyond that, they can speak for themselves. But they are not in favor of closing Guantanamo without a plan.

With regard to the suggestion that we should bring these prisoners to the United States and try them, my good friend from Illinois has suggested there is no down side to that. Why not do it? We could. But the question is, Should we? We should not because we passed the military commissions for the purpose of trying these very detainees. There are courtrooms and a \$200 million state-of-the-art facility at Guantanamo to both incarcerate them and to try them. We know no one has ever escaped there, and we know we haven't been attacked again since 9/11.

But let's assume we did bring them up here for trial. My good friend has suggested no harm done. During the Ramzi Yousef trial, he tipped off terrorists to a communications link. During the Zacarias Moussaoui trial, there was inadvertently leaked sensitive material. The east Africa Embassy bombing trials aided Osama bin Laden. The blind Sheikh Abdel-Rahman trial provided intel to Osama bin Laden. When you have these kinds of trials in a regular American criminal setting, there are down sides to it.

In terms of community disruption, I would cite the mayor of Alexandria, VA, right across the river. Ask him

how he felt about the impact of the Moussaoui trial on their community.

So I think the suggestion that somehow it is a good solution to bring these terrorists to the United States and to mainstream them into the U.S. criminal justice system is simply misplaced. If they are convicted, we don't have a good place for them. Everybody cited the supermax facility. Well, there is no room there. It is quite full. We have the perfect place for these detainees, for them to be detained and to be tried and ultimate decisions made.

I share the view of the Senator from Illinois that the previous administration did not engage in those military tribunals as rapidly as we all would like. They had a lot of disruptions from lawsuits and other things, and I expect they would argue that slowed them down. But I think they are in the right place—the right place to be incarcerated and the right place to have their cases disposed of.

Mr. President, my friend from Arizona is here and wants to address this, or another issue, and so I yield the floor.

The PRESIDING OFFICER (Mr. BENNET). The Senator from Illinois.

Mr. DURBIN. Mr. President, I will speak briefly, then yield to the Senator from Arizona. I will be happy, if he wants to ask a question or maintain a dialogue, but I will make this very brief.

I have confidence in the courts of America. If I had to pick one place on Earth to have a trial and to be assured it would be a fair trial with a fair outcome, it would be right here in the United States of America. Maybe I have gone too far. Maybe I am showing my patriotism, or whatever it is, but I believe that.

If you said to me: We captured a terrorist somewhere in the world, where would you like to have them tried? It would be right here because I believe in our system of justice. I believe in the integrity of our judiciary. I believe in our Department of Justice prosecutors. I believe in our defense system, our jury system. I believe we have the capacity and the resources to try someone fairly better than anyplace in the world.

The Senator from Kentucky may not agree with that conclusion. He obviously thinks there is too much danger to have a trial of a terrorist in the United States. How then does he explain 355 convicted terrorists now sitting in American prisons, tried in our courts, sent to our prisons, safely incarcerated for years? That is proof positive this system works.

The Senator from Kentucky, the Republican leader, is afraid. He is not only afraid of terrorism—and we all should be because we suffered grievously on 9/11—but he is afraid our Constitution is not strong enough to deal with that threat. He is afraid the guarantees and rights under our Constitution may go too far when it comes to keeping America safe. He is afraid of

using our court system for fear it will make us less safe, that it would be dangerous. He is afraid the values we have stood for and the Geneva Conventions and other agreements over the years may not be applicable to this situation.

I disagree. I have faith in this country, in its Constitution, its laws, and the people who are sworn to uphold them at every level. I believe Mr. Ghailani will get a fairer trial in the United States than anyplace on Earth, and that if he is found guilty in being complicit in the killing of over 200 innocent people and innocent Americans, he will pay the price he should pay, and he will be incarcerated safely.

This notion that we have run out of supermax beds and that is the end of the story—and the State of Colorado is the home State of the Presiding Officer, where the Florence facility is located—I would say to the Senator from Kentucky that may be true for the supermax facility at the Federal level, but there are many other supermax facilities across America that can safely incarcerate convicted terrorists or serial murderers or whomever. We can take care of these people.

If there is one thing America knows how to do—and some may question whether we should brag about it—we know how to incarcerate people. We do it more than any other place on Earth, and we do it safely. The notion there is only one place—Guantanamo—where these detainees can be safely held defies logic and human experience.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, first of all, I was going to interrupt and ask a question, but I simply conferred with Senator MCCONNELL—and I will state and the RECORD can reflect the fact—that I believe Senator MCCONNELL asked the question of where he would be released if he were acquitted. I don't believe he asserted that he would be released in the United States. I just wanted to clear that up. Obviously, we can check the transcript and determine it. I think that was his intent because of the question that Robert Gibbs had posed. At least that is my understanding of it. We can resolve that.

But I would like to say a couple of other things. First of all, it is important to have this debate. The Senate had a debate some weeks ago, and it is true 90 Senators voted against funding a program to close the prison at Guantanamo Bay. Six Senators voted in favor of moving forward with that.

I appreciate the Senator from Illinois staunchly defending the lonely six, but they represented also a minority of American public opinion, which has said, by 2 to 1, according to the USA Gallop poll, that it is against closing the Guantanamo prison, and by 3 to 1 they do not want the prisoners released in the United States.

Both sides have engaged in a little bit of rhetoric. For example, I would respectfully request my colleague from

Illinois go back over what he said a moment ago and perhaps come back tomorrow and think about rephrasing it. I don't think it is fair to characterize the position of the Senator from Kentucky as being fearful of trying people in the United States; fearful, for example, that terrorists—or afraid of giving terrorists rights and so on. I don't think that is the issue. I think what is the issue is the question of whether, as a general rule, it is better to keep prisoners in Guantanamo prison than to put them somewhere else.

I, for one, don't fear trying some of these people who are appropriately charged and tried in Federal court in the United States. But I would also say it is loaded with problems and headaches, and I think my colleague from Illinois would have to acknowledge that the trials that have occurred here have produced some real problems. These are hard cases to try in the United States. You start with the proposition that there are huge security concerns.

Now, it can be done. There will be huge security concerns with this alleged terrorist from Tanzania, and it will cost a lot of money in the place where he is tried. It will pose very difficult questions for the judge, for the people within the courtroom, the parties to the case, the lawyers in the case. There are evidentiary questions and other questions that are illustrated by the case of Zacarias Moussaoui, who was tried in Alexandria. I think we can all acknowledge the government would certainly say that was a huge problem for them because it was difficult to use evidence in the case that had been acquired through confidential or classified methods. The case was ping-ponged back and forth several times between the District Court and the court of appeals. It was a difficult, hard thing to do.

Then there are the situations where cases have been tried in American courts and classified information has inadvertently—and in some cases not inadvertently—been released, gotten into the hands of terrorists. Let me just cite a few of these, and not to make the case that it is impossible or a terrible idea but also to refute the notion that it is a piece of cake. It is not. It is really hard. If you could avoid doing this, I think the better practice would be to try to do so. But on an occasional basis, when we have a good Federal charge, we have the evidence that can back it up, and we think we can get a conviction, there is nothing wrong in those few selected cases with doing it. But we can't say all 240 of the terrorists at Guantanamo qualify for that. Very few of them do, as the President said in his remarks.

Let me note some of these cases. The famous trial of Ramzi Yousef. Here is a statement by Michael Mukasey, the former Attorney General. This is a quotation from the Wall Street Journal, again, during the trial of Ramzi

Yousef, the mastermind of the 1993 World Trade Center bombing:

Apparently, an innocuous bit of testimony . . . about delivery of a cell phone battery was enough to tip off terrorists still at large that one of their communication links had been compromised. That link, which in fact had been monitored by the government and had provided enormously invaluable intelligence, was immediately shut down, and further information lost.

I am not going to read the entire quotations but just some headlines. I mentioned the trial of Zacarias Moussaoui. That was a case also in which sensitive material was inadvertently leaked. Here is the headline from a CNBC story:

The Government Went To The Judge And Said, "Oops, We Gave Moussaoui Some Documents He Shouldn't Have." . . . Documents That The Government Says Should Have Been Classified.

There is a whole story about how that happened. The East Africa Embassy bombing trials, which occurred after 2001, September 26 is the Star-Ledger story.

The cost of disclosing information unwisely became clear after the New York trials of bin Laden associates for the 1998 bombings of U.S. embassies in Africa. Some of the evidence indicated that the National Security Agency, the U.S. foreign eavesdropping organization, had intercepted cell phone conversations. Shortly thereafter, bin Laden's organization stopped using cell phones to discuss sensitive operational details, U.S. intelligence sources said.

There is another story about the same thing, with a headline in the New York Times. There is another quotation about the trial of the blind sheik, a story we are all familiar with, of Michael Mukasey, the former Attorney General, saying this in the Wall Street Journal:

In the course of prosecuting Omar Abdel Rahman . . . the government was compelled—as in all cases that charge conspiracy—to turn over a list of unindicted co-conspirators to the defendants. Within ten days, a copy of that list reached bin Laden in Khartoum.

There are other cases. Mr. President, I ask unanimous consent to have these articles printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From FOX NEWS.com, Feb. 11, 2005]

N.Y. LAWYER CONVICTED OF AIDING
TERRORISTS

(By Associated Press)

NEW YORK.—A veteran civil rights lawyer was convicted Thursday of crossing the line by smuggling messages of violence from one of her jailed clients—a radical Egyptian sheik—to his terrorist disciples on the outside.

The jury deliberated 13 days over the past month before convicting Lynne Stewart, 65, a firebrand, left-wing activist known for representing radicals and revolutionaries in her 30 years on the New York legal scene.

The trial, which began last June, focused attention on the line between zealous advocacy and criminal behavior by a lawyer. Some defense lawyers saw the case as a government warning to attorneys to tread carefully in terrorism cases.

Stewart slumped in her chair as the verdict was read, shaking her head and later wiping tears from her eyes.

Her supporters gasped upon hearing the conviction, and about two dozen of them followed her out of court, chanting, "Hands off Lynne Stewart!"

She vowed to appeal and blamed the conviction on evidence that included videotape of Usama bin Laden urging support for her client. The defense protested the bin Laden evidence, and the judge warned jurors that the case did not involve the events of Sept. 11.

"When you put Usama bin Laden in a courtroom and ask the jury to ignore it, you're asking a lot," she said. "I know I committed no crime. I know what I did was right."

Lawyers have said Stewart most likely would face a sentence of about 20 years on charges that include conspiracy, providing material support to terrorists, defrauding the government and making false statements.

She will remain free on bail but must stay in New York until her July 15 sentencing.

The anonymous jury also convicted a U.S. postal worker, Ahmed Abdel Sattar, of plotting to "kill and kidnap persons in a foreign country" by publishing an edict urging the killing of Jews and their supporters.

A third defendant, Arabic interpreter Mohamed Yousry, was convicted of providing material support to terrorists. Sattar could face life in prison and Yousry up to 20 years.

Attorney General Alberto Gonzales called the verdict "an important step" in the war on terrorism.

"The convictions handed down by a federal jury in New York today send a clear, unmistakable message that this department will pursue both those who carry out acts of terrorism and those who assist them with their murderous goals," Gonzales said.

Stewart was the lawyer for Omar Abdel-Rahman, a blind sheik sentenced to life in prison in 1996 for conspiring to assassinate Egyptian President Hosni Mubarak and destroy several New York landmarks, including the U.N. building and the Lincoln and Holland Tunnels. Stewart's co-defendants also had close ties to Abdel-Rahman.

Prosecutors said Stewart and the others carried messages between the sheik and senior members of an Egyptian-based terrorist organization, helping spread Abdel-Rahman's venomous call to kill those who did not subscribe to his extremist interpretation of Islamic law.

Prosecutor Andrew Dember argued that Stewart and her co-defendants essentially "broke Abdel-Rahman out of jail, made him available to the worst kind of criminal we find in this world—terrorists."

At the time, the sheik was in solitary confinement in Minnesota under special prison rules to keep him from communicating with anyone except his wife and his lawyers.

Michael Ratner, president of the Center for Constitutional Rights, said the purpose of the prosecution of Stewart "was to send a message to lawyers who represent alleged terrorists that it's dangerous to do so."

But Peter Margulies, a law professor at Roger Williams University in Rhode Island who conducted a panel on lawyers and terrorism recently, called the verdict reasonable.

"I think lawyers need to be advocates, but they don't need to be accomplices," he said. "I think the evidence suggested that Lynne Stewart had crossed the line."

Stewart, who once represented Weather Underground radicals and mob turncoat Sammy "The Bull" Gravano, repeatedly declared her innocence, maintaining she was unfairly targeted by overzealous prosecutors.

But she also testified that she believed violence was sometimes necessary to achieve justice: "To rid ourselves of the entrenched, voracious type of capitalism that is in this country that perpetuates sexism and racism, I don't think that can come nonviolently."

A major part of the prosecution's case was Stewart's 2000 release of a statement withdrawing the sheik's support for a cease-fire in Egypt by his militant followers.

Prosecutors, though, could point to no violence that resulted from the statement.

[From nytimes.com, Dec. 20, 2005]

BUSH ACCOUNT OF A LEAK'S IMPACT HAS
SUPPORT

(By David E. Rosenbaum)

WASHINGTON.—As an example of the damage caused by unauthorized disclosures to reporters, President Bush said at his news conference on Monday that Osama bin Laden had been tipped by a leak that the United States was tracking his location through his telephone. After this information was published, Mr. Bush said, Mr. bin Laden stopped using the phone.

The president was apparently referring to an article in The Washington Times in August 1998.

Toward the end of a profile of Mr. bin Laden on the day after American cruise missiles struck targets in Afghanistan and Sudan, that newspaper, without identifying a source, reported that "he keeps in touch with the world via computers and satellite phones."

The article drew little attention at the time in the United States. But last year, the Sept. 11 commission declared in its final report: "Al Qaeda's senior leadership had stopped using a particular means of communication almost immediately after a leak to The Washington Times. This made it much more difficult for the National Security Agency to intercept his conversations." There was a footnote to the newspaper article.

Lee H. Hamilton, the vice chairman of the commission, mentioned the consequences of the article in a speech last month. He said: "Leaks, for instance, can be terribly damaging. In the late 90's, it leaked out in The Washington Times that the U.S. was using Osama bin Laden's satellite phone to track his whereabouts. Bin Laden stopped using that phone; we lost his trail."

In their 2002 book, "The Age of Sacred Terror" (Random House), Steven Simon and Daniel Benjamin, who worked at the National Security Council under President Bill Clinton, also mentioned the incident. They wrote, "When bin Laden stopped using the phone and let his aides do the calling, the United States lost its best chance to find him."

More details about the use of satellite phones by Mr. bin Laden and his lieutenants were revealed by federal prosecutors in the 2001 trial in Federal District Court in Manhattan of four men charged with conspiring to bomb two American embassies in East Africa in 1998.

Asked at the outset of his news conference about unauthorized disclosures like the one last week that the National Security Agency had conducted surveillance of American citizens, Mr. Bush declared: "Let me give you an example about my concerns about letting the enemy know what may or may not be happening. In the late 1990's, our government was following Osama bin Laden because he was using a certain type of telephone. And the fact that we were following Osama bin Laden because he was using a certain type of telephone made it into the press as the result of a leak. And guess what happened? Osama bin Laden changed his behavior. He began to change how he communicated."

Toward the end of the news conference, Mr. Bush referred again to this incident to illustrate the damage caused by leaks.

[From the Wall Street Journal, Aug. 22, 2007]
JOSE PADILLA MAKES BAD LAW—TERROR TRIALS HURT THE NATION EVEN WHEN THEY LEAD TO CONVICTIONS

(By Michael B. Mukasey)

The apparently conventional ending to Jose Padilla's trial last week—conviction on charges of conspiring to commit violence abroad and providing material assistance to a terrorist organization—gives only the coldest of comfort to anyone concerned about how our legal system deals with the threat he and his co-conspirators represent. He will be sentenced—likely to a long if not a life-long term of imprisonment. He will appeal. By the time his appeals run out he will have engaged the attention of three federal district courts, three courts of appeal and on at least one occasion the Supreme Court of the United States.

It may be claimed that Padilla's odyssey is a triumph for due process and the rule of law in wartime. Instead, when it is examined closely, this case shows why current institutions and statutes are not well suited to even the limited task of supplementing what became, after Sept. 11, 2001, principally a military effort to combat Islamic terrorism.

Padilla's current journey through the legal system began on May 8, 2002, when a federal district court in New York issued, and FBI agents in Chicago executed, a warrant to arrest him when he landed at O'Hare Airport after a trip that started in Pakistan. His prior history included a murder charge in Chicago before his 18th birthday, and a firearms possession offense in Florida shortly after his release on the murder charge.

Padilla then journeyed to Egypt, where, as a convert to Islam, he took the name Abdullah al Muhajir, and traveled to Saudi Arabia, Afghanistan and Pakistan. He eventually came to the attention of Abu Zubaydeh, a lieutenant of Osama bin Laden. The information underlying the warrant issued for Padilla indicated that he had returned to America to explore the possibility of locating radioactive material that could be dispersed with a conventional explosive—a device known as a dirty bomb.

However, Padilla was not detained on a criminal charge. Rather, he was arrested on a material witness warrant, issued under a statute (more than a century old) that authorizes the arrest of someone who has information likely to be of interest to a grand jury investigating crime, but whose presence to testify cannot be assured. A federal grand jury in New York was then investigating the activities of al Qaeda.

The statute was used frequently after 9/11, when the government tried to investigate numerous leads and people to determine whether follow-on attacks were planned—but found itself without a statute that authorized investigative detention on reasonable suspicion, of the sort available to authorities in Britain and France, among other countries. And so, the U.S. government subpoenaed and arrested on a material witness warrant those like Padilla who seemed likely to have information.

Next the government took one of several courses: it released the person whose detention appeared on a second look to have been a mistake; or obtained the information he was thought to have, and his cooperation, and released him; or placed him before a grand jury with a grant of immunity under a compulsion to testify truthfully and, if he testified falsely, charge him with perjury; or developed independent evidence of criminality sufficiently reliable and admissible to warrant charging him.

Each individual so arrested was brought immediately before a federal judge where he was assigned counsel, had a bail hearing, and was permitted to challenge the basis for his detention, just as a criminal defendant would be.

The material witness statute has its perils. Because the law does not authorize investigative detention, the government had only a limited time in which to let Padilla testify, prosecute him or let him go. As that limited time drew to a close, the government changed course. It withdrew the grand jury subpoena that had triggered his designation as a material witness, designated Padilla instead as an unlawful combatant, and transferred him to military custody.

The reason? Perhaps it was because the initial claim, that Padilla was involved in a dirty bomb plot, could not be proved with evidence admissible in an ordinary criminal trial. Perhaps it was because to try him in open court potentially would compromise sources and methods of intelligence gathering. Or perhaps it was because Padilla's apparent contact with higher-ups in al Qaeda made him more valuable as a potential intelligence source than as a defendant.

The government's quandary here was real. The evidence that brought Padilla to the government's attention may have been compelling, but inadmissible. Hearsay is the most obvious reason why that could be so; or the source may have been such that to disclose it in a criminal trial could harm the government's overall effort.

In fact, terrorism prosecutions in this country have unintentionally provided terrorists with a rich source of intelligence. For example, in the course of prosecuting Omar Abdel Rahman (the so-called "blind sheik") and others for their role in the 1993 World Trade Center bombing and other crimes, the government was compelled—as it is in all cases that charge conspiracy—to turn over a list of unindicted co-conspirators to the defendants.

That list included the name of Osama bin Laden. As was learned later, within 10 days a copy of that list reached bin Laden in Khartoum, letting him know that his connection to that case had been discovered.

Again, during the trial of Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing, an apparently innocuous bit of testimony in a public courtroom about delivery of a cell phone battery was enough to tip off terrorists still at large that one of their communication links had been compromised. That link, which in fact had been monitored by the government and had provided enormously valuable intelligence, was immediately shut down, and further information lost.

The unlawful combatant designation affixed to Padilla certainly was not unprecedented. In June 1942, German saboteurs landed from submarines off the coasts of Florida and Long Island and were eventually apprehended. Because they were not acting as ordinary soldiers fighting in uniform and carrying arms openly, they were in violation of the laws of war and not entitled to Geneva Conventions protections.

Indeed, at the direction of President Roosevelt they were not only not held as prisoners of war but were tried before a military court in Washington, D.C., convicted, and—except for two who had cooperated—executed, notwithstanding the contention by one of them that he was an American citizen, as is Padilla, and thus entitled to constitutional protections. The Supreme Court dismissed that contention as irrelevant.

In any event, Padilla was transferred to a brig in South Carolina, and the Supreme Court eventually held that he had the right to file a habeas corpus petition. His case

wound its way back up the appellate chain, and after the government secured a favorable ruling from the Fourth Circuit, it changed course again.

Now, Padilla was transferred back to the civilian justice system. Although he reportedly confessed to the dirty bomb plot while in military custody, that statement—made without benefit of legal counsel—could not be used. He was instead indicted on other charges in the Florida case that took three months to try and ended with last week's convictions.

The history of Padilla's case helps illustrate in miniature the inadequacy of the current approach to terrorism prosecutions.

First, consider the overall record. Despite the growing threat from al Qaeda and its affiliates—beginning with the 1993 World Trade Center bombing and continuing through later plots including inter alia the conspiracy to blow up airliners over the Pacific in 1994, the attack on the American barracks at Khobar Towers in 1996, the bombing of U.S. embassies in Kenya and Tanzania in 1998, the bombing of the Cole in Aden in 2000, and the attack on Sept. 11, 2001—criminal prosecutions have yielded about three dozen convictions, and even those have strained the financial and security resources of the federal courts near to the limit.

Second, consider that such prosecutions risk disclosure to our enemies of methods and sources of intelligence that can then be neutralized. Disclosure not only puts our secrets at risk, but also discourages allies abroad from sharing information with us lest it wind up in hostile hands.

And third, consider the distortions that arise from applying to national security cases generally the rules that apply to ordinary criminal cases.

On one end of the spectrum, the rules that apply to routine criminals who pursue finite goals are skewed, and properly so, to assure that only the highest level of proof will result in a conviction. But those rules do not protect a society that must gather information about, and at least incapacitate, people who have cosmic goals that they are intent on achieving by cataclysmic means.

Khalid Sheikh Mohammed, the mastermind of the 9/11 attacks, is said to have told his American captors that he wanted a lawyer and would see them in court. If the Supreme Court rules—in a case it has agreed to hear relating to Guantanamo detainees—that foreigners in U.S. custody enjoy the protection of our Constitution regardless of the place or circumstances of their apprehension, this bold joke could become a reality.

The director of an organization purporting to protect constitutional rights has announced that his goal is to unleash a flood of lawyers on Guantanamo so as to paralyze interrogation of detainees. Perhaps it bears mention that one unintended outcome of a Supreme Court ruling exercising jurisdiction over Guantanamo detainees may be that, in the future, capture of terrorism suspects will be forgone in favor of killing them. Or they may be put in the custody of other countries like Egypt or Pakistan that are famously not squeamish in their approach to interrogation—a practice, known as rendition, followed during the Clinton administration.

At the other end of the spectrum, if conventional legal rules are adapted to deal with a terrorist threat, whether by relaxed standards for conviction, searches, the admissibility of evidence or otherwise, those adaptations will infect and change the standards in ordinary cases with ordinary defendants in ordinary courts of law.

What is to be done? The Military Commissions Act of 2006 and the Detainee Treatment Act of 2005 appear to address principally the

detainees at Guantanamo. In any event, the Supreme Court's recently announced determination to review cases involving the Guantanamo detainees may end up making commissions, which the administration delayed in convening, no longer possible.

There have been several proposals for a new adjudicatory framework, notably by Andrew C. McCarthy and Alykhan Velshi of the Center for Law & Counterterrorism, and by former Deputy Attorney General George J. Terwilliger. Messrs. McCarthy and Velshi have urged the creation of a separate national security court staffed by independent, life-tenured judges to deal with the full gamut of national security issues, from intelligence gathering to prosecution. Mr. Terwilliger's more limited proposals address principally the need to incapacitate dangerous people, by using legal standards akin to those developed to handle civil commitment of the mentally ill.

These proposals deserve careful scrutiny by the public, and particularly by the U.S. Congress. It is Congress that authorized the use of armed force after Sept. 11—and it is Congress that has the constitutional authority to establish additional inferior courts as the need may be, or even to modify the Supreme Court's appellate jurisdiction.

Perhaps the world's greatest deliberative body (the Senate) and the people's house (the House of Representatives) could, while we still have the leisure, turn their considerable talents to deliberating how to fix a strained and mismatched legal system, before another cataclysm calls forth from the people demands for hastier and harsher results.

Mr. KYL. Mr. President, the only point I am making is that while it is possible to try these people in Federal court, it is very difficult. It frequently results in the disclosure of information that we don't want disclosed. I think it would be far better, if we can, to try these people in military commissions. The President has now said he would go forward with military commissions—modified to some extent—and I think that is a good thing for the trial of those who are suitable for that action.

The President also noted, of course, that there are going to be a lot of these terrorists who cannot be tried but are dangerous and need to be held, and the U.S. Supreme Court has affirmed the appropriateness of holding such people until the end of hostilities. The President has indicated that he would, in fact, do that.

I think there is no question, therefore, that we will be holding some of these people. The question is where best to do it. This is the nub of the argument that my colleague and fellow whip, the Senator from Illinois, and I have been having long distance. I relish the opportunity when we can both get our schedules straight to literally have a debate back and forth. I think it is an important topic.

I see now other colleagues are here, and so I will make one final point, and then I hope we can continue in this debate because I think it is a better policy to keep Guantanamo open and keep these prisoners there than to try to find some alternative.

Let me cite one statistic, and then make my primary point. According to the numbers I have—and I would be

happy to share these with my colleague from Illinois with respect to the slots available in our supermax facilities, if I can find it—there are about 15 high security facilities which were built to hold 13,448 prisoners. Those facilities currently house more than 20,000 inmates.

The bottom line is that is not necessarily a supersolution either.

Did my colleague have a quick comment? I want to make my main point.

OK, thank you.

Here is my main point. There are those very credible people who say: Well, this is a recruitment symbol. Guantanamo prison is a recruitment symbol. I have no doubt they are right, it is a recruitment symbol. Several questions, however, are raised by that observation.

The first question is, even if it is false that there has been torture at Guantanamo prison—obviously, terrorists can believe falsehoods—should we take action based upon that falsehood?

The next question I think has to be asked is, does this mean, then, that other terrorist recruiting symbols need to be eliminated by the United States?

The third question is, would that eliminate their terrorism?

What is it exactly that animates these terrorists? Gitmo didn't even exist before some of the worst—in fact, before all of the worst terrorist attacks on the United States or U.S. facilities abroad. There was no Gitmo prior to 9/11. Yet we had all of the various attacks that occurred throughout the world leading up to 9/11 and 9/11 itself. They didn't need another reason to hate America. They didn't need another reason to be able to recruit people. They have all the reasons they can dream up.

I think the key reasons are that they fundamentally disagree with our way of life, and they believe they have an obligation, through jihad, to either get the infidels—that is all of us who don't agree with them—to bend to their will or to do away with us because they don't like our way of life. They do not like the fact that we have the culture we have. They do not like the fact that we give equal rights to women or that we have a democracy. There are a lot of things they hate about the Western World generally and about our society in particular.

These are obviously recruiting symbols and recruiting tools. Are we to do away with these things in order to please them? And even if we did, what effect would it have on their recruiting? Do you think they would then say: OK, great. You have closed Guantanamo prison, you have taken away women's rights, you are halfway home to us not recruiting anybody or terrorizing you anymore. If you will only get rid of the vote and institute Sharia law, we can start talking here.

I don't think that is the way they are going to act. They are going to have grievances against us no matter what. For us to assume we have to change

our policies, to change what we think is in our best interests, simply to assuage their concerns because maybe they do use this as a recruiting tool, I think is to, in effect, hold our hands up and say: In the war against these Islamist terrorists, we have no real defenses because anything we do is going to make them unhappy. It is going to be a recruiting tool. After all, we wouldn't want to give them a recruiting tool.

I do not think it is too much of an exaggeration to make the point I made. One might say: Obviously, we are not going to give up our way of life. They are going to have to deal with that. Well, then they are going to keep recruiting. But we could at least get rid of Guantanamo prison. That would at least get rid of one thorn. Would it make a difference? Nobody believes it would make a difference.

The key point I make is—and this is just a disagreement reasonable people are going to have, I guess—I think Guantanamo is the best place to keep these people. My friend from Illinois thinks there are alternatives that are better and that, under the circumstances, we should make the change. Again, I observe that the American people seem to be on the side of not closing it down, and I do not think it all has to do with fear. I think it has to do with the commonsense notion that this is not going to remove terrorist recruiting. If it is better for us to keep them there, we might as well do that.

The PRESIDING OFFICER. The Senator from Illinois is recognized.

Mr. DURBIN. Mr. President, I ask consent to speak in morning business for 5 minutes. I see other Members are on the floor and I will finish after 5 minutes and yield the floor on this issue we have debated.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DURBIN. I respect my colleague from Arizona and I respect the fact that we are on the floor together. This is a rarity in the Senate, where people with opposing viewpoints actually arrive at the same moment and have a chance at least to exchange points of view if not have more direct communication. I would say, as follows: I don't know what motivates the mind of a terrorist. I think I have some ideas and my colleague does as well. I do not know that we will ever be able to save every soul when it comes to those who are inclined toward terrorism. Let's face reality, it is like crime in this country. We all would like to see it go away, but we know, intuitively, there are some people who are bad people and do bad things and need to pay the price, and I think the same is true for terrorism.

But when President Obama goes to Cairo, Egypt, and appears to speak to the Islamic world about this new administration and its new approach when it comes to dealing with Islam and says as part of it that the United

States has forsworn torture in Guantanamo, he has said to the world: We are telling you this is a different day. It is a new day. For those who are not convinced in terrorism and extremism, at least understand that America is now ready to deal with you in an honest way, in a different way. What message does it send if the Congress turns around and says to the President: No, you can't say that to the Islamic world. We are going to keep Guantanamo open. We are going to keep this open, even if it is an irritant.

Don't take my word for it because I am not an expert in this field but those who are, many of them, believe Guantanamo should be closed. I would never question the sincerity or the resume of GEN Colin Powell, who has said close Guantanamo; GEN David Petraeus: Close Guantanamo; the Secretary of Defense: Close Guantanamo; President George W. Bush: Close Guantanamo.

All of these people who have seen the intelligence and have the background believe it is time to close that facility. This President is trying to make good on that promise by President Bush and turn the page when it comes to Guantanamo and its future. I think that is critical to bringing about a more peaceful world and reaching out and saying to this world: Things have changed.

I bet the Senator from Arizona joined me when we went upstairs to 407 and saw the photographs from Abu Ghraib. It is a moment none of us will ever forget as long as we live. Some of the things we saw there were gut-wrenching. I stood there with my colleagues, women and men, embarrassed at the things I looked at.

Some of those images are going to be with us for a long time, images that the people of the world have seen. We have to overcome them by saying it is a new day, and the clearest way to do that is to close Guantanamo in an orderly way, not to release any terrorists in the United States. On the question about whether we can incarcerate them—even if our prison population is as large as it is, there are facilities available. Once this President is given this option to reach out to States and this Nation, I am confident he will find accommodations in Federal prisons and supermax State prisons to deal with 240 people who are now left at Guantanamo. I think that is something we can expect to happen, and it will happen.

I will close by saying this: I asked the Senator from Kentucky twice if he would comment on what I heard to be his statement about whether this gentleman, Ahmed Ghailani, if found not guilty, would be released into the United States. He said Mr. Gibbs, the White House Press Secretary, had led him to that conclusion. I think, in fairness, Mr. Gibbs would say, clearly, he had no intention that this President or anyone in this administration would ever release this man, and there is no right under the law that he be released, even if he is found not guilty, into the

U.S. population. It is not going to happen. I think raising that specter, raising that question, is raising that level of fear.

I do not think fear should guide us. America is not a strong nation cowering in the shadows in fear. America is a strong nation when we realize our challenge, stand together united, don't abandon our principles, and use the resources we have around the world to make certain we are safer.

The last point I will make is I have the greatest confidence in our system of justice, more than any in the world. I hope all my colleagues will have that same sense of confidence, that if the President sends a case to our courts of law, it will be handled professionally and fairly in the best possible manner.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Mr. President, I have enjoyed this debate between these two great Senators. It is an interesting debate. I come down on the fact, if they are moved into any of our facilities in this country—and there are very few that could take them; in fact, I do not know of any that can take them that are not overcrowded right now—there will be the same screaming and shouting because they will not be treated anywhere near as well as they are treated down there at Guantanamo. No matter what we do that new day is not going to be a very happy day. It is far better to have this \$200 million state-of-the-art facility that has been approved by international organizations as being better than expected, better than average facilities that would be acceptable—it is better to acknowledge that and keep treating them as decently and with as much dignity as we can, which is more than they will get in a supermax facility in this country or any other facility.

The supermax facilities are loaded with prisoners. They have more than they can handle now. Why would we put terrorists in among them, and why would we put them in this country where they can influence other people who are dissatisfied with life and have been discontented and have committed very serious crimes and allow them the recruitment possibilities they would have in our country? It doesn't make sense.

Why would we blow \$200 million on state-of-the-art facilities and then spend another \$80 million to shut it down? It seems like it is going a little bit too far because of the attempt of this administration to please, basically, people who support terrorists and the rest of the world.

Admittedly, there have been some outstanding people in our country who have come to the conclusion they should shut Guantanamo down, but they did so without having a real, viable alternative to Guantanamo. That is the issue that bothers me. I don't know of any State in the Union that wants these people within their prison sys-

tem, assuming they could handle them. It means a lot more expense, a lot more problems. It means the possibility that they will be recruiting terrorists and helping criminals to become terrorists in our country. I can't begin to tell you the cost to this society if we do that. Be that as it may, the President seems to want to do that in spite of the fact that overwhelmingly the American people don't want him to do that.

STATE SECRET PROTECTION ACT

Mr. HATCH. Mr. President, I rise today to express my reservations regarding the State Secrets Protection Act. Since one of the purposes of government is to provide a strong national defense, there are methods and sources that should never be disclosed for fear of irreparable damage to national security. The judicial branch has a long-documented history in addressing the state secrets privilege. Through the years, courts have affirmed time and again the privilege of the government to withhold information that would damage national security programs.

The modern origin of this doctrine was established in *United States v. Reynolds*. The Supreme Court created the Reynolds compromise, which stated that the privilege applies when the court is satisfied "from all circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." That is what the Supreme Court has held, and it has continued to affirm this position with the utmost deference to the executive branch. Under Reynolds, the state secrets privilege cannot—and has not—been lightly invoked. The pending bill before the Judiciary Committee, known as the State Secrets Protection Act, would negate the Reynolds compromise and create a higher standard of proof for the government to assert the privilege.

My analysis of the legislation before us leads me to conclude that this bill will bring chaos to the balance struck by Reynolds. This bill lowers the deference that courts give to the executive branch in its assertion of the state secrets privilege. It raises the burden of proof that the government must meet to protect state secrets. The courts have built great flexibility into the state secrets doctrine to allow themselves the latitude to reach an effective compromise between the rights of litigants and the needs of national security. This is conducted on a case-by-case basis.

The writers of this bill want to redefine the standard to only afford protection under the state secrets privilege only when the disclosure of evidence is "reasonably likely to cause significant harm" to national security. This is a serious departure from the long established precedent of Reynolds. This has ramifications that would severely impede the protection of national security secrets. It is preposterous to abandon a standard that has more than 55

years of jurisprudential evolution and case law to support it. The Reynolds compromise says if there is reasonable danger then we secure the information. S. 417 says if it is reasonably likely, you can compromise the information. S. 417 fails to protect state secrets.

This state secrets privilege is never lightly used and never used with impunity. The assertion of this right must be made in writing by the head of the executive agency invoking the state secrets privilege. In recent cases this has sometimes been the Director of National Intelligence. Courts may conduct their own probe to ensure that the privilege has been invoked correctly. This probe will include an examination as to why the information being sought is needed to prove a plaintiff's case. Conversely, courts will examine as to why the information is critical to national security. After thoughtful review, a judge makes the determination on the production of evidence alleged to have been covered by the privilege. Not a law passed by politicians.

There is a myth that the Bush administration invoked the state secrets privilege more than any other previous administration. Rooted in this fallacy is the idea that the administration overreached in asserting the privilege to protect information not previously thought to be within its scope. This erroneous notion was propagated by not only the media, but by Members of this body. Most legal experts in the field of national security law have stated that it is not possible to collect accurate annual statistics for year-to-year comparisons. There is no "batting average" that can be empirically compared from one presidential administration to another.

To do so would incorrectly operate under the assumption that the government is presented with the same amount of cases each year in which the privilege can be asserted. It makes absolutely no sense to me to compare the administrations and judge them based on the total number of times they asserted the privilege.

The flow of litigation changes from year to year and varies from each administration, as does the invocation of the privilege. It varies because of the times and circumstances. We have been living in very difficult times and circumstances where we have to protect this country; circumstances we have never had to face before. Therefore, it is ludicrous that attempts to compare the rate of assertions of this privilege and arrive at the incorrect conclusion that because the Bush administration used this privilege it must be changed.

Unfortunately, for the authors of this bill, the data does not support the hypothesis that the Bush administration ever used the state secrets privilege in an attempt to dismiss complaints. Published opinions have revealed in the 1970s the government filed five motions. In the 1980s the government filed motions nine times. In the 1990s the government filed motions 13 times.

Preliminary data available for the Bush administration indicate that the privilege was used 14 times.

Therefore, the impetus for the State Secrets Protection Act does not support the conclusion that the Bush administration blazed a new trial in national security law. On the contrary, the authors of this bill are the ones attempting to alter national security law. Keep in mind, we have been going through an extended war on terrorism, and, frankly, there is a need to protect national security. That is why we have the state secrets law.

In the first 100 days of the Obama administration—get that now—in the first 100 days of the Obama administration, the Department of Justice has invoked this privilege three times—in the first 100 days. This is the administration that was complaining about this. Now they found, when they faced reality and how important this privilege is, they changed their tune, and they should. I commend the administration and specifically the President for recognizing this.

The administration has picked up where the Bush administration left off in three pending cases: *Al Haramain Islamic Foundation v. Obama*, *Mohammed v. Jepperson Data Plan*, and *Jewell v. NSA*. During an interview of a widely revered liberal journalist, Attorney General Eric Holder stated that in his opinion the Bush administration—get this word—"correctly" applied the state secrets privilege in these cases.

If this legislation is passed in its present form, private attorneys would be given access to highly classified declarations before a judge rules on whether the state secrets privilege should prevent such a disclosure. Can you imagine the harm that could come to our country? It is hard to believe that anybody would be advocating this in the Senate with what we have been going through and the special wars that we have been going through and the special type of terrorists that we have been having to put up with.

This legislation—lousy legislation—will have the effect of incentivizing lawsuits by rewarding attorneys who file lawsuits with a security clearance. I remember one case in New York where the attorney herself was convicted because she was passing on information.

Now this clearance will grant these attorneys access to classified information that if divulged could reasonably harm our national security interests. It is bad enough trying to keep secrets around here, let alone with people who really should not be qualified for that type of classification. Does an attorney need absolute proof of some violation of law to file a lawsuit to learn details about classified programs? No, under this bill, they simply need to make an accusation. Any accusation will do.

Ensuring national security programs stay classified is critical to our citizens' continued safety. Under this leg-

islation, private attorneys, regardless of the merits of their lawsuits, will be given access to our Nation's secrets, secrets that are critical to the protection of our country. It is not hard to see how this legislation could seriously harm national security.

It is hard for me to see why anybody would be arguing for this legislation. It is a legitimate concern that ideological attorneys would be willing to compromise national security interests and secrets and disclose classified information. There are at least two recent instances involving the disclosure of classified information. These are recent. I am just talking about the recent ones, and then only two of them. There may be more.

In May 2007, a Navy JAG lawyer leaked classified information pertaining to Guantanamo detainees to a human rights lawyer. I find it disturbing that a U.S. military officer who is sworn to protect this Nation would disseminate classified information. But an even more troubling scenario is posed by private attorneys. In 2005, a more alarming case came to light when a civilian defense counsel was convicted of providing material support for a terrorist conspiracy by smuggling messages from her client, a Muslim cleric convicted of terrorism, to his Islamic fundamentalist followers in Egypt.

Do you know how difficult it was to convict an Islamic fundamentalist religious leader? Yet this man was convicted, and rightly so. His attorney compromised these matters. In press interviews after the attorney was convicted, she said, "I would do it again—it's the way lawyers are supposed to behave."

She also said that "you can't lock up the lawyers. You cannot tell the lawyers how to do their job."

I am not implying that all lawyers would act so egregiously. What I am saying is there is a profound reason why the government has classifications for categorizing the sensitivity of information that is vital to national security. Providing top secret clearances to persons outside the employment of the United States is a colossal blunder. This bill will allow that.

The courts recognize the executive branch's superior knowledge on military, diplomatic, and national security matters. Judges do not relish the thought of second-guessing decisions made by officials who are better versed on matters that may be jeopardized by allowing attorneys access to classified materials. Similarly, Congress should not relish the thought of second-guessing the judgment of courts that have given careful consideration regarding the appropriate legal standards to balance the interests of judges and national security programs.

The State Securities Protection Act does not protect state secrets. This bill upsets the judicially developed balance between protection of national security and private litigants' access to secret

documents. The judicial branch has crafted a state secrets doctrine to give judges the flexibility to weigh these interests with appropriate deference to the executive branch. This judicially crafted doctrine is more than sufficient and has evolved from the 1912 case of *Firth Sterling* to *Reynolds* to current cases such as *Hepting* and *Al Masri*.

The State Secrets Protection Act is unnecessary and potentially harmful to national security. Unless serious changes are made to this legislation and the amendments offered by myself and my Republican colleagues are adopted, I cannot in good conscience vote this bill out of committee. I do not know how any Senator sitting in this body can do so.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. INHOFE. I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. INHOFE. Mr. President, I ask unanimous consent to speak as in morning business for 12 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

GUANTANAMO

Mr. INHOFE. Mr. President, I have come to the floor over the past several years, countless times, talking about a resource we have called Guantanamo Bay. People refer to it as Gitmo.

I was distressed about some of the statements our President made when he made the comment that we are going to close Gitmo and make sure there is no more torture. I have to say, there has never been one documented case of torture in Guantanamo Bay. It is ludicrous that people would say this. Every time I talk to someone who says we have to close Guantanamo Bay and you ask them what the reason for that is, they turn around and they say: It is because the people in the Middle East and some people in Europe think there is torture that has been going on. It goes back to the Abu Ghraib thing. This had nothing to do with Abu Ghraib. There has never been a documented case of torture.

Let's look at this resource. We got Gitmo in 1903. It is one of the best bargains we have had in government because we only paid \$4,000 a year for this. It is a state-of-the-art prison. We don't have anything in the United States that is as secure and as humane as Gitmo. They have a ratio of doctors to detainees of two to one, the same with legal help. I have been down there several times. If you talk to the ones who won't be throwing something at you, they will tell you they have never had food and treatment as good as they have had down there. I can't imagine we would take a resource such as that and close it down and bring some 200 or 240 terrorists to the United States. Yet that is exactly what the President is talking about doing.

I was shocked when I picked up the newspaper on Monday morning and saw that Ahmed Ghailani, who was the terrorist who bombed the embassies in Tanzania and Kenya, was actually brought to the United States. He is in New York today. I didn't know about it until I read it in the newspaper. He is going to be adjudicated or go to trial in our court system.

Here is the problem we have with that. These people in Guantanamo Bay are terrorists, detainees. These are not criminals. These are not people who committed a crime. They are not people to whom the normal rules of evidence would apply. In fact, most of the rules of evidence, it was assumed, would be in the form of military tribunals. Of course, those rules are different than they are in the court system. What will happen when you have some of the worst terrorists in the world coming up and getting tried in our system and we find out they have to be acquitted because the rules of evidence are not what they were during the time they were brought into custody?

We have this resource we have used since 1903. It is the only place in the world we can actually put detainees. The President has said there are some 17 prisons in the United States where we can incarcerate these people. I suggest—and I don't think anyone will refute this—if you did that, you would have 17 magnets for terrorism.

One of the places they suggested happened to be Fort Sill in Oklahoma. I went down to Fort Sill. There is a young lady there who is a sergeant major in charge of our prison. She said: What is wrong with those people in Washington? What is wrong with the President, thinking that we can incarcerate terrorists here in Oklahoma?

This young lady was also a sergeant major at Guantanamo just a few months ago. She went back and she said: That is the greatest facility. There is no place where we can replicate that thing.

She said: On top of that, we have the courtroom that was built.

We spent 12 months and \$12 million on a courtroom where we could have military tribunals, and they were going on. And President Obama ordered them to stop, and he wanted to bring them to the United States to be adjudicated here. This is outrageous.

I have heard people on the Senate floor talk about how bad Guantanamo Bay is. They will never be specific. They will never talk about what is wrong with Guantanamo Bay. What are they doing? Are they torturing people? No. Are they being mistreated? No. There are six levels of security. When you are dealing with terrorist detainees, you have to put them in areas where the level of their activity is greater and requires more or less security, and we have that opportunity to do it there. No place else in America, no place else in the world can they do that.

By the way, it is not just 245 detainees whom we have to deal with. It is worse than that because in Afghanistan, with the surge taking place right now, there will be more detainees. There are two major prisons: Bagram—and I can't remember the other one in Afghanistan. They will say they could be incarcerated there. No, they won't, because they won't accept any detainees who are not from Afghanistan. So if they are from Djibouti or from Saudi Arabia or someplace else, we have to have a place to put them or else you turn them loose or else you execute them.

A lot of these people who think they should not be incarcerated in any prison at all, you have to keep in mind, you can't turn them loose on society. These are people who are not normal, people like normal criminals. First of all, they have no fear of death. It is just ingrained in them. These are people who want to kill all of us. So we are talking about very dangerous people.

I am very much concerned. I did not believe President Obama would go through with bringing terrorists to the United States. I didn't think that would happen. Yet I picked up the paper Monday morning and there it is. Ahmed Ghailani, one of the worst terrorists around, killed 244 people, many Americans, in Tanzania and Kenya. This is something that I know the American people don't want. I would hope many of my good Democratic friends are not going to line up and support President Obama in bringing these terrorists to the United States.

I guess I am prejudiced. I have 20 kids and grandkids. I don't want a bunch of terrorists in this country where they are subjected to that type of thing. The fact is, they would be magnets; there is no doubt in my mind. This Sergeant Major Carter at Fort Sill said that if we put them down there, they would be in a position where it would draw terrorist activity to my State of Oklahoma.

By the way, I think there are 27 State legislatures that have passed resolutions saying they don't want any of the detainees located in their States. I can assure my colleagues that every one of the 17 proposed sites that would house these people is a site where they have passed resolutions saying: We don't want them here.

The liberal press is always talking about how bad things are and we have to close Gitmo. If you go down there, you find that those people have never been there. Almost without exception—I don't know of one exception where if they have gone down there and they have seen how humanely people are treated, they have seen a resource down there that we can't replicate any place in the United States, they come back shaking their heads saying: What is wrong with keeping Gitmo open? Even Al Jazeera went down there. That is a Middle Eastern network. They went down and had to admit publicly that the treatment was better there

than it is in any of the prisons they are familiar with.

Abu Ghraib was a different situation. Yes, some of our troops were involved in that. Most people wouldn't call it torture. It is more humiliation than anything else. But nonetheless, they did that. But the interesting thing about Abu Ghraib is, prior to the time that the public was aware that was going on, the Army had already come in and started their discipline, and it stopped that type of thing from taking place. But even if it weren't, for people to think just because there was something in their minds that was torture that was going on in Abu Ghraib, to even suggest that was going on in Guantanamo Bay is totally fictitious.

I have been privileged to take several Members down with me to see this firsthand. I think every Member of the Senate should have to go down and see for himself or herself what is really going on down there.

We can't afford to take a chance on turning terrorists loose in the United States. The polling that came out just this morning showed that by a margin of 3 to 1, people do not want to close Guantanamo Bay. We have to keep Gitmo open.

I was in a state of shock when I found out that one of the worst terrorists incarcerated down there was brought back to face justice in our court system in New York.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BEGICH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

MORNING BUSINESS

Mr. BEGICH. Mr. President, I ask unanimous consent that the Senate proceed to a period of morning business, with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMENDING NICKY HAYDEN

Mr. MCCONNELL. Mr. President, I rise today to pay tribute to Nicky Hayden, a native of Owensboro, KY., who has followed his passion and is an inspiration for all Kentuckians.

Hayden is among the world's elite in Grand Prix motorcycle racing. Driving at speeds of up to 200 miles per hour, with his knees sometimes only inches off of the ground, Hayden has won countless races all over the world.

Nicky's racing career has led him to win the Moto Grand Prix Championship in 2006, the AMA Superbike Championship in 2002, and the AMA Supersport 600 Championship in 1999.

Nicky's parents, Earl and Rose Hayden, could not be more proud of what

their son has already accomplished since he began racing at a very young age.

An article in the June 2009 edition of Kentucky Living magazine chronicled Nicky's career, highlighting his exciting and successful career, his extensive travel schedule, and his love of his home State and town. I ask unanimous consent to have the full article printed in the CONGRESSIONAL RECORD.

Mr. President, I further ask my colleagues to join me in recognizing the achievements of Nicky Hayden and I wish him continued success throughout his career.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From Kentucky Living, June 2009]

NICKY HAYDEN, THE KENTUCKY KID

(By Gary P. West)

When fans call you The Kentucky Kid and you race throughout the world on a motorcycle at speeds in excess of 200 miles per hour, you better believe you have to be good, real good.

That's what 28-year-old Nicky Hayden from Owensboro does, and as a professional motorcycle racer, who started out in the sport long before he was big enough for his feet to touch the ground while seated, he has become one of the biggest names in the sport.

Nicky was back home in Owensboro, or OWB as he calls it, taking the name from the local airport, on a summer break from an 18-race schedule that begins in March and ends in November.

"I travel 11 months a year," he says. "But I love coming home to my family. Family's important to me. Growing up here with my two brothers and two sisters, I have everything I want. My mom was from a big farm family, 11 brothers and sisters, so my family has always been close. I don't want to live in Monaco or anywhere else like that."

Nicky's parents, Earl and Rose, once upon a time, enjoyed the thrill of going fast on motorcycles themselves. Earl raced often and won on dirt tracks, while Rose competed successfully in "powder puff" leagues, but when their family began to expand, they turned to introducing their three sons to the sport.

While older brother Tommy and younger brother Roger have had successful professional riding stints, it's Nicky who has risen to world-class status winning the MotoGP or Grand Prix, the sport's most elite level of motorcycle racing. As the World Champion in 2006, he has picked up several other accolades that might be expected for a handsome bachelor who hangs out with jetsetters throughout Europe and the United States.

Nicky often finds himself far removed from his Owensboro home in order to race against riders from Italy, Spain, Portugal, Australia, and other countries throughout the world. But it's his return visits to Kentucky and his family and friends that help him keep his Daviess County values.

Swerving through curves, routinely leaning his motorcycle so far on its sides that the friction from the asphalt eats into his knee pucks, Hayden and his cycle appear to defy the law of gravity. Riding on the edge of traction, the slightest loss of concentration and his race is over.

Motorcycle racing, considered by many to be a daredevil sport, has gained its popularity on dirt tracks throughout America over the years. But with the strong influence of his parents, one question begs to be asked.

Considering Owensboro's reputation as a hotbed for stock car racing how did the Hayden family stay focused on motorcycles?

With Owensboro names like Waltrip, Green, and Mayfield, all established NASCAR stars, it seems like it would have been easier to catch on with automobile racing.

But Hayden's star was growing at a much earlier age than it takes to get a ride in a car at Daytona.

By the age of 17, and still in high school at Owensboro Catholic, he was racing factory Honda RC45 superbikes and winning. In 2002, at the age of 21, he won the Daytona 200 while becoming the youngest ever to win an AMA Superbike Championship. He was years removed from the days when his parents would hold his bike in place for the start of a race because he was too small to touch the ground.

Soon after, Honda tapped The Kentucky Kid to join what many in the business consider the elite team in MotoGP racing, Repsol Honda. Earning rookie-of-the-year honors on the circuit his first year, his racing togs began to take on more sponsors than an Indy car. A jewelry line, clothing, sunglasses, tires, energy drink, watches, and, of course, Repsol, an oil and gas company operating in more than 30 countries, cover almost every inch of his protective racing ware.

With his boyish good looks and success as an international motorcycle racer, it was of little surprise when Hayden was listed among People magazine's 50 Hottest Bachelors in 2005.

That was followed by appearances on the Today Show, Jay Leno's Tonight Show, and a two-hour documentary on MTV appropriately called The Kentucky Kid, which chronicled his 2006 championship season. "It gave us good exposure in a market we hadn't been in," says Nicky.

Rubbing elbows and shaking hands with the likes of Michael Jordan, Brad Pitt, and Tom Cruise, and seeing your picture on a full-page Honda ad and in USA Today, further points out the two worlds Nicky lives in.

It did not come, however, without some difficulties and second-guessing. Family closeness made Nicky's travels throughout the world difficult at times, especially that first year in MotoGP competition.

"It was another world to me," recalls Nicky. "I was learning the bike, my team, the hectic travel schedule, and everything that went with it. My two brothers and I always trained, practiced, and rode together and then the next year I was out there by myself."

With Nicky and his family growing up on Rose's home-cooked meals, the sudden change in culinary choices as he traveled presented some problems.

"Oh, yeah, food was definitely an issue," his voice rising to emphasize the point. "It's not much fun being on an airplane with food poisoning. There have been several nights I have gone to bed hungry, and when I was in China I lived on watermelon for a while." "At the races I stay in a motor home at the track," he says.

One of the perks of racing at this level is that a motor home is delivered to each of his European races. It also includes an English-speaking satellite television that he says helped to overcome his loneliness.

The entire setting is thousands of miles removed from his Daviess County home, and thousands of thoughts about those days when he couldn't wait to finish high school and race motorcycles. It was his only thought.

"I did just enough in school to get by" to keep my grades up so my parents would let