

# PREVENTATIVE DETENTION AND OUR CRIMES

I guess the news that came out of yesterday's great chat (if I do say so myself) with Sheldon Whitehouse is his analogy on preventative detention.

To argue by analogy, one can go to court and to a civil standard of proof show that someone is a danger to themselves or others, and obtain a civil commitment restricting their freedom. If we can do this with Americans, it seems logical that we could also do it with foreign terrorists. The question is, what checks and balances should surround the initial determination of danger, and what safeguards should stay with the person through the period of confinement? I look forward to hearing more from the Obama Administration about what schedule of rule of law safeguards they intend to apply, but I think that the example of civil commitment shows that it is not categorically forbidden to restrict someone's freedom based on a finding of danger.

I was already thinking of what it means to use the analogy from psychiatric detention, but reading Digby talk about issues has a way of bringing them into focus.

I think that may be even scarier than Gitmo. It implies use of psychiatric hospitals for political prisoners, a la the Soviet Union. It's a terrible analogy.

Whitehouse is a good guy and I don't mean to pick on him, but this just won't do, even to make a point. Involuntary commitment cannot be used for

criminals, who everyone knows may very well re-offend when they are released, so it certainly cannot be used for terrorist suspects who are accused of being at war with America. (Unless, of course, you think it is insane to be at war with America.) The history of involuntary commitment is hideous throughout world history and it remains controversial to this day, even when it is used for people who are truly mentally ill. To even think of it as a way to argue that such policies are analogous to the indefinite detention of terrorist suspects is really dangerous.

You see, while I know this whole preventative detention thing is being proposed for a range of detainees, having read two recent filings from Abu Zubaydah's lawyers and TheraP's take on those filings, I'm mostly thinking of Abu Zubaydah, whom our government has been calling one of the 9/11 plotters for years, but who did not get charged when KSM and the others got charged. I can't help to shake the notion that this preventative detention stuff is supposed to solve what we do with Abu Zubaydah. On one hand, Zubaydah really is someone who has a severe physical condition that will hinder his ability to mount a defense.

[Between September 2006 and August 19, 2008, Zubaydah] has suffered approximately 150 seizures. According to Petitioner, the seizures are brought on by noise and bright lights, and begin with a headache. It is an excruciating pain, starting at the base of his skull near the top of his neck, and traveling along a line that traces up the back of his skull, along the center and slightly to the left of center. It is the same area where he was injured in late 1992, fighting the communists in Afghanistan. He feels as though electricity is pulsing through his head.

Along with the headache, his right hand begins to shake. It is a small tremor that he cannot control. On some occasions, he loses the ability to grasp with that hand. Sometimes he also has a tremors in his right leg, below the knee, again beyond his control. At the same time, he feels as though his ears are closing. Sounds become faint, indistinct, and distant. Occasionally he is dizzy, and sometimes he vomits.

Then he faints. Petitioner suffers a complete loss of consciousness, collapsing to the concrete. He can be unconscious for hours, though it may be less, depending on when the guards come for him. But always, he emerges from his episodes when the guards revive him. He does not wake himself up. The guards use ammonia in his nose or wake him up by carrying him from the floor to his cot. Sometimes when they revive him, he is in a state of semi-consciousness. He can hear, faintly, but cannot move, speak, or respond to instructions.

When he is conscious, the headache returns, only this time it is worse. It feels like someone is drilling in his head. And always the pounding is in the same—the rear of his skull and slightly to the left. Sometimes he slams his head with his fists, or against the wall, in an unsuccessful attempt to relieve the pain. Very commonly after his episodes, he vomits. He is dizzy, and cannot stand up. The feeling of electricity in his head returns. [footnotes omitted]

In another filing, Zubaydah's lawyers argue he cannot remember events—particularly those of which he was accused in his CSRT—without his diaries.

Mind you, at the times when he is not suffering from such seizures, Zubaydah does seem competent

to help his lawyers, but these seizures sound utterly debilitating, and stress appears to be one of the triggers for them.

So what to do with Zubaydah, and the detainees reported to be psychologically even less fit to stand defense?

But Zubaydah reveals all the problems with the suggestion of preventative detention. Not only is there the tremendous problem that Zubaydah's condition—and that of other detainees—can be traced directly to our treatment of them. Zubaydah, for example, told the ICRC that ever since being waterboarded, he loses control of his bladder when under stress. And even detainees who didn't have Zubaydah's history of head injury ended up far less competent than him after our treatment of them. So are we really proposing indefinite detention for a bunch of men who can't be tried because we drove them crazy?

And, too, the suggestion that we could not try Abu Zubaydah is a nice fiction that allows us to avoid admitting how bad some of the errors the Bush regime made. The biggest impediment to Zubaydah mounting a defense, of course, is not his own condition, but the fact that the government has thus far refused to give him the parts of his diary that will not only prove (Zubaydah maintains) that he actually condemned 9/11, but also show that any confessions he made, he made under torture. Has the government refused to turn over those diaries because they were destroyed, like the tape depicting Zubaydah's torture?

I don't know, but I do know that this farce of indefinite detention would allow the government to dispose of Zubaydah without having to either admit they destroyed exonerating evidence or deal with the fact that the treatment we gave him makes him much less competent to stand trial. Not to mention deal with the fact that his treatment was almost certainly illegal under a range of interpretations.

Detain Zubaydah indefinitely, and you sweep all these problems under the rug. Along with a human being.

So to those who make the analogy, in apparent good faith, that indefinite detentions would be just like psychiatric detention, I challenge you not only with Digby's point, but also with the burden of proof that these detentions are not just a cop-out to avoid admitting what we did to a number of men in detention, that they're not designed to ensure we can "move forward" without any accountability for the crimes committed against them?

Are we just entertaining the possibility of indefinite detention because no one is ready to level with the American people that Abu Zubaydah—on whose treatment all the rest is predicated—is not who we were told he was?