

TASK FORCE CONCLUSION: “MANY” DETAINEES WERE LEGALLY DETAINED

✘ While I was away celebrating my 20th college reunion this weekend (thanks for filling in, bmaz), the WaPo liberated the Gitmo Review Task Force report. As the WaPo reported, the big takeaway is the government’s admission that over 55% of those reviewed by the Task Force were what it called “low level fighters” in al Qaeda, the Taliban, or “associated groups.” The claim itself is not all that credible—and that doesn’t include some of the 20% whom the Task Force described as having some organizational role in al Qaeda but might just mean they’re one of Osama bin Laden’s seemingly infinite number of bodyguards. Just 10% were the “worst of the worst” that Gitmo was supposed to hold (the report did not name Abu Zubaydah among those, for example).

All of which might explain why the report was so desperate to claim that detaining these men all these years—well, “many” of them, anyway—wasn’t illegal.

For many of the detainees approved for transfer, however, the review participants found there to be reliable evidence that the detainee had engaged in conduct providing a legal basis for his detention.

No word about the others who have been detained for up to 8 years for whom the Task Force found no legal basis to hold.

Similarly, the report implies that torture was not why the government cannot prosecute “most” of the 48 detainees it has slated for indefinite detention.

Notably, the principal obstacles to prosecution in the cases deemed infeasible by the Task Force did not stem from concerns over protecting sensitive sources or methods from disclosure, or concerns that the evidence against the detainee was tainted. While such concerns were present in some cases, most detainees were deemed infeasible for prosecution based on more fundamental evidentiary and jurisdictional limitations tied to the demands of a criminal forum, as described above.

It describes those jurisdictional limitations this way:

Second, many of the detainees cannot be prosecuted because of jurisdictional limitations. In many cases, even though the Task Force found evidence that a detainee was lawfully detainable as part of al-Qaida—e.g., based on information that he attended a training camp, or played some role in the hierarchy of the organization—the Task Force did not find evidence that the detainee participated in a specific terrorist plot. The lack of such evidence can pose obstacles to pursuing a prosecution in either federal court or a military commission. While the federal material support statutes have been used to convict persons who have merely provided services to a terrorist organization, e.g., by attending a terrorist training camp, there are potential limitations to pursuing such a charge against the detainees. 21

21 Among these limitations: First, the two relevant statutes—18 USC 2339A and 2339B—were not amended to expressly apply extraterritorially to non-US persons until October 2001 and December 2004, respectively. Thus, material support may

not be available as a charge in the federal system unless there is sufficient evidence to prove that a detainee was supporting al-Qaida after October 2001 at the earliest. Second the statute of limitations for these offenses is typically eight years (see 18 USC 3286), which may bar prosecution for offenses that occurred well before the detainee's capture. Third, because the statutory maximum for material support is 15 years (where death does not result from the offense), sentencing considerations may weigh against pursuing prosecution in certain cases. Some of these considerations would not apply to material support charges brought in the military commissions; however, the legal viability of material support charges brought in the military commission system has been challenged on appeal in commission proceedings.

Let's take a moment to lay out what these passages all suggest, but don't admit candidly:

- "Concerns" about tainted evidence explained why at least "some" of these people cannot be prosecuted. I take that as a shorthand admission that these men—or their accusers—were abused in US custody. And the solution, apparently, is to just keep them in custody. The report doesn't say how the government can trust the evidence itself if it is tainted. I guess they just know.
- For a significant number of

the 48 men slated for indefinite detention, **there is no evidence** that the man participated in terrorism. Indeed, given the description, it appears there isn't even any evidence the man took part in an attack on American troops (even granting the government claim that all such attacks were necessarily illegal and not self-defense, which is itself bogus). And given the timing implied by the October 2001 deadline, there's not even any evidence these men continued their affiliation with Al Qaeda after 9/11 made it clear the organization was attacking US civilians. In short, a significant number of these 48 men are just like the mujahadeen the US used to fund in the glorious Reagan days. But in the glorious post-9/11 days, such actions qualify a man for indefinite detention.

- The report also notes—without giving any details—that the eight year statute of limitations has expired for a number of these men. You see, we've

held these men with no charges for so long that now we can't charge them, so we'll just indefinitely detain them with no charges instead (which has the added benefit that the standard of evidence for detention in a habeas proceeding would be lower than that in a civilian trial).

- Finally, the report admits that it doesn't want to charge some of these men with material support for terrorism because the 15 year maximum sentence presents "sentencing considerations." To further translate, the government doesn't want to charge these men with material support because they won't be able to hold them long enough, even if they get a conviction. The government wants to hold them longer than Congress legislated the crime merited and so instead of charging them, the government will just hold them. Also logically included in that premise is the assumption that, first of all, this indefinite detention equates to "more than 15 years" of detention.

And the assumption that the legal justification for holding these men—the AUMF—would extend at least 15 years **from now**.

And this is the best logic the Gitmo Task Force can give to justify the indefinite detention of 48 men.

There's one more interesting detail in the report's justification for indefinitely holding these men. It describes that they have a,

History of associations with extremist activity. Some of the detainees approved for detention have a history of engaging in extremist activities or particularly strong ties (either directly or through family members) to extremist organizations.

First of all, the AUMF does not authorize holding those with associations with extremist activity that is not in some way tied to al Qaeda or an associated force (see pages 8-9/PDF 12-13 for the report's description of what is justified by the AUMF). And the reference to "particularly strong ties ... through family members ... to extremist organizations" may well refer to people like Mohamedou Slahi (and might describe Omar Khadr if they decide to drop the grenade charges against him). Judge Robertson, in ordering the government to release Slahi, found that the ties between him and al Qaeda were too attenuated to qualify—not to mention the fact that the government relied on information collected through abuse. (The Task Force report, dated January 22, noted that all four habeas petitions brought by those slated for indefinite detention that had been decided by the time of the report had been denied; but Slahi's petition was granted in March.) In other words, with its final justification (which, though I'm NAL, doesn't seem to fall under the government's own description of what is

justified under the AUMF), the government is trying to claim the right to detain men indefinitely based on attenuated associations, perhaps even with organizations aside from al Qaeda.

But don't worry about all these inconvenient details. "Many" of these detainees were and are being legally detained.