

Congressional Testimony

“Guantanamo Bay: The Remaining Detainees”

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Chairman DeSantis, Ranking Member Lynch, and other members of the committee, thank you for inviting me to testify today. I have been writing about Guantanamo and the detainees held there for more than a decade and I visited the detention facility in 2008. I have reviewed most, if not almost all, of the publicly available files created by the U.S. government on the individual detainees, as well as the habeas decisions issued by the courts.¹ This material constitutes thousands of pages of source files, which I have summarized in databases containing dozens of variables on most of the men who have been detained. The Guantanamo detainees are a regular part of my coverage at *The Long War Journal*, which was among the first publications to report that former detainee Ibrahim al Qosi, who is a senior al Qaeda figure, had rejoined the fight.²

The key points in my testimony today are as follows:

1. Guantanamo has always posed risk management problems for the U.S. government. Early on, U.S. officials decided to divide the detainee population into categories based on risk. This process was incredibly difficult as it must take into account numerous factors, including sometimes murky, contradictory or uncorroborated intelligence. This process hasn't been perfect, as some detainees were misidentified as low threats, transferred or released, and then rejoined the jihad in a significant capacity. In addition, in some cases detainees were misidentified as being more senior in jihadist organizations than they really were.
2. Even so, various bodies in the U.S. government have collected significant intelligence on most of the detainees. And the detainees' dossiers have been reviewed multiple times by U.S. officials.
3. In January 2010, President Obama's Guantanamo Review Task Force finished its work on the detainee population. It should be noted that the task force did not recommend any of the 240 detainees it evaluated be outright released.³

¹ The publicly available files include summaries and transcripts created during the Combatant Status Review Tribunals (CSRT) and Administrative Review Board (ARB) hearings at Guantanamo. These documents were declassified years ago. In addition, Joint Task Force Guantanamo (JTF-GTMO) created threat assessments for the individual detainees and more than 700 of these have been leaked online. My testimony today is limited to only those files officially declassified or released by the U.S. government. All of these files are summarized and categorized in databases I maintain.

² See Thomas Joscelyn, "Ex-Guantanamo detainee now an al Qaeda leader in Yemen," *The Long War Journal*, December 9, 2015. (<http://www.longwarjournal.org/archives/2015/12/ex-guantanamo-detainee-now-an-al-qaeda-leader-in-yemen.php>) We also first reported that Abdul Hafiz, who was transferred in 2009, was fighting in Afghanistan. See Bill Roggio and Thomas Joscelyn, "Former Gitmo detainee targeting Afghan charities," *The Long War Journal*, March 24, 2010. (<http://www.longwarjournal.org/archives/2010/03/former-gitmo-detainee-3.php>)

³ Guantanamo Review Task Force ("GRTF"), Final Report, January 22, 2010, p. 7. The task force noted that the guidelines it operated under "further provided that a detainee should be deemed eligible for release if he does not pose an identifiable threat to the national security of the United States." However, "no detainees were approved for 'release' during the course of the [task force's] review." The task force also noted that 17 Chinese Uighur detainees had been approved for "transfer or release," but their cases had a unique pattern, including habeas petitions that were decided in their favor. The report can be found at: <https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf>

4. Instead, the task force approved for “transfer,” or eventual transfer after “conditional detention,” 156 of the 240 detainees it reviewed -- that is, nearly two-thirds of the detainee population.⁴ The task force made it clear that the term “transfer” was “used to mean release from confinement subject to appropriate security measures.” The term “release” was “used to mean release from confinement without the need for continuing security measures in the receiving country.”⁵ Again, no detainees were approved for outright release. In other words, the task force determined that there was *at least some risk* involved in the detainee transfers.
5. As of May 19, 2016, 80 detainees remain at Guantanamo. Only 15 of them were approved for transfer by President Obama’s task force. The majority of the detainees, 65 in all, were either referred for prosecution or slated for continued detention under the law of war (2001 Authorization for Use of Military Force). Therefore, the detainee population today is mostly comprised of detainees who President Obama’s own task force *deemed too dangerous to transfer*.
6. The Obama administration has established a Periodic Review Board (PRB) process to evaluate the cases of the 65 detainees previously deemed too dangerous to transfer. The PRB has issued 28 decisions thus far. The PRB has approved for transfer – again, subject to “appropriate security measures” – 21 of the 28 detainees. In some cases, detainees were approved for transfer by the PRB just months after the PRB itself ruled that continued detention remained necessary to mitigate the threat posed by the detainee. In the remaining seven instances, the PRB concluded that detention remained necessary.
7. In its most recent assessment, the Office of the Director of National Intelligence said that 204 former detainees were “confirmed” or “suspected” of reengaging in jihadist activities. The overwhelming majority of these recidivists were transferred or released by the Bush administration. But the number of recidivists transferred by the Obama administration has begun to climb as well, and it is likely only a matter of time until more of them are considered recidivists.
8. In sum, the U.S. government has taken on more and more risk in approving detainee transfers. The government seeks to mitigate this risk and some of its practices are likely somewhat effective (such as transferring detainees to countries that are not currently embroiled in jihadist insurgencies). Still, history shows that it is often difficult for the U.S. government to ensure that “appropriate security measures” are enacted by host countries.

⁴ The 156 detainees approved for transfer includes 30 Yemeni detainees who were placed in “conditional detention.” These Yemeni detainees are discussed further below.

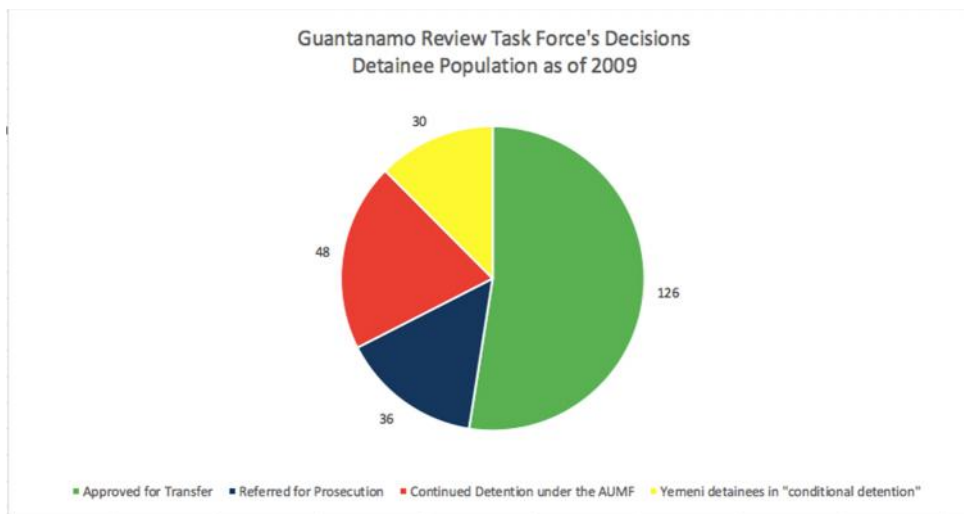
⁵ The distinction between the terms “transfer” and “release” can be found on p. 3 of the GRTF’s Final Report.

Overview of the Guantanamo Detainee Population

President Obama's Guantanamo Review Task Force noted in its final report, which was submitted in January 2010, that it had "reached decisions on the appropriate disposition of all 240 detainees" who were held as of January 2009 and "subject to" President Obama's Executive Order.⁶ Below is a brief overview of the task force's decisions for these 240 detainees. This is intended to be used as a comparison to the current population, which is also summarized below.

The task force approved 126 of the 240 detainees (52.5%) for transfer. Another 30 Yemeni detainees (12.5%) were placed in "conditional detention," meaning they could be transferred if certain conditions were met. Therefore, the task force's plan called for the eventual transfer of nearly two-thirds of the detainee population (65%). These detainees are represented in the green and yellow slices of the pie chart below.

The remaining detainees were either referred for prosecution (36 detainees, or 15% of the population) or slated for continued detention under the 2001 Authorization for Use of Military Force (48 detainees, or 20% of the detainees). Those referred for prosecution in either a court or a military commission are represented in the blue slice of the pie chart below. The detainees slated for continued law of war detention are represented in the red slice.



Although President Obama's interagency task force approved nearly two-thirds of the detainees for transfer, its decisions did *not* mean that these same detainees were

⁶ GRTF, Final Report, p. 9.

considered innocents who posed no threat. It is often reported that these same detainees were “cleared for release,” but that is not accurate. As the task force made clear, “appropriate security measures” needed to be put in place.

“It is important to emphasize that a decision to approve a detainee for transfer does not reflect a decision that the detainee poses no threat or no risk of recidivism,” the task force’s final report reads.⁷ The task force continued:

Rather, the decision reflects the best predictive judgment of senior government officials, based on the available information, that any threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country. Indeed, all transfer decisions were made subject to the implementation of appropriate security measures in the receiving country, and extensive discussions are conducted with the receiving country about such security measures before any transfer is implemented.⁸

In other words, many of the detainees approved for transfer were thought to pose at least some risk.

The task force also explained that its transfer decisions did not reflect a conclusion that the detainees were improperly held in the first place. “It is also important to emphasize that a decision to approve a detainee for transfer does not equate to a judgment that the government lacked legal authority to hold the detainee,” the task force’s participants wrote.⁹ The task force continued:

To be sure, in some cases the review participants had concerns about the strength of the evidence against a detainee and the government’s ability to defend his detention in court, and considered those factors, among others, in deciding whether to approve the detainee for transfer. 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 lawful basis for his detention. The review participants nonetheless considered these detainees appropriate candidates for transfer from a threat perspective, in light of their limited skills, minor organizational roles, or other factors.¹⁰

As mentioned above, 30 Yemeni detainees were placed in “conditional detention.” Their status was more nuanced than much reporting lets on and they were not “cleared for release” as is sometimes reported. The task force found these Yemeni men could be transferred if the “security situation improves in Yemen,” “an appropriate rehabilitation program becomes available,” or “an appropriate third-country resettlement option becomes available.”¹¹ The task force considered the Yemenis placed in “conditional detention” to be a lower risk than the detainees slated for continued detention under the

⁷ GRTF, Final Report, p. 17.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ GRTF, Final Report, pp. 12-13.

2001 AUMF, but they were also thought to be more of a threat than the Yemenis approved for outright transfer. Even if one of the three security conditions was “satisfied,” the task force said, the 29 Yemenis “approved for transfer would receive priority for any transfer options over the 30 Yemeni detainees approved for conditional detention.”¹²

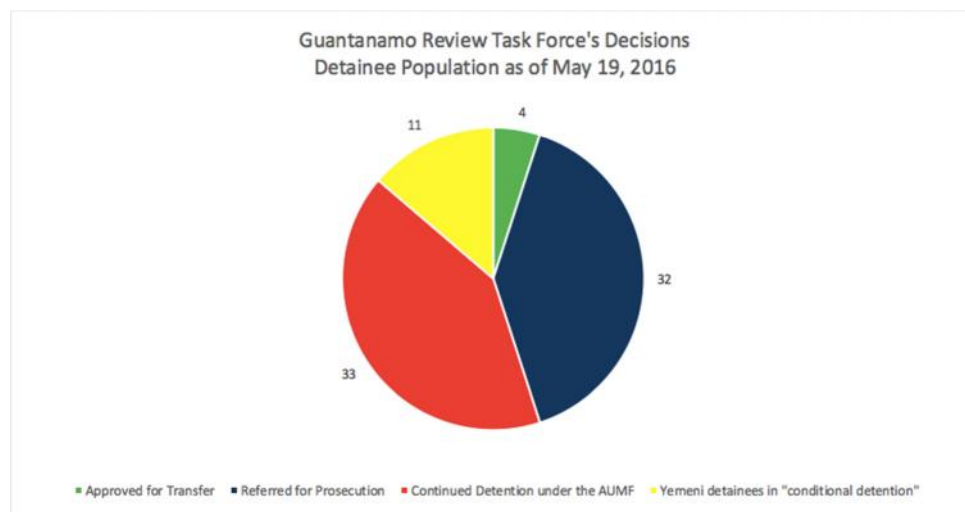
It should also be noted that the Bush administration approved some of these same detainees for transfer. The task force’s final report states that 59 of them “had been approved by the prior administration for transfer or release.”¹³ An additional 11 detainees were “ordered released by a federal court” as a result of habeas litigation.¹⁴ Thus, the task force reported, “a total of 70 detainees subject to the review were either approved for transfer during the prior administration or ordered released by a federal court.”¹⁵

Given that the task force approved 156 detainees for transfer (including the Yemen detainees approved for eventual transfer after “conditional detention”), this means that President Obama’s interagency body approved an additional 86 detainees for transfer.

Overview of the current Guantanamo detainee population

Since the task force finished its final report, the detainee population has been reduced, primarily due to transfers, but also other reasons. Most of the detainees approved for transfer have been transferred.

80 detainees remain at Guantanamo today.



The pie chart above summarizes the detainee population as of May 19, 2016. Comparing it to the previous chart reveals how the situation has evolved.

¹² GRTF, Final Report, p. 13.

¹³ GRTF, Final Report, pp. 15-16.

¹⁴ GRTF, Final Report, p. 16.

¹⁵ Ibid.

Just four (4) of the remaining detainees were approved for transfer by the task force and 11 additional Yemenis were placed in “conditional detention.” This means that only 15 of the remaining 80 detainees (18.75%) were approved for transfer by the task force. The remaining 65 (81.25%) were either slated for prosecution or have been successfully prosecuted (32 detainees), or they were placed in continued detention under the 2001 AUMF (33 detainees).

The evolution of the detainee population is best seen by comparing the two charts. Whereas the green (approved for transfer) and yellow (conditional detention) slices dominated the pie in 2009, the blue and red slices account for most of the pie chart today.

According to the Guantanamo Review Task Force, the 33 detainees remaining at Guantanamo who were placed in continued detention under the laws of war “were determined to be too dangerous to transfer but not feasible for prosecution.”¹⁶ Detainees were placed in detention under the AUMF “only if (1) the detainee poses a national security threat that cannot be sufficiently mitigated through feasible and appropriate security measures; (2) prosecution of the detainee by the federal government is not feasible in any forum; and (3) continued detention without criminal charges is lawful.”¹⁷

The decision to prosecute 32 of the remaining detainees was based on “standards used by federal prosecutors across the country.”¹⁸ The task force reported that cases were referred for prosecution “if the detainee’s conduct constitutes a federal offense and the potentially available admissible evidence will probably be sufficient to obtain and sustain a conviction—unless prosecution should be declined because no substantial federal interest would be served by prosecution.”¹⁹ The task force also listed “[k]ey factors in making this determination,” such as “the nature and seriousness of the offense; the detainee’s culpability in connection with the offense; the detainee’s willingness to cooperate in the investigation or prosecution of others; and the probable sentence or other consequences if the detainee is convicted.”²⁰

In sum, more than four out of every five (65 detainees) of the remaining 80 detainees were considered too dangerous to transfer by President Obama’s task force.

Overview of the Periodic Review Board (PRB) process

President Obama’s March 7, 2011 Executive Order (EO) 13567 established a Periodic Review Board (PRB) process “to review whether continued detention of particular individuals held at Guantanamo remains necessary to protect against a continuing significant threat to the security of the United States.”²¹ The PRB is “a discretionary,

¹⁶ GRTF, Final Report, p. ii.

¹⁷ GRTF, Final Report, p. 8.

¹⁸ GRTF, Final Report, p. 7.

¹⁹ GRTF, Final Report, p. 8.

²⁰ Ibid.

²¹ <http://www.prs.mil/AboutthePRB.aspx>

administrative interagency process” and its “decision-making panel consists of one senior official from the Departments of Defense, Homeland Security, Justice, and State; the Joint Staff, and the Office of the Director of National Intelligence.” There are four stages of review listed on the PRB’s website: “initial review,” “file review,” “full review,” and “subsequent full review.”

Thus far, 28 detainees have had their initial reviews completed. Four (4) of these 28 detainees subsequently had their “full review” completed as well. The decisions are publicly available on the PRB’s website. A review of these unclassified files revealed the following:

- President Obama’s Guantanamo Review Task Force previously determined that 24 of these detainees should remain in continued detention under the 2001 AUMF. That is, these 24 detainees were considered “too dangerous to transfer but not feasible for prosecution.” The remaining four (4) detainees were referred for prosecution. Thus, the task force did not approve any of them for transfer.
- In 21 of the 28 cases, the PRB determined that detention was “no longer necessary” or “does not remain necessary” to mitigate the threat posed by the individual detainee. This means that the PRB has approved 21 detainees for transfer who were previously denied transfer by the task force. Nine (9) of these 21 detainees have since been transferred.
- In approving the transfer of these 21 detainees, the PRB notes that the “standard security assurances” or “appropriate security assurances” must be enacted by the receiving country, as determined by the Guantanamo Detainee Transfer Working Group.²² This language reflects the fact that the detainees are not being approved for outright release, and the PRB recognizes at least some level of risk is involved. The PRB’s decisions often cite reasons why the officials believe this risk can be mitigated (ranging from the detainee’s stated desire to start a new life, to medical conditions, to a family support network). Still, the language of the PRB’s decisions takes into account that the transfers are not, in general, risk free.
- The PRB has approved for transfer all four detainees who have gone through the “full review” process. In each instance, not only was the detainee considered “too dangerous” to transfer by the Guantanamo Review Task Force, but he had also been previously denied transfer by the PRB itself. A brief overview of one of these decisions follows:

²² See, for example:

http://www.prs.mil/Portals/60/Documents/ISN031/131120_U_ISN31_Unclassified%20Summary%20of%20Final%20Determination.pdf

http://www.prs.mil/Portals/60/Documents/ISN713/141003_U_ISN713_FINAL_DETERMINATION_PUBLIC.pdf

http://www.prs.mil/Portals/60/Documents/ISN232/140714_U_ISN232_FINAL_DETERMINATION_PUBLIC.pdf

http://www.prs.mil/Portals/60/Documents/ISN235/150318_U_ISN235_FINAL_DETERMINATION_PUBLIC.pdf

- Abdel Malik Ahmed Abdel Wahab Al Rahabi (Internment Serial Number 37): On March 5, 2014, the PRB determined that “continued law of war detention of [Rahabi] remains necessary to protect against a continuing significant threat to the security of the United States.”²³ The PRB cited Rahabi’s “significant ties to al-Qa’ida, including his past role as a bodyguard for Usama Bin Ladin and a prior relationship with the current amir of al-Qa’ida in the Arabian Peninsula.” In addition, the PRB cited Rahabi’s “experience fighting on the frontlines, possible selection for a hijacking plot, and significant training” as reasons for the PRB’s “concern.” In March 2014, the PRB did not think that the risks posed by Rahabi could be sufficiently mitigated. In December 2014, however, the PRB found the risks he presented could be “adequately mitigated” based on the testimony of Rahabi and his family members.²⁴
- I have previously written about another one of these cases, that of Fayez al Kandari.²⁵ The differences between the PRB’s decisions in 2014 and 2015 are striking. In July 2014, the PRB concluded that Kandari “almost certainly retains an extremist mindset and had close ties with high-level al Qaeda leaders in the past.”²⁶ The PRB was also skeptical of Kuwait’s ability to handle a detainee such as Kandari, noting “a lack of history regarding the efficacy of the rehabilitation program Kuwait will implement for a detainee with his particular mindset.” The PRB said it “appreciate[d] the efforts of the Kuwaiti government and encourages the officials at the Al Salam Rehabilitation Center to continue to work with the detainee at Guantanamo.” In September 2015, however, the PRB claimed that Kandari had “demonstrated a willingness to examine his religious beliefs and engaged more openly with the Board.” The PRB “noted [Kandari’s] willingness to engage with Kuwaiti officials and rehabilitation center staff members, comply with security requirements, and disassociate with negative influences since his last hearing.” In 2015, the PRB also said that Kandari’s “threat can be adequately mitigated by the Kuwaiti government’s commitment to require and maintain the detainee’s participation in a rehabilitation program and to implement robust security measures to include monitoring and travel restrictions.”²⁷

²³ The PRB’s March 2014 decision can be found at:

http://www.prs.mil/Portals/60/Documents/ISN037/140305_U_ISN37_FINAL_DETERMINATION_PUBLIC.pdf

²⁴ The PRB’s December 2014 decision can be found at:

http://www.prs.mil/Portals/60/Documents/ISN037/141205_U_ISN37_FINAL_DETERMINATION_PUBLIC.pdf

²⁵ <http://www.longwarjournal.org/archives/2016/01/high-risk-guantanamo-detainee-transferred-to-kuwait.php>

²⁶ The PRB’s July 2014 decision can be found at:

http://www.prs.mil/Portals/60/Documents/ISN552/140714_U_ISN552_FINAL_DETERMINATION_PUBLIC.pdf

²⁷ The PRB’s September 2015 decision can be found at:

http://www.prs.mil/Portals/60/Documents/ISN552/ISN552SubsequentFReview/20150908_U_ISN552_FINAL_DETERMINATION_PUBLIC.pdf

- In seven (7) of the 28 cases the PRB ruled that continued detention “remains necessary.” In some of the more recent cases, the PRB has cited the detainees’ ties to senior al Qaeda personnel who have plotted against the West.²⁸

The number of recidivists continues to rise

In March, the Office of the Director of National Intelligence (ODNI) released the most current statistics on recidivism.²⁹ The figures are as of January 15, 2016.

The number of former Guantanamo detainees confirmed or suspected of rejoining the jihad has grown to 204, according to the ODNI. Nearly two-thirds of the jihadists, 128 in total, are at-large. The remaining 76 ex-detainees have been killed, died of natural causes, or were re-captured.

The overwhelming majority of the ex-detainees on the ODNI’s recidivist list, 185 out of 204 (91 percent), were transferred or released during the Bush administration. An additional 19 recidivists (7 confirmed, 12 suspected) were freed from Guantanamo during President Obama’s tenure.

The U.S. government’s list of one-time Guantanamo detainees who have rejoined the fight has grown significantly since 2008, when the first statistics were made public.

In June 2008, the Department of Defense reported that 37 former detainees were confirmed or suspected of returning to the fight. On Jan. 13, 2009, a Pentagon spokesman said that number had climbed to 61. In April 2009, the Pentagon told the press that same metric had risen further to 74.

The estimated number of recidivists more than doubled between April 2009 and October 2010, when the ODNI released an updated analysis saying that 150 former detainees were on the list. Since then, the ODNI’s assessment has climbed further, leading to the latest figure of 204 former detainees confirmed or suspected of rejoining jihadist networks.

²⁸ See, for example:

http://www.prs.mil/Portals/60/Documents/ISN569/160331_U_ISN569_FINAL_DETERMINATION_PUBLIC.pdf

http://www.prs.mil/Portals/60/Documents/ISN1094/160407_U_ISN1094_FINAL_DETERMINATION_PUBLIC.pdf

http://www.prs.mil/Portals/60/Documents/ISN1457/160414_U_ISN1457_FINAL_DETERMINATION_PUBLIC.pdf

²⁹ The summary can be found at:

https://www.odni.gov/files/documents/Newsroom/Reports%20and%20Pubs/Summary_of_the_Reengagement_of_Detainees_Formerly_Held_at_GTMO_Ma%204_2016.pdf

The ODNI tracks former Guantanamo detainees who are involved in both “terrorist” and “insurgent” activities, including those thought to be “planning terrorist operations, conducting a terrorist or insurgent attack against Coalition or host-nation forces or civilians, conducting a suicide bombing, financing terrorist operations, recruiting others for terrorist operations, and arranging for movement of individuals involved in terrorist operations.”

The U.S. intelligence community’s assessment does not include those jihadists who have communicated with other former detainees or “past terrorist associates” about “non-nefarious activities.” The production of anti-American propaganda is not enough to be considered a recidivist either, according to the ODNI.

In order to be considered a “confirmed” recidivist, a “preponderance of information” must identify “a specific former GTMO detainee as directly involved in terrorist or insurgent activities.” The “suspected” category requires “[p]lausible but unverified or single-source reporting” that identifies a “specific former GTMO detainee” as being “directly involved in terrorist or insurgent activities.”

The current estimate includes 118 “confirmed” and 86 “suspected” recidivists, for a total of 204. Therefore, the reengagement rate is approximately 30 percent. However, this rate may be misleading.

It is likely that U.S. intelligence does not track all of the jihadists who were once held at Guantanamo, so even more former detainees could have rejoined terrorist or insurgent groups without the ODNI’s knowledge. There is also a lag time in the ODNI’s reporting. “A February 2010 review of GTMO detainees’ release dates compared to first reporting of confirmed or suspected reengagement shows about 2.5 years between leaving GTMO and the first identified reengagement reports,” the ODNI previously reported. It is possible, too, that some of the “suspected” recidivists aren’t really engaged in jihadist activities.

Former Guantanamo detainees have served jihadist groups in a variety of capacities, ranging from suicide bombers to leadership positions. Both the Taliban and al Qaeda have filled senior roles with alumni from the detention facility in Cuba.

Ibrahim al Qosi, who was held at Guantanamo from 2002 to 2014, reemerged as one of al Qaeda in the Arabian Peninsula’s (AQAP) most prominent figures late last year. Qosi received a favorable plea deal from prosecutors in the military commission system in 2010. Two years later, he was sent to his native country of Sudan. Since December 2015, AQAP has released several messages featuring Qosi.

Another Guantanamo alumnus, Hamed Abderrahaman Ahmed, was arrested by Spanish authorities in February and charged with running a recruiting network for the Islamic State.³⁰ Ahmed was held in Cuba from February 2002 to February 2004, when he was

³⁰ <http://www.longwarjournal.org/archives/2016/02/ex-guantanamo-detainee-allegedly-led-recruiting-cell-for-islamic-state.php>

transferred to Spain. He was allegedly operating a jihadist network in the city of Ceuta, which borders Morocco on the North African coast, at the time of his arrest.

The Obama administration notes that the number of confirmed or suspected recidivists transferred since early 2009 is much lower than the figure from the Bush years. This is, of course, true. One factor is that many of the Obama administration's transfers have been to countries where the jihadists are not waging insurgencies. This is, on balance, a smart way to transfer otherwise risky detainees. It means that former detainees who may wish to rejoin the jihad will have a more difficult time doing so. We can hope that these detainees choose to follow a different path in the new country where they were placed. However, this may also only serve to delay some detainees' recidivism. Given that President Obama's task force previously determined that none of detainees should be outright released, and most of the remaining detainees were deemed too dangerous to transfer, we should expect the number of recidivists to continue to rise.