

REPUBLICANS REFUSE TO HEAR HOLDER'S CLAIMS ABOUT CIVILIAN TRIALS

If you suspended disbelief in yesterday's DOJ oversight hearing and pretend this wasn't about demagoguing and protecting torturers, the Republican attacks on Eric Holder's decision to try five of the 9/11 detainees raise good points. They argue:

- The 9/11 conspirators are actually more appropriate defendants for a military commission than some others who will be charged in military commissions
- The standards for who gets tried in a civilian court and who gets tried in a military commission are inconsistent
- Trying al Qaeda detainees in civilian courts may present Miranda challenges to soldiers in Afghanistan
- A civilian trial will take a long time (3 years, according to Mary Jo White) and cost a lot of money (\$50 million, according to Chuck Schumer)
- Defendants might get off on legal technicalities
- There were problems alleged

to have arisen out of the earlier NYC terrorist trials

- KSM might be able to demand asylum under the Convention Against Torture once in the US

Some of those are, frankly, legitimate concerns. But I said, “pretend this wasn’t about demagoguing,” because even when Holder addressed each of these concerns (though he did admit he’s not an immigration expert), the Republicans continued to attack him on the same grounds. They simply ignored his serious responses to their questions.

But what I found most interesting about the way Republicans not listening to Holder’s answers came in response to Holder’s assertion that the government is **more likely** to succeed in getting a conviction in Article III Court. The exchange, above, with Kyl, is one of the most heated examples.

Kyl: Surely you’re not arguing that it’s easier to get evidence into an Article III than a military commission. I mean, you made the point that you’re aware of a lot of evidence in this case that others aren’t, of course, but the rules for admitting evidence are more lenient before a military commission than an Article III Court, so that can’t be the basis for your decision, is it?

Holder: That is not necessarily the case. With regard to the evidence that would be elicited in a military commission, evidence elicited from the detainees, from the terrorists as a result of these enhanced interrogation techniques, it is not clear to me, at all, that that information would necessarily be admitted into a military commission, even with the use of a clean team, or that it would withstand

appellate scrutiny. And on the basis of that concern and other things, my desire to go to an Article III Court and to minimize the use of that kind of information, that kind of evidence, I thought was paramount.

Yet Kyl all but dismissed this assertion, continuing on to demagogue some more (in this case, by raising one of Andrew McCarthy's attacks on Holder).

The Attorney General of the United States repeatedly told Congress that the government stands a better chance of getting a conviction in a civilian court, yet Republicans **don't care**—they still want their military commissions.

Now, the Republican refusal to consider Holder's assertion is one thing. But it does raise the question of what Holder meant.

We discussed some of these issues in the David Frakt thread. Significantly, Frakt noted that the judge in the Jawad case ruled that he had the basis to dismiss all charges on the basis of pretrial abuse.

The Judge in the case, Colonel Stephen Henley, had made a couple of rulings in the Jawad case (my case) which made the government very nervous. First, **he ruled in response to a motion to dismiss that I filed on the basis of torture that he "beyond peradventure" had the power to dismiss all charges on the basis of pretrial abuse of the detainee.** [my emphasis]

And that—Frakt suggests later in that comment—might lead a military judge to deny the death penalty to make up for the fact that KSM had been waterboarded 183 times. In addition, both Mustafa al-Hawsawi and Ramzi bin al-Shibh have active challenges to the constitutionality of the military commissions, which, at the very least would hold up the military commissions

themselves (even assuming that they were found to be constitutional).

Holder seems to be accounting for some of these factors—as well as noting that a death penalty case should be heard in the place where the crime occurred. But he also seems to be suggesting that it will be easier to present the evidence he feels the government should use to try its case against KSM and the others. (I sort of suspect he thinks it might be easier to bracket off any consideration of KSM's torture in a civilian trial—though I'm curious what the lawyers think about this.)

I'm going to look more closely at what Holder might be thinking.

But the bottom line is this: the country's top law enforcement officer says we are most likely to win a conviction of KSM in a civilian trial. But Republicans want their military commission anyway.