

CAP'N JACK'S CRACKERJACK LOGIC!

Here's where Jack Goldsmith's op-ed, purporting to offer a solution to the Gitmo problem, breaks down (see Spencer's take on it [here](#)).

Civilian trials for terrorists have also proven difficult. They gathered disfavor when Attorney General Eric Holder said he would prosecute Khalid Sheik Mohammed and other alleged Sept. 11 plotters in civilian court in Manhattan. Disfavor grew when the failed Christmas Day plotter, Umar Farouk Abdulmutallab, and the Times Square suspect, Faisal Shahzad, were placed in the civilian criminal system and read Miranda rights rather than detained and interrogated in the military system. The Bush administration prosecuted scores of terrorists in civilian court with little controversy. But the charge that the Obama administration is insufficiently tough on terrorists has made it harder for this administration to try terrorists in civilian court.

Difficulties with trials have left the Obama administration, like its predecessor, relying primarily on military detention without trial to hold terrorists.

Granted, Goldsmith uses the lawyerly trick of hiding the agency in his statement—substituting “disfavor grew” for “Republicans drummed up disfavor because it polled well”—to hide his faulty logic. But what he's basically saying is that: (1) there's no big deal with civilian courts, as the Bush experience shows, (2) nevertheless a bunch of fearmongerers who just happen to come from Goldsmith's own party have been bad-mouthing civilian trials for crass political reasons, and therefore (3) civilian

trials are just too difficult to pull off.

The rest of Goldsmith's op-ed follows from this artificially created difficulty.

The correct response, for someone in Goldsmith's position, would be to say, "stop being such cynical assholes, Republicans, this is about law, not your political stunts!" But instead, he wrings his hand and invents a new legal system to work around the difficulty created by his colleagues in the Republican party.

Which offers him the ability to make this move, which addresses an issue that has nothing to do with closing Gitmo:

Courts have given their general blessing to military detention as a legitimate form of terrorist incapacitation. But military detention still raises hard legal questions, about which Congress has said practically nothing. As a result, unaccountable judges are making fateful detention decisions, demanding release of some whom the administration thinks are dangerous terrorists.

[snip]

Second, acknowledge that military detention will remain the primary basis for holding terrorists, and strengthen the system. The president will eventually need Congress's help, not only to put Guantanamo detentions on firmer footing but also to support the growing global fight against terrorists beyond traditional battlefields. The main legal foundation for targeting and detention in places such as Pakistan, Somalia and Yemen is the September 2001 congressional authorization to deal with the Sept. 11 attacks. But as dangerous terrorists have ever-dimmer connections to Sept. 11, the government is bumping up against the limits of what this authorization permits.

Again, Goldsmith hides his logic here. But what he's actually saying is, "those mean judges on whom our entire legal system relies have pointed out that we've illegally been holding people who have nothing to do with 9/11" (and in fact have been doing so since the Bush Administration collected a lot of people who they called terrorists but weren't tied to al Qaeda), "so we need to invent some means to hold them and more like them even though we have no legal basis to do so." Sure, he, like John Bellinger, notes that the Obama Administration is pushing the legal limits of what the AUMF for Afghanistan legally authorized. But what he's really calling for is some new legal authorization to just pick up anyone anywhere in the world and hold them indefinitely and maybe give them a civilian trial if we feel like it.

In the process he ignores the larger logical problem with this argument. Yes, the international community recognizes military detention as legal during times of war.

But what Goldsmith is advocating for is that Congress create some legal justification for military detention of those we are not at war with.

Now, Cap'n Jack isn't really a big fan of international law binding US actions, which may be why he introduces this idea with so little thought, the same way he dismisses the symbolic value of closing Gitmo.

But if Congress were to pass a law granting the Executive the authority to unilaterally declare organizations terrorist groups, and on that basis, to indefinitely detain those alleged to be members without even the guise of war as a time-limiting factor, my guess is the international community would look none too fondly on it. It would be a new stain on our international reputation, added to the still-oozing sore of Gitmo.

And Jack Goldsmith, whose entire op-ed is premised on allowing his party to do anything it

wants for political gain, doesn't see where this
kind of unilateral Executive power might lead.