

# A WAY TOWARDS THE RULE OF LAW - AN ANSWER TO CAP'N JACK

*Justice, what do you care about justice. You don't even care whether you've got the right men or not. All you know is you've lost something and someone's got to be punished. The Ox-Bow Incident.*

Nine years after September 11 and eight years after the CIA provided a memorandum to the White House explaining that at a minimum, one-third of the detainees at GITMO were "mistakes" who had been purchased in bounty transactions. Nine years after the Department of Justice covertly elevated the President of the United States as a power above the Constitution and the laws of the United States and seven years after the Department of Justice assisted in allowing the torture of Ibn al Shaykh al-Libi to be laundered through Colin Powell to the UN and to America. So many years after so many incidents, our nation is still being flimflammed over what to do with so-called terrorist detainess.

Enter Jack Goldsmith with his recent op ed titled, "A way past the terrorist detention gridlock." While Marcy and Spencer have already weighed in, I whined until Marcy let me have my own go at this too, because I wanted to provide an alternative route to deal with the "gridlock."

Goldsmith's advice to Obama is to: (i) keep GITMO open because closing it is hard, (ii) forget civilian criminal actions because they are hard, (iii) forget military commissions because they have no international credibility and are hard, (iv) get Congress to give the President unchecked and unsupervised powers to engage in forever detentions without respect to guilt or innocence, and (v) use the reality of forever detentions for the innocent as well as the guilty and other coercion to get detainees

to offer up confessions and plea deals and thereby get around the hard parts of civilian criminal suits. Part (v) includes the caring-compassionate touch of only being recommended if Obama takes the death penalty off the table.

Despite such awesome[ly bad] advice, GITMO has not proved hard to close because there are not enough coerced confessions and coerced plea deals. GITMO has proved hard to close because current and ex-Department of Justice lawyers, as well as current and ex-Presidents and their intelligence apparatus, have found it too politically dangerous to tell the truth. It's worth noting that throughout Goldsmith's piece the one thing he never mentions is innocence. He offers up a lot of advice, but none of it even begins to contemplate the innocent and how they can be protected and released.

While Goldsmith stops short of saying that our country has a long and celebrated history of lynchings that could be used when trials are hard, he does pretty much advocate that if trials are hard, you just do something else – preferably something that bars any judicial review. Something like putting human trafficking victims in forever military detention; expanding from the Strawberry Fields (forever) detention facilities we already have to ever expanding concentrated population camps necessitated by his long term solution of granting the President unchecked powers for extra-judicial detentions. For this foray into solving “detainee gridlock” WaPo stops the presses.

Well, let me offer up a counterpoint to Goldsmith's argument that it is the “abundant dysfunctions in our system for incapacitating terrorists” that has led to not only GITMO (and let's not forget Bagram) but also to an increase in “targeted” killings and in outsourced renditions which are not “optimal.” He's wrong. It has never been the dysfunction of our system that was the problem; rather, it has been the dysfunction of our Department of Justice and our

Presidents that have created GITMO and the "gridlock" associated with it.

The solutions to the dysfunction are the same now as they were eons ago, and for that matter the same as when we were in kindergarten. We have to face the truth, tell the truth and take responsibility. So here is a short review of a "pragmatic" approach that would begin to address the "detainee gridlock" that perturbs Goldsmith, by using truth and accountability – a way towards the rule of law as opposed to a bypass around law, with no off ramps.

First, the White House has to acknowledge what much of the world, although not necessarily much of America, knows to be true. Obama needs to publically explain to this nation that, despite the rhetoric that GITMO was a facility reserved for the "worst of the worst" terrorists, it has been, in fact, a destination for many innocent people who were sold to the US or mistakenly captured by the US. He needs to admit we comingled people who had plotted and supported the 9/11 attacks with innocent chefs from London. He needs to admit the White House has had this information since at least August, 2002 when it was provided by the CIA after a review of the detainees at Guantanamo. He needs to release that memo, which has already been mentioned in at least one habeas decision. The "difficulty" dealing with GITMO will never, ever, be diminished until we tell the truth about detainees who were not involved in 9/11 and take responsibility for what has been done to them.

Second, Obama needs to lay out that in addition to having kidnapped and purchased people who were not involved with 9/11, the treatment of the guilty and the innocent detainees alike has involved war crimes. He needs to reference and support the findings of Susan Crawford that detainees at GITMO were tortured. He needs to explain that interrogators were sent out with the direction that "no one leaves GITMO

innocent” and he needs to explain that under the Geneva Conventions, it is a war crime to transport innocent civilians out of country, to a destination like GITMO or to destinations like our CIA blacksites. He needs to say that our tribunals can never have international credibility without recognizing that we have committed war crimes against some detainees and that we have innocent detainees who are entitled to reparations and apologies.

Third, the President needs to explain to the nation that it is because we have picked up innocent people as well as terrorists involved in plotting 9/11 and we have treated **both** in ways that are shameful, that we must have full, fair and transparent trials of anyone we are claiming had something to do with 9/11. He needs to explain that if we can’t do that – if we can’t allow the innocent to have access to courts and we can’t make a public case against the guilty – then the terrorists have won because they have rendered America unable to live up to its Constitution and its international commitments.

Fourth, Obama needs to explain that in addition to innocent people and terrorists involved in 9/11, we also have captured people who were not involved in 9/11 but who fought back against invasion of their countries (or who responded to the invasion of a Muslim country) by outside forces and also people who are far from innocent (like drug lords) but who had nothing to do with 9/11. These people need to be returned to their sites of capture, in Afghanistan or Iraq respectively. In Iraq, they need to be handed over to the Iraqi government and in Afghanistan, they need to be turned over to the Afghan government or to be held at Bagram until our forces return home next year (at which time they should be handed over to the Afghan government the way our thousands of Iraqi detainees were). Those who were fighting back against invasion need to be given all proper prisoner of war status and treatment while they are held in Bagram. Those who are drug lords or were

captured while they were engaged in crimes need to be treated as civilian criminals.

Fifth, those who had nothing to do with 9/11 and were not captured in Iraq or Afghanistan are going to be a problem that requires another set of revelations – that we operated in many countries other than Iraq and Afghanistan and those operations included kidnapping or buying humans for a bounty without any proof that they were involved with 9/11. Obama needs to explain that we have a duty to these people who had not committed acts against the United States, but who may have been refugees from totalitarian regimes and who cannot be returned now.

Sixth, the canard of the worldwide battlefield needs to be addressed. Obama needs to explain that while the US is going to fight terrorism and terrorists everywhere, it is a sign of failure and a lack of understanding of U.S. law to suggest that the “world” is a battle theatre, because our U.S. courts have defined that term to mean a place where there is no civilian law. He needs to absolutely and completely reject any argument that terrorists have forced the closure of our courts or robbed America of the rule of law. We fought for it, died for it and it lives. And he needs to say that America is not so fearful that it needs to make up peculiar interpretations of civilian or military laws to transform a cook or a driver into a terrorist or war criminal. He needs to say that there are many Americans dead and injured and over two million Iraqi refugees that stand as a living testament to why America should not make life and death decisions based on evidence that was coerced from someone being buried alive or waterboarded.

Seventh, Obama as Commander in Chief and as chief law enforcement officer of the nation, needs to assert that if Congress fails to provide full and open and transparent trials, it puts our nation at risk. America is strong and once, faced with the truth, it has many, many more than just a few good men who can handle

that truth.

The way out of "detainee gridlock" isn't more power to a dilettante White House and dysfunctional Department of Justice and more statutes providing Congressional support for detentions on Executive whim. It isn't collecting a worldwide assortment of human specimens to hold in the belief that the rest of the world will at some point become a Borg collective that supports the US in its every action without dissent. That "way past" won't provide international credibility. That "way past" won't protect the innocent. That "way past" won't require leadership from the Presidency. That "way past" will guarantee more and more who hate the US. That "way past" will weaken rather than strengthen America. That "way past" buries facts and disinforms our citizenry. That "way past" relies on the destruction of the rule of law.

*The law's a lot more than words you put in a book ... it's everything people ever have found out about justice and what's right and wrong; it's the very conscience of humanity. There can't be any such thing as civilization unless people have a conscience. **The Oxbow Incident.***

\*\*\*\*\*UPDATED As bobschact has noted @ 27 I probably need to clarify the seventh item. Congress has actively blocked funding for closing GITMO and Senators have been working hard to defund civilian trials and transport for those trials. This, despite the Democratic majorities in both Houses.