

KHALID SHEIKH MOHAMMED AND THE FOREVER WAR

There are a lot of things wrong with Obama's apparently imminent decision to just let Khalid Sheikh Mohammed rot in jail without a formal trial.

Khalid Sheik Mohammed, the self-proclaimed mastermind of the Sept. 11, 2001, attacks, will probably remain in military detention without trial for the foreseeable future, according to Obama administration officials.

The administration has concluded that it cannot put Mohammed on trial in federal court because of the opposition of lawmakers in Congress and in New York. There is also little internal support for resurrecting a military prosecution at Guantanamo Bay, Cuba. The latter option would alienate liberal supporters.

The administration asserts that it can hold Mohammed and other al-Qaeda operatives under the laws of war, a principle that has been upheld by the courts when Guantanamo Bay detainees have challenged their detention.

Obviously, it's a further spineless capitulation on Obama's part. It's a concession, too, that all you have to do to eliminate the rule of law in this country is squawk in Congress and on Fox News.

It also serves as a guarantee that the 2001 AUMF declaring war against the now-50 al Qaeda members who had something to do with 9/11 will last forever—or at least for the rest of Khalid Sheikh Mohammed's life.

Mind you, the government has been planning on

making this a forever war since 2001, precisely so it could hold people like KSM forever.

Now, with the decision to just let KSM rot, it seems to me, that plan gains a new anchor (and none too soon! given that only a handful of al Qaeda members remain in Afghanistan, **that** justification was getting rather dicey). After all, the very decision not to try KSM in a military commission is an admission that it would not work for him—it might rule out the death penalty for him in any case, but a military commission judge actually has leeway to adjust any sentence on account of the extreme torture KSM underwent, meaning our torture of KSM might become a central issue in a military commission.

But any further delay in charging KSM in civilian court make it less likely they'll be able to charge him in the future, because this current delay almost certainly violates any interpretation of speedy trial rights. You can't just wait to charge someone until such a time as the political winds make it easier to do.

Mind you, I agree that KSM is precisely the kind of person you do need to hold for the safety of the country (unlike many of the other detainees slotted for indefinite detention).

And that's why this decision almost guarantees that the AUMF just became a forever war—at least one lasting the next twenty to forty years of KSM's life. Because the government has apparently decided to hold KSM with no more solid legal justification than the war, which judges have interpreted to be the AUMF. Which means the government is going to have to sustain some claim that that AUMF remains in effect, even if we go broke and withdraw from Afghanistan as a result (that seems to be the only thing that will make us withdraw, in spite of the fact that we're not going to do any good there).

Nine years ago, a British Embassy employee wrote,

As long as the war against terrorism in the widest sense continued, the US/UK would have rights to continue to detain those they had been fighting against (even if the fighting in Afghanistan itself were over). [Redacted] conceded that **the strength of such a case would depend on the plausibility of the argument that the war was continuing.**

The decision to hold KSM indefinitely has now flipped that equation: so long as the only justification for holding KSM is the claim we're at war, we'll have to remain at war.

And all those bonus powers a President gets with the claim that we're at war? They're all wrapped up now, in the necessity to hold KSM forever.