

DAVID IGLESIAS: OBAMA'S USED CAR SALESMAN FOR GITMO SHOW TRIALS

The Obama Administration is using David Iglesias as a shill for its wholesale adoption of the military commissions and prosecution based on torture championed by George bush and Dick Cheney.

COURT SLAPS GOVERNMENT OVER USE OF TORTURE EVIDENCE

A Federal Court in Washington DC has issued a very hard slap down by of the government's continued use of bogus evidence obtained by brutal torture to try to justify continued detention of detainees at Guantanamo.

HOLDER TESTIFIES BEFORE SENATE JUDICIARY COMMITTEE

The Committee feed is screwy right now, but cspan.org is carrying it. Pat Leahy will not be there today; he's at a funeral. I don't know if Herb Kohl (who will act as Chair) had an opening statement or not. But Jefferson Beauregard Sessions is up now whining about civilian trials.

(Incidentally, at 10, the House Judiciary Committee will have Glenn Fine and Valerie Caproni talking about the Exigent Letter IG Report. I'll do my best to keep my eye on that too.)

Sessions apparently doesn't know there was a hearing last week in a military commission, which basically consisted of everyone looking at each other and admitting that MCs have no rules right now.

Here's Holder's statement.

Holder: 19 USA nominees and 17 Marshal nominees pending.

Holder now listing all the terrorists prosecuted in civilian courts.

Use every tool available. Includes both civilian and military commissions. Referred 6 cases to military commissions. It would seriously weaken national security not to have civilian trials.

9/11 Commission trial. No decision yet.

Kohl: Review of 240 detainees. In your testimony did not mention if and when you plan to close Gitmo. Update?

Holder: Still intention to close Gitmo. Once was bipartisan support for closing it. Both men who ran for President last year supported closing Gitmo. Will close as soon as we can.

Holder basically says they intend to use Thompson to hold people indefinitely.

Kohl raises Holder's comment about reading Miranda rights to Osama bin Laden.

Kohl: Do you still believe civilian trials are better? When can this decision be made.

Holder: Reviewing decision. NY is not off the table. Have to take into consideration concerns raised by local community. Expect to be able to make determination in a number of weeks.

Sessions: Admin had been slow in making those

nominations. I think if you look at where delays are are lack of nominations. You said 9/11 would be tried in NY. Caused quite a bit of controversy. I understand now WH suggesting that would be tried in NY. Makes me uncomfortable having politicians discussing where it'll be tried. What is your position. Are you uneasy that WH is leaking statements about where it will take place.

Holder: Not sure if there have been leaks. National Security Team deciding. SecDef, SoS, Intelligence Community. Meet w/President every Tuesday. This is a trial that is unique. It does involve national security concerns.

Sessions: There is a venue problem.

Holder: You're obviously a former US Attorney. If possibility that we move the trial, what would the possible venues be. What I will say is that SDNY is much larger place than simply Manhattan. Trying case in other venues beyond NY.

Sesssions, after having said he doesn't want pols to decide where to have trials, is now criticizing Holder for making the decision w/o listening to Sessions.

Holder: Not many differences between civ and MC, biggest difference is interlocutory appeals. Much of other enhancements reflect what judges do on civ side.

Sesssions: when you try someone in civ court, lawyer, Miranda, discovery, when you hold them in MC, don't have to charge them at all, POW, until over. They may be tried if you choose to try them.

Holder: Decisions based on what is best. Whole variety of concepts and things that have to be taken into consideration. Case by case basis, being most effective in particular trial.

DiFi: Degree to which this dialogue has escalated is unhealthy. Dems did not do to Bush following 9/11 wrt decision-making. I find it

reprehensible. Best interest of the people of this nation, served by Admin, and the President having maximum flexibility as to which venue these defendants will be tried. I have never seen anything quite like this. It doesn't matter that MCs which have been fraught w/controversy have convicted 3, two of whom are out. Doesn't matter that Zazi will plead guilty. I was mayor in the wake of a major assassination. I know what happens in a city w/major scar tissue. Indefinite detention?

Holder: People we decide should be held under laws of war, judge has ability to see whether detention appropriate. We have won some cases, we have not been successful with others. Some of people ordered released by judges have been released. We use that power with thought of keeping American people safe. If you look at number of people at Gitmo, number of people we would seek to detain relatively small.

DiFi: Children subject to detention. We've had no response to that.

Hatch: Why revise prosecutorial guidelines on marijuana. Specific intention of making dangerous drugs illegal. Not WH's vision of how controlled substances act should be enforced. Impending deadline of Adam Walsh Act.

Hatch wants more obscenity prosecutions.

Hatch: Undiebomber. You alone made this decision.

Between Hatch and Sessions, they should have practiced how to say "Abdulmutallab's" name. Woe betide them if we get around to talking about Anwar al-Awlaki, that's even harder to pronounce.

Holder: Decision has been shown to be the right one. The information that he has since provided as result of his decision to cooperate.

Feingold: Well aware of my support for federal trials. Continued strength. I have a statement that discusses that, asked to be place in

record. COPs.

Here's what Feingold's statement for the record said about the 9/11 trials:

As members of this committee are aware, I strongly support the decision to try Khalid Sheikh Mohammed and other 9/11 plotters in our federal criminal courts. We have a great track record of successfully trying and convicting terrorists in civilian courts. The military commission system is largely untested, and these cases could easily get bogged down in years of legal challenges. The best way to bring these terrorists to justice swiftly is through our civilian courts. It has been nine years since 9/11, and it is inexcusable that these men have not yet been brought to justice for what they did.

Whatever one might think of using the military commission system, it is simply not yet ready to start handling prosecutions. The Military Commissions Act requires that the Secretary of Defense issue rules to govern those proceedings, and that has not yet happened. It hardly seems possible to start using military commissions without the rule book. The military commission system is also the subject of a constitutional challenge in the D.C. Circuit that is at only the beginning stages of litigation, and anyone charged in a military commission prosecution could bring yet another legal challenge to the system itself before any trial begins. In fact, when a military commission defendant named Salim Ahmed Hamdan challenged a prior version of the military commission system, his case wound up in the Supreme Court after years of litigation. It strikes me as not only possible, but very likely, that the first few military commission trials

will be subjected to legal challenges, and that any trials would not begin for several years.

The federal criminal system, on the other hand, is available now. It has been tested for literally hundreds of years, and we know it works because hundreds of people are sitting in federal prison today after being convicted of terrorism crimes in our federal courts. We know that our federal judges and prosecutors have the experience needed to take on these cases because they've done it, again and again. Indeed, the Department has achieved significant successes in the Zazi and Headley cases just in the past few months. Both were serious terrorism cases, and in both cases the Department used the criminal justice system to obtain intelligence and ultimately guilty pleas. So I support the Attorney General's decision and believe it is the best decision for the security of this country.

Grassley: Thanks for anti-trust hearings on Ag. [Feingold also raised this.] People who represented detainees. Your staff refuses to give information, but DOJ managed to verify for Fox News. Call into integrity of employees of department. I agree w/department's view that personal attacks inappropriate. Inquiry seeks to understand who is advising you on these issues.

Holder: I know that your request comes from good place. Hesitance I had has been borne out. Drag their reputations through the mud. Reprehensible ads used to question their patriotism. I'm not going to be a part of that effort. Their names are out there, it has been placed in public record. I will not allow good decent lawyers, done what John Adams did, done what our Chief Justice has said is what is good.

Grassley: Request from this committee. Recently

said that attorneys representing unpopular people patriots, doubt you'd say same about those representing mafia. Does not keep central database of recusals. You know large lawfirms have conflict committees to ensure that rules are followed. Why shouldn't DOJ have some centralized system of conflicts as private firms have.

Holder: Legitimate concern.

Grassley: FOI. Presidential Memoranda on FOI.FY 2009, Agencies cited FOI exceptions more than FY2008. B5 used 70,000 times, compared to 47,000 times in 2008.

Durbin: Courageous position to take, and the right one, SCOTUS ruled that detainees had right to habeas, Bush admin, right to counsel. Inspiration in Fox news. If anyone decides to represent Gitmo detainee, can't be trusted. If legal representation or possible inclinations toward one party or another, where does it end? You're standing up for a fundamental principle that does go back to John Adams. Men and women who've had the courage to stand up. I hope the record will reflect, it was Bush Admin that said Gitmo detainees had right to counsel. Miranda warnings. A lot of question about using Article III Courts, for fear of Miranda warnings. Policy of Bush?

Holder: I think a good case can be made that once people get Miranda information can flow. Especially in terrorism cases, and the lengthy sentences in Article III hearings.

Durbin: Richard Reid. How long after he was detained by Bush DOJ was it before given Miranda.

Holder: A few minutes.

Durbin: Five minutes.

Durbin: Those who are arguing that we have to shift to MC side would have to explain why we'd put aside this history of success.

Holder: Article III court can plead guilty to

capital offense.

Lindsey Graham: President Obama has said we're at war with al Qaeda. Some people don't believe in that. Times when Article III court would be superior. Financier, more charging capabilities.

Holder confirms 48 detainees slotted for indefinite detention.

Lindsey: Lindsey now complaining that Robertson supported Slahi's habeas petition. If presumption should follow al Qaeda, once you're a member, presumption that you're still a member of al Qaeda. One reason why Congress needs to be more involved.

Lindsey: If you send new detainees to Afghanistan, you're going to bring down Afghan government.

Schumer: Want to reaffirm how difficult it would be to have trial in densely populated area.

Holder: It has not been ruled out. Would take into consideration.

Cardin [who calls it "Guantanamo"]: Asks about making review for indefinite detention transparent so international community can see it. Holder says he's working w/interagency, and also Graham.

Cardin: If we don't put sunlight on it, if we don't engaged intl community, this war's not going to end anytime soon.

Holder: need to deal with it on symbolic level.

Of course, what remains unsaid is that the REASON why Abu Zubaydah and al-Qahtani can't be tried is because we tortured them into insanity.

Cornyn: Financial crisis, border, healthcare fraud. Criminal prosecution can be deterrent . One thing that's been missing is show trials.

Holder: Madoff, other ponzi.

Cornyn: Who is coordinating investigation?

Holder: Me, financial task force.

Franken: Merger of Comcast and NBC. Want to delve into it a little bit. Concerned because I see potential of consolidation of media that is very frightening. Want the best for NBC. If this goes through, will Verizon and AT&T buy studios? Are we going to be seeing situation where 5 companies own all information we get. Very dangerous situation. Familiar with FinSyn in early 90s. Remember that basically networks prohibited from owning own programs, during testimony that all networks said why would we buy our own programs [heh] we're in the business of getting ratings. Right now we have this incredible concentration, reduced competition for independent producers. Comcast, yes, it's a vertical integration, but also horizontal, both have sports programming,

Holder: If determination were made that it would violate anti-trust. Not at liberty to talk about much. Ongoing investigation, one that antitrust div that has shown itself to be appropriately aggressive.

Franken: Varney previous DOJ anti-trust, significant conditions. Skeptical but still open to imposing conditions. I have problems with imposing conditions. Hard to enforce them. Almost inevitably expire after a few years. Make sure that DOJ conditions would actually have enough teeth, and long enough life, would really impose real conditions to prevent very thing I'm fearing.

Holder: Take myself away from NBC Comcast. A wide range of things that can be done.

Franken: Can affect cable bill.

Holder: Now I'm concerned.

Franken: The way to Holder is through his pocketbook.

Klobuchar: Commend on Petters case, Ponzi.

Klobuchar: Cybercrime.

Whitehouse: Associate myself with remarks DiFi made. Emblems of American Justice, admired and

revered around the world, justifiably take great pride. Blindfold and balance, not torch and pitchfork. Values of Article III courts, experiential base. Prosecutors can know how it's going to play out. Hundreds of Article III terror prosecutions. Of the MC, a number were plea agreements.

Holder: I think that's correct.

Whitehouse: Raises Goldsmith statement talking about novel legal issues that might render MCs ineffectual. Legislature has no proper business in exercise of prosecutorial discretion.

Holder: Letter from me and SecDef, inherently Executive Branch function.

Whitehouse: Graham's remarks, flexible pragmatic and aggressive. A good one.

Specter: Oppty to test warrantless wiretaps unconstitutional.

Holder: We have not decided. Protection of sources and methods. A determination as to what we're going to do has not been made. We are considering our options. I haven't made up my mind yet. We have to see what the impact will be on this case, wrt program that ended in 2007, 2006, to the extent that the support of congress is the way in which Exec branch should operate. When we work w/Congress to set up these programs. When we look at requirements under FISA. We will have to consider what our options are and understand what the ramifications are.

Specter: I'd urge you to get a decision. I've filed a bill to compel SCOTUS to decide it.

Specter: Miranda warnings. All it means is that statements made by subject of interrogation cannot be admitted into evidence. When you dealt w/someone like Christmas day bomber, caught red handed, didn't need confession. I would hope they not be given.

Holder: Intelligence. I think we have to have flexibility. They did not give Miranda warnings in initial interaction. Gathering of

intelligence of critical importance.

Sessions, to Specter: Good to see you in that [Chair's] chair, except it's on the other side of the aisle.

Specter: This is not on an aisle.

Sessions: Yes, it's in the middle of the room.

Holder: If bin Laden were captured, I can see no reason why he'd be given Miranda warnings. Concern with Miranda warnings only whether that information would be excluded. We have sufficient information.

Sessions: With Abdulmutallab, as a result of not giving Miranda, may create many defenses that would not otherwise exist. Rule would simply be that you expect these terrorist individuals be taken into military custody. We've done that a number of times.

Sessions keeps interrupting Holder.

Holder: FBI agents, had presence of mind, understand did not have to give him Miranda warnings.

Oops, Lindsey just said this: Obviously, we're not torturing these people but we'll have the authority to do that.

He means authority to interrogate, but didn't say it.

Graham: What additional rights would a person have if transferred to Thomsen?

Holder: We don't know yet.

Graham: Congress could give some direction. I think Lamberth has been very open about Congress needs to help. Have you been reading those?

Holder laughs.

Holder: yes, I have to read them.

Graham: We're in a dilemma as a nation. GB has changed their rules to allow people to be held up to 1 year. We have the right here, if you're

an enemy combatant, law of war takes over.

Graham wants to make have non-arbitrary indefinite detention, even after govt loses habeas case.

Lindsey: 59% of American people opposed to closing Gitmo. Why?>

Holder: politicization and misinformation.

Lindsey: Alternate theory, a lot of people worried that we don't have a coherent policy. I think it would be helpful to focus not only on our allies, but also on Americans. Tell them we'll keep them secure. We've got to assure American people that we've got an enduring system. Let's park some of the rhetoric.

Holder: Point you last made a good one, incumbent on people like myself, what our intentions are and to explain to them, ways I have not done, so degree of assurance, that in addition to whatever I have mentioned, factors you have mentioned is why approval has dropped.

MEET DEPUTY ATTORNEY GENERAL ROBERT GIBBS

I guess, in addition to President Rahm Emanuel and Attorney General Lindsey Graham, Deputy Attorney General Robert Gibbs sees the wisdom in putting aside rule of law for political expediency.

Some policy advisers have wondered why the administration's flack is so often in attendance, but insiders fluent in the administration's power dynamics know Obama values his views. According to one administration official, who would not be quoted speaking about internal White

House discussions, Gibbs late last year pointed out the political perils of letting the Justice Department try Khalid Sheikh Mohammed in a civilian court and has urged the president to ignore Wall Street critics who argue Obama has adopted too populist a tone when speaking out against executive bonuses. [my emphasis]

You know, when Karl Rove unacceptably took over DOJ, he did so to support world domination. He had a plan.

But apparently we've decided to shred the Constitution for no other reason than a press flack thinks it would be smart.

HAS AAFIA SIDDIQUI'S DAUGHTER SURFACED?

Aafia Siddiqui has been at the center of one of the many mysteries flowing from the Bush and Obama administrations' conduct of intelligence operations. A Pakistani native and former MIT scientist, background on Siddiqui can be found several places, including a Seminal diary by ondelette here.

The stories of Siddiqui's disappearance and her recent trial in the US are too convoluted to easily summarize. For purposes of the story now emerging – the possible appearance of Siddiqui's daughter – the bare bones are that, after returning to Pakistan from the US, Aafia Siddiqui was named by Khalid Sheikh Mohammed in his US-run torture interrogations. Shortly thereafter, in March, 2003, Siddiqui disappeared. Her three children – oldest son Ahmed, 4-year-old Maryam and her infant son, Suleman – disappeared with her.

After seven years, Siddiqui suddenly reappeared in Afghanistan, where the US alleged she was involved in the attempted shooting of an American soldier as she was being detained for interrogation. When Aafia was apprehended in Afghanistan, a boy was with her. The US handed off the boy to Afghan intelligence while they shipped Siddiqui to the US for trial.

Pakistan became involved diplomatically over the child and demanded his return. He was handed over to Siddiqui's family in Pakistan, but her other children have remained missing. There has been controversy in Pakistan over the status of the boy and whether he truly was Siddiqui's son or not.

Last weekend a girl approximately 12 years old, who spoke only English and Persian and claimed her name was "Fatima," was dropped off in front of the home of Siddiqui's sister. Some stories indicate an American named "John" may have been with her. Dawn reported a senior policeman described that the girl was:

... wearing a collar "bearing the address of the house in case she wandered off".

That was last week.

This week, April 11 marks the start of a visit by Pakistan's Prime Minister, Yousuf Raza Gilani, to the US. He had been under pressure from the Pakistani press, Senate, courts and Siddiqui's family (who have been highly critical of Gilani) to take up the case of Aafia Siddiqui in his meetings with the administration scheduled for this week. Today, as those meetings are about to begin, Pakistan's Interior Minister, Rehman Malik has confirmed that the young girl left in the street with a collar on her neck is Maryam.*

While this stands in contrast with earlier statements by Siddiqui's sister that "the finger prints of teenage girl were not matched with the prints of her niece, Mar[y]am" the Interior Ministry's statement is based upon DNA testing.

Those results reveal that Siddiqui's ex-husband, Amjad Khan, "cannot be excluded" as the father of the two children:

"The DNA profile obtained from blood samples of Maryam Khan alias Fatima, Ahmad Muhammad – her brother – share the STR Genetic Markers with the DNA profile obtained from blood sample of Dr Amjad Khan. Based on the DNA analysis, Dr Amjad cannot be excluded as the biological father of Maryam alias Fatima," concludes the National Forensic Science Agency's report, an exclusive copy of which is available with Daily Times. The laboratory is run by the Interior Ministry.

My online search for a US source discussing the story originally came up with a reference in a WaPo story, buried at the end of the story on Pakistani forces battling Taliban. But the link for the cached reference ("Separately, Interior Minister Rehman Malik said a Pakistani girl left outside a house in Karachi on Sunday was the daughter of *Aafia Siddiqui*, a Pakistani...") no longer includes that reference.

In any event, this story about the possible return of Maryam had been getting cautious play throughout the middle east when the girl appeared, last week. Now, with the Interior confirmation that the girl is Maryam, the story is been receiving much more play. Some headlines (and a Pakistan Senator) assert that the girl had been held the last seven years at Bagram.

The *Pakistan Ledger* (caveat: not necessarily an unbiased or hard core news site) ran as it's headline, "US Bagram Air Force base girl prisoner, 12 released" and also ran the information on the DNA report

According to reports, the girls' DNA matched that of Ahmed, Dr Aafia's son. The report has been handed over to the

investigation police.

Several reports, including the *Ledger*, are mentioning that the release of the young girl might be linked to intervention by Afghan President and Obama ex-bff, Hamid Karzai.

Mr. Karzai had told the family that if no questions were asked, he would return the child to the family.

From another report,

Terming the visit of Afghan President, Hamid Karzai, a key factor in making the efforts of the government and the Interior Minister productive, (Siddiqui's sister) said that the rehabilitation of Maryam would be started soon

And from the Indian Express, earlier, when the girl had been discovered but not DNA tested:

Claiming that Afghanistan President Hamid Karzai had indicated recently that Aafia's daughter would return home, Fauzia (Siddiqui's sister) said, "If this girl is my sister's daughter then now this issue will be settled in Islamabad."

Meanwhile, Press TV reports that a Pakistani Senator and chairman of the Pakistani Senate's Standing Committee on Interior, Senator Talha Mehmood, "slammed the US for keeping the child in a military jail in a cold, dark room for seven years."

Almost everything you hear about the targeted story (Maryam's discovery) and the larger story (Siddiqui's disappearance and subsequent US conviction) should, imo, but taken with a grain of salt. But what we do have are some strongly competing narratives at work.

Karzai and the US administration have severe rifts. Pakistani Prime Minister Gilani is on his way to the US (and had apparently earlier refused to put any discussions of Siddiqui on his scheduled talks with the US). Karzai is reported as making some claims about the return of the girl. A girl appears and, as the Prime Minister is arriving in the US, Pakistan's Interior Minister and a Pakistani Senator are holding press conferences, one confirming that the girl is Siddiqui's long missing daughter and the other alleging she was held in a dark cell at Bagram by the US military.

Meanwhile, the Secretaries, Gates and Clinton, are out in force today, calling Karzai a "reliable partner."

The cast of characters and plot lines in the Siddiqui mystery are complex – courts in Pakistan, the CIA, competing political factions, KSM, large street rallies and protests, a Pakistani Prime Minister and Interior Minister, Afghan leader Karzai, the US Department of Justice, Charles Swift who handled the Hamdan case (and represented Siddiqui in her trial), courts in the US, missing bullets, missing children, competing fingerprint and DNA information, and more.

The only thing missing from this international tale of intrigue? Dedicated reporting by the US press.

*A Reuter's slide show of yesterday's meeting between Malik, Siddiqui's sister and the young girl can be found [here](#).

COURT RELEASES SLAHI DECISION

Last month, we talked about Judge James Robertson's decision that Mohamedou Slahi should

be released. Robertson's order has now been released. I'll have comments as I read it. But the short version is that the Government abandoned its attempt to prove (first) that Slahi had knowledge of 9/11 before it happened, and (second) that any material support he had offered al Qaeda had effectively ended by the time they picked him up.

I'll have more as I read this, but just as a reminder, this is the guy for whom Donald Rumsfeld developed a special interrogation plan including death threats.

(And in related news, Jason Leopold got a hold of the Lawrence Wilkerson declaration regarding innocent people at Gitmo.)

WILKERSON: CHENEY AND RUMMY KNEW GITMO DETAINEES WERE INNOCENT

About a hundred of you have pointed to this story, which reports that Lawrence Wilkerson signed a declaration to support the lawsuit of a former Gitmo detainee, Adel Hassan Hamad, stating that Dick Cheney and Donald Rumsfeld knew there were innocent people at Gitmo.

Colonel Wilkerson, who was General Powell's chief of staff when he ran the State Department, was most critical of Mr Cheney and Mr Rumsfeld. He claimed that the former Vice-President and Defence Secretary knew that the majority of the initial 742 detainees sent to Guantánamo in 2002 were innocent but believed that it was "politically impossible to release them".

[snip]

He also claimed that one reason Mr Cheney and Mr Rumsfeld did not want the innocent detainees released was because “the detention efforts would be revealed as the incredibly confused operation that they were”. This was “not acceptable to the Administration and would have been severely detrimental to the leadership at DoD [Mr Rumsfeld at the Defence Department]”.

Referring to Mr Cheney, Colonel Wilkerson, who served 31 years in the US Army, asserted: “He had absolutely no concern that the vast majority of Guantánamo detainees were innocent ... If hundreds of innocent individuals had to suffer in order to detain a handful of hardcore terrorists, so be it.”

He alleged that for Mr Cheney and Mr Rumsfeld “innocent people languishing in Guantánamo for years was justified by the broader War on Terror and the small number of terrorists who were responsible for the September 11 attacks”.

Now, as Mary has pointed out, there was actually a study done in summer 2002 that showed that vast majority of those at Gitmo were innocent. So this is not news.

But I certainly welcome some public discussion about the maltreatment of a number of innocent people at Gitmo as we enter back into discussions on closing Gitmo.

NO HABEAS IF THEY'VE MOVED YOUR BODY

Fatster linked to this Carol Rosenberg story, describing how Judge Thomas Hogan dismissed the habeas petitions of over a hundred former Gitmo detainees because they were no longer held at Gitmo—though they may be held by US proxies elsewhere.

A federal judge has dismissed more than 100 habeas corpus lawsuits filed by former Guantanamo captives, ruling that because the Bush and Obama administrations had transferred them elsewhere, the courts need not decide whether the Pentagon imprisoned them illegally. The ruling dismayed attorneys for some of the detainees who'd hoped any favorable U.S. court findings would help clear their clients of the stigma, travel restrictions and, in some instances, perhaps more jail time that resulted from their stay at Guantanamo.

While I can see how the ruling makes sense legally, Rosenberg's story does demonstrate how some of these former detainees are still screwed because the US once rounded them up.

There's one argument, in particular, that is very haunting, given our recent discussions of the way the US was playing with jurisdictional definitions to hold or kill captives.

Moreover, he added, CCR affiliated attorneys have tracked former captives to prison at Pol-i-charki, Afghanistan, that was once run by the U.S. military. He said "the U.S. may be pulling the puppet strings" of their continued

captivity.

[snip]

Hogan said the attorneys for the former detainees hadn't offered enough proof that other countries were operating essentially as U.S. proxies. "Petitioners are short on examples, except for the fact that former Guantanamo detainees from Afghanistan transferred back to Afghanistan have been detained at a detention facility built by the United States," he wrote.

And let's not forget how Ibn Sheikh al-Libi was suicided conveniently after we sent him back to a Libyan prison rather than Gitmo.

CCR FIGHTS TO UPHOLD ATTORNEY-CLIENT PRIVILEGE

So al-Haramain, at least for the moment, has won its case against the government. But there's an aspect of the case that often gets forgotten: al-Haramain argued not just that some of its employees were wiretapped, but that lawyers working for al-Haramain, Wendell Belew and Asim Ghafoor, were wiretapped. We seem to have forgotten that this country once believed that

attorney-client conversations should be protected to ensure the legal process.

The Center for Constitutional Rights hasn't forgotten. They, too, had a suit arguing that the government wiretapped attorney-client conversations (though unlike al-Haramain, they never got a wiretap log reflecting those conversations, nor were they able to make a prima facie case they were wiretapped). Last night, they appealed their suit to the Supreme Court. From their press release:

Last night, the Center for Constitutional Rights (CCR) asked the Supreme Court to take up its warrantless surveillance case, *Wilner v. National Security Agency (NSA)*. CCR and co-counsel argue that the Executive Branch must disclose whether or not it has records related to the wiretapping of privileged attorney-client conversations without a warrant. Lawyers for the Guantánamo detainees fit the officially acknowledged profile of those subject to surveillance under the former administration's program, and the Executive Branch has argued in the past that it has a right to target them.

The plaintiffs in the case are 23 attorneys who have represented Guantánamo detainees. They filed a Freedom of Information Act (FOIA) request seeking records of any surveillance of their communications under the NSA's warrantless surveillance program, which began after 9/11 but was only disclosed to the public in December 2005. The government refused to either confirm or deny whether such records existed, and the lower courts refused to order the government to confirm whether it had eavesdropped on attorney-client communications. The question before the Supreme Court is whether the government can refuse to confirm or deny whether

records of such surveillance exist, even though any such surveillance would necessarily be unconstitutional and illegal.

“Illegal surveillance of attorney-client communications makes it nearly impossible to challenge other illegal behavior by the government,” said Shayana Kadidal, Senior Managing Attorney of the CCR Guantánamo Global Justice Initiative. “The new administration has no legal basis for refusing to come clean about any violations of attorney-client privilege by the NSA.”

The petition filed last night includes declarations from the Guantánamo attorneys detailing how the threat of illegal surveillance by the NSA has made it harder for them to gather evidence in their cases from witnesses overseas, including family members of detainees, who are often unwilling to speak freely on the phone given the threat that the government may be listening in.

I’m in the process of writing a post on why I think the government will not appeal Judge Walker’s ruling in al-Haramain. But who knows—SCOTUS might get a warrantless wiretap case sooner rather than later.

Update: Here’s their petition. I’ll have some comment on that later.

KOH V. JOHNSON: MATERIAL SUPPORT IN

FAR AWAY

“BATTLEFIELDS”

I don't know about you. But I'm sort of bored with the Holder v. Rahm fight over torture and Gitmo. My hope is they'll start a military commission trial, it'll get delayed and challenged, and Holder will be able to demonstrate in terms even Rahm understands that civilian trials are not just a question of politics—they are also clearly more efficacious.

Ah well.

Lucky for us, there's a new debate to watch, this one between State Department Legal Advisor Harold Koh and DOD General Counsel Jeh Johnson, over whether Presidential wartime powers are limited to those actually in al Qaeda, or include those more loosely affiliated with the organization. As Charlie Savage describes, both have written secret memos advocating a position on the issue.

But behind closed doors, the debate flared again that summer, when the Obama administration confronted the case of Belkacem Bensayah, an Algerian man who had been arrested in Bosnia – far from the active combat zone – and was being held without trial by the United States at Guantánamo. Mr. Bensayah was accused of facilitating the travel of people who wanted to go to Afghanistan to join Al Qaeda. A judge found that such “direct support” was enough to hold him as a wartime prisoner, and the Justice Department asked an appeals court to uphold that ruling.

The arguments over the case forced onto the table discussion of lingering discontent at the State Department over one aspect of the Obama position on detention. There was broad agreement that the law of armed conflict allowed

the United States to detain as wartime prisoners anyone who was actually a part of Al Qaeda, as well as nonmembers who took positions alongside the enemy force and helped it. But some criticized the notion that the United States could also consider mere supporters, arrested far away, to be just as detainable without trial as enemy fighters.

That view was amplified after Harold Koh, a former human-rights official and Yale Law School dean who had been a leading critic of the Bush administration's detainee policies, became the State Department's top lawyer in late June. Mr. Koh produced a lengthy, secret memo contending that there was no support in the laws of war for the United States' position in the Bensayah case.

Mr. Koh found himself in immediate conflict with the Pentagon's top lawyer, Jeh C. Johnson, a former Air Force general counsel and trial lawyer who had been an adviser to Mr. Obama during the presidential campaign. Mr. Johnson produced his own secret memorandum arguing for a more flexible interpretation of who could be detained under the laws of war — now or in the future.

Part of me actually wonders whether the debate stems at least partly from Johnson's greater familiarity with whom we're already keeping—which includes a bunch of people whose “material support for terrorism” is really quite tenuous. That doesn't justify holding them, but this may be a question about whom we have already held for 9 years.

Still, the ramifications of holding those who materially supported al Qaeda are pretty ominous, given the fairly expansive notion this country has used to claim material support.

And meanwhile, David Barron—Dawn Johnsen's stand-in—basically punted on this question, seemingly hoping that some judge who is not a radical Bush appointee will make the decision for him.