

ANOTHER ADMINISTRATION WITHHOLDING OLC MEMOS

I'm going to have a few posts on answers Eric Holder gave to the Senate Judiciary Committee's Questions for the Record submitted after his last appearance in November 2009.

Two of the questions (one from John Kyl and the other from Tom Coburn) asked whether Gitmo detainees brought to the United States for civilian trial would get additional constitutional rights. Both Senators asked Holder for details on OLC opinions on whether this would happen.

Though Holder did point to a public document (it's the last several pages of his response packet) laying out the risks that courts would require even military commissions to grant such constitutional rights, he refused to let Congress see the OLC memos in question. Here's Kyl's question and response.

Prosecution of Khalid Sheikh Mohammed and Other 9/11 Conspirators in Federal Court :

68. Now that the Administration has made a final decision to bring Khalid Sheikh Mohammed and other 9/11 conspirators to the United States for prosecution, please provide this Committee with any memoranda written by the Office of Legal Counsel articulating what additional constitutional and statutory rights detainees may receive by virtue of their presence in the United States that are not currently available to them at Guantanamo.

Response: Please find attached a memorandum concerning the application of

the Due Process Clause of the Fifth Amendment to military commission proceedings in the United States and at the Guantanamo Bay Naval Base, which the Department of Justice previously provided in response to a congressional inquiry (Attachment 3). The Department would have substantial confidentiality interests in any other memorandum that OLC or other components might have prepared on this topic.

As I said, Coburn asked a similar question and got an identical response.

Now, I get a weird spidey-sense every time DOJ refuses to show members of Congress who have an oversight role the OLC memos that DOJ has written. Even if these memos say Khalid Sheikh Mohammed would have the right to free health care and a shiny new pony the moment he was taken off a plane in the continental US, I still think Committee Members with a proper oversight interest ought to be able to see these memos.

But I gotta say, I also suspect there's a reason they're so insistent on not only the existence of memos, but also their right to see them. Is it possible that Bradbury or Yoo or someone wrote up a KSM's shiny pony memo before they left DOJ as one more justification for keeping Gitmo open indefinitely? Are they hoping to flush out another of the hack memos written under the Bush Administration?

JEFF SESSIONS: GEORGE BUSH WAITED 7 YEARS TO SET UP MILITARY

COMMISSIONS

Jeff Sessions has already seized on yesterday's release of DOJ's list of 390 terrorist convictions and twisted it to sustain his claim that we need to try Khalid Sheikh Mohammed in a military commission. Much of his response consists of making non-specific claims about individuals on the list in an attempt to minimize the applicability of all these convictions.

The great majority of the terrorism cases cited by the Attorney General are in no way comparable to KSM's case. Most of the convictions in this list are for far lesser offenses, such as document fraud and immigration violations, while only a small handful concern conduct even remotely similar to a mass-casualty terrorist attack. And none are on the level of KSM, who masterminded 9/11.

Among the cases cited is that of Zaccarias Moussaoui, **which was fraught with procedural problems, delays,** appeals, risks to classified evidence, and even a lone holdout juror who spared the 20th hijacker the death penalty. Due to gaps in federal law, many of the problems prosecutors encountered in the Moussaoui trial will be experienced in future terrorism trials.

[snip]

The figures released today also contradict the Attorney General's claims on the Christmas Day Bomber: two of the terrorists on this list were placed in military custody precisely because the criminal justice system severely limits our ability to gather intelligence. [my emphasis]

But by far the most amusing attack on this list is Jeff Sessions' explanation—after pointing to

the procedural problems and delays in the Moussaoui trial—that most of these 390 convictions happened before military commissions were operational, which he dates to 2008.

Moreover, the overwhelming bulk of these cases are for acts committed by U.S. citizens—which KSM and the Christmas Bomber are not—and **occurred before military commissions became fully operational in 2008.** [my emphasis]

Someone better tell George Bush, who claims to have set up military commissions on November 13, 2001. And someone better tell Salim Hamdan, who was first charged in a military commission in 2004, and whose appeal of the terms of the military commissions lasted two years, after which there was another two year delay until his trial began.

In other words, Jeff Sessions deals with **precisely** the kind of delay we can expect for any future military commissions—one of the biggest reasons not to use them—by simply ignoring the delays that have already happened.

ANOTHER REASON TO USE CIVILIAN COURTS

This WaPo story—which tells how Mohamedou Ould Slahi and Tariq al-Sawah got special privileges and too much fast food at Gitmo in exchange for cooperation—focuses on the things the detainees get, like Subway sandwiches, their own mint garden, and their own compound. (h/t cs) But it really points to one more reason why civilian trials may be better than military commissions: because of the ability to offer something in exchange for cooperation.

With both the underwear bomber and Najibullah

Zazi, officials were eventually able to get their cooperation investigating their ties with the al Qaeda network in exchange for the possibility of leniency (and for the underwear bomber, a promise not to try for the death penalty). And Jamal al-Fadl ended up being one of the key witnesses in the Embassy Bombing trial, which helped put US-based al Qaeda figures in jail for life.

Yet with Slahi and al-Sawah, there seems to be no easy way to reflect their cooperation. Rewarding these two detainees for having cooperated is considered “a hard sell.”

“I don’t see why they aren’t given asylum,” said W. Patrick Lang, a retired senior military intelligence officer. “If we don’t do this right, it will be that much harder to get other people to cooperate with us. And if I was still in the business, I’d want it known we protected them. It’s good advertising.”

A current military official at Guantanamo suggested that that argument was fair. Still, he said, it’s “a hard-sell argument around here.”

Heck, in the case of Slahi, the government is appealing Judge Robertson’s order that he be released.

And, as a number of sources admit later in the EPU range of this article, we simply don’t have the means to account for cooperation in our disposition of higher level al Qaeda detainees.

A Justice Department-led review of the cases of all detainees at Guantanamo Bay, which recently wrapped up, decided that Sawah and Slahi are owed no special treatment. An administration official, speaking before the federal court ruling on Slahi, said the government wants either to prosecute them or to hold them in some form of indefinite detention without charge.

Some current and former military officials say there should be other options. The treatment of high-profile informants such as Sawah and Slahi, they argue, will affect the government's ability to turn other jihadists.

"We are much behind in discussing and working out details of some form of witness protection program for the most potentially important and in-danger witnesses," said a military official who has served at Guantanamo.

The former chief military prosecutor at Guantanamo, Lawrence Morris, said officials always weighed a detainee's cooperation, particularly its quality and timeliness, before making a charging decision.

"We were not heedless to other factors, but our job was to make our best judgment from a criminal standpoint," said Morris, who noted that the decision to bring a case against Sawah came after prolonged deliberation and consultation with intelligence officials.

So instead of providing an incentive for al Qaeda insiders to flip in exchange for special treatment, we instead push for indefinite detention for them (albeit detention softened by fast food). And we're left with the kind of intelligence hack contractors can collect in the field rather than real inside information.

HERE COMES THE JUDGE; GITMO MILITARY

COMMISSIONS REDUX

The handwriting for a complete ObamaRhama cave to the neocon howlers on military commissions instead of civilian trials is getting carved awfully deep in the granite wall.

THE PRISONER SHELLGAME

On Friday, I pointed out that Eric Holder and Dennis Blair used language in a letter on Gitmo's detainees that suggests some subset of the detainees at Gitmo is not covered by Obama's Executive Order requiring some resolution to their status.

In recent days, a couple of you have linked to articles about two other shell games the Obama Administration appears to be playing with its detainees. First, it appears that when we cede control over Iraqi prisons to Iraqis later this year, we will retain custody of about 100 detainees from Camp Cropper (where we've kept Iraqi High Value Detainees), purportedly at the request of the Iraqi government.

The U.S. military said it plans a July 15 handover of Camp Cropper, which has held high-level detainees such as Saddam Hussein and members of his regime on the outskirts of Baghdad. The roughly 2,900 detainees in Camp Cropper are currently the only Iraqi detainees in American custody, down from a wartime high of 90,000, the U.S. military said. At the Iraqi government's request, the U.S. will continue to hold about 100 detainees who pose a high security risk, Quantock said, although he was not more specific about who would be kept in

custody.

Meanwhile, someone (it's not clear who) is proposing keeping international detainees at Bagram (which would basically mean Bagram would become a colder less accessible Gitmo). (h/t Jim White—and see this excellent Adam Serwer post on the Bagram debate from last November)

That the option of detaining suspects captured outside Afghanistan at Bagram is being contemplated reflects a recognition by the Obama administration that it has few other places to hold and interrogate foreign prisoners without giving them access to the U.S. court system, the officials said.

Without a location outside the United States for sending prisoners, the administration must resort to turning the suspects over to foreign governments, bringing them to the U.S. or even killing them.

In one case last year, U.S. special operations forces killed an Al Qaeda-linked suspect named Saleh Ali Saleh Nabhan in a helicopter attack in southern Somalia rather than trying to capture him, a U.S. official said. Officials had debated trying to take him alive but decided against doing so in part because of uncertainty over where to hold him, the official added.

U.S. officials find such options unappealing for handling suspects they want to question but lack the evidence to prosecute. For such suspects, a facility such as Bagram, north of Kabul, remains necessary, officials said, even as they acknowledged that having it in Afghanistan could complicate McCrystal's mission.

Mind you, some of these prisoner shell games may

be related. While it would seem that the US will have to hold Iraqis within Iraq, if there really are people at Gitmo who don't qualify for the Task Force review, I can imagine that someone would like to keep them away from a prison in Illinois where their presence may become an issue.

But all this illustrates two things. First, there are a number of people against whom we have intelligence that is strong enough to get them imprisoned, but shoddy enough we want to make sure no independent body ever reviews it. As I noted yesterday, one troubling aspect of the shell game they're playing with the Army Field Manual's Appendix M is that it appears to be applicable to those who we can label an illegal enemy combatants even though they have not engaged in any act of war against us. Which sounds like the kind of people we might want to throw into Gitmo.

And this ongoing shell game with detainees also makes another thing clear: we really need someone (like SCOTUS) to insist that the same access to some review process now available to Gitmo detainees be available to Bagram detainees. Until that happens, our government seems intent on holding people in arbitrary detention.

THE “DETAINEES SUBJECT TO THE REVIEW”

MadDog linked to the letter that Dennis Blair and Eric Holder sent the Senate describing the process by which 6 agencies and a 100 staffers meticulously decided the ultimate fate of Gitmo detainees—who could be released or imprisoned elsewhere, who could be tried, and (presumably)

who had to be held indefinitely. It might be a reassuring letter for its portrayal of the deliberation and rationality applied to Gitmo detainees.

Except for this phrase, repeated twice: “all 240 detainees subject to the review.”

After carefully considering each case, the six agencies reached unanimous agreement on disposition determinations for all 240 detainees subject to the review.

[snip]

After all of the deliberations described above, the DNI-either personally for cases considered by Principals or by delegation to the ODNI official on the Review Panel-agreed with the other five agencies on disposition determinations for all 240 detainees subject to the review.

This process, apparently doesn't apply to all detainees. Only the detainees “subject to the review.” Now perhaps they're just making the distinction between Gitmo detainees and those in some black hole in Bagram or some other secret site. But it sure seems to be referring just to Gitmo detainees. In which case, there must be other Gitmo detainees, outside of the 240, who are not “subject to the review.”

Why? Who are they?

Executive Order 13492, which instituted this review, provides two potential hints. First, it provides this definition:

(c) “Individuals currently detained at Guantánamo” and “individuals covered by this order” mean individuals currently detained by the Department of Defense in facilities at the Guantánamo Bay Naval Base whom the Department of Defense has ever determined to be, or treated as, enemy combatants.

This would seem to leave out detainees held by CIA or contractors (maybe?). And it would seem to leave out those detainees whom DOD had simply never called nor treated as an enemy combatant. You know those family members Mary keeps asking about? They wouldn't be enemy combatants, would they?

The EO also suggests DOD would have authority over any other detainees.

(a) Nothing in this order shall prejudice the authority of the Secretary of Defense to determine the disposition of any detainees not covered by this order.

So while this letter to the Senate sounds like a wonderful work of rational deliberation, it also seems to hint at some remaining Kafkaesque hole, whereby some people who have **not** been deemed enemy combatants remain in some arbitrary limbo not covered by this great display of rational deliberation.

Update: Hmmm is right: the EO lets the Secretary of Defense do what he will with all the other detainees (which I guess makes it especially useful if your Secretary of Defense is an old Chief Spook). I've fixed the post accordingly.

THE ANONYMOUS COWARD CALLING HOLDER WEAK

Time has another one of those *Rahm v. Holder* profiles. It is notable from the slew of other ones for two reasons.

The anonymous source calling Holder a coward

First, the story features several main sources

for this story: Lindsey Graham, speaking on the record.

Holder, issuing no-nonsense statements like this, on the record:

And it's Holder's experience in the law-enforcement system that makes him such a strong believer in its ability to put terrorists like KSM away forever. "We should have great faith in the resilience of our systems, the resilience of our people, the toughness that has always separated Americans from other peoples in this world, and that's what's made this country great," he says.

And at least one anonymous White House aide (AKA Rahm).

What I especially love about about that anonymous White House aide is that the guy who is too chicken to speak on the record seems to be parroting GOP attacks calling Holder weak on terror.

Republicans, meanwhile, were busy turning Holder into the poster child for White House weakness on terrorism, and some polls showed that most Americans agreed with them. "The only two people who still believe in civilian trials," says one of the meeting's attendees, "are Holder and the President."

Brave anonymous White House aide!!
Singlehandedly fighting terrorism by hiding behind anonymity!!

Lindsey's July (?) meeting with Holder and December meeting with Obama

The article also provides a useful timeline for two meetings Lindsey had with the Administration, first an July (or August) meeting with Holder.

By July, Obama had asked Holder to decide whether it was feasible to prosecute KSM in a civilian court. Holder chewed on that question for weeks. Meanwhile, Obama's chief of staff, Rahm Emanuel, who opposed civilian trials, asked Holder to meet with Republican Senator Lindsey Graham of South Carolina, a key centrist vote on matters of counterterrorism. Graham told Holder he strongly opposed civilian trials for the alleged 9/11 conspirators and that they could affect his support for closing Guantánamo Bay prison, a key Obama goal.

And then a December meeting with Obama.

When Obama met with Graham in early December, the Senator laid out his case against civilian trials. But the President said he thought Holder had the better side of the argument. "I just agreed to disagree with the President on that issue," Graham told TIME.

Those meetings are interesting both for the way they match up to the timeline of the attacks on Holder and Greg Craig (which started in earnest around the time of the first meeting, and culminated in the December meeting after Craig had been ousted.

I'd really love to know the logic for the Obama meeting. After all, this was before the Christmas day bombing, when the Administration was still basking in the success of the foiled Zazi plot. And it came at a time when the Democrats had 60 votes in the Senate.

So why meeting with Lindsey?

It sure suggests the push against civilian trials is more about politics than efficacy.

But we knew that.

BYBEE'S CIRCUIT: ASHCROFT CAN BE SUED FOR WRONGFUL DETENTION

The 9th Circuit has ruled that John Ashcroft can be sued for wrongful detention of an American citizen. From an ACLU press release:

The American Civil Liberties Union lawsuit charging that former Attorney General John Ashcroft is personally responsible for the wrongful detention of an innocent American, Abdullah al-Kidd, can go forward, the U.S. Court of Appeals for the Ninth Circuit ruled today. The ruling denies Ashcroft's request that his appeal be heard by the entire court and upheld the court's September 2009 decision that the federal material witness law cannot be used to detain or investigate suspects where no probable cause exists for criminal charges. The ruling also held that Ashcroft does not have immunity in this case and can be held personally liable for the wrongful detention of al-Kidd.

"In this country, we don't believe in arresting and imprisoning people who haven't been charged with any crime," said ACLU Immigrants' Rights Project Deputy Director Lee Gelernt. "Former Attorney General Ashcroft deliberately distorted the federal material witness law to allow the detention of innocent people. As the primary architect and overseer of this policy that so clearly circumvented the Constitution, he should be held personally liable."

Prior to 9/11, the federal material witness law was used sparingly – especially with U.S. citizens – to ensure that witnesses would be available to testify in criminal cases. Arrests under the statute took place in rare cases to secure testimony where there was hard evidence that an individual had material information but would not testify voluntarily. After 9/11, Ashcroft retooled the law into an investigative detention statute, allowing the government to arrest and detain individuals for whom the government lacked probable cause to charge with criminal violations.

Today's ruling affirms the court's September 2009 ruling that found that the material witness law may only be used when an individual is genuinely sought as a witness and where there is a real risk of flight. The court ruled that the law does not allow an end-run around the constitutional requirements for arresting someone suspected of a crime. Ashcroft had appealed the ruling.

Al-Kidd, a U.S.-born American citizen, was on his way to Saudi Arabia to study when he was unlawfully detained and arrested in Washington's Dulles Airport on March 16, 2003 as a material witness in the trial of Sami Omar Al-Hussayen. For 16 days, al-Kidd was held in heightened-security units of various jails and shackled whenever moved. He was eventually released under onerous conditions that included confining his travel to four states, surrendering his passport and reporting to probation officers. Al-Kidd was held for more than 13 months under these conditions without ever being charged with any crime or asked to testify.

At the time of his arrest, al-Kidd had

already shown that he was not a flight risk and would cooperate as a witness. He had voluntarily met with the FBI repeatedly, never missing a scheduled appointment. For six months prior to his arrest, al-Kidd had not been contacted by the FBI, and he had never been told that he was prohibited from traveling abroad to pursue his studies.

The ACLU lawsuit names Ashcroft, the United States and several federal agents as defendants. Local, state and federal officials in Virginia, Oklahoma and Idaho already settled claims against these parties.

WHEN LAWYERS EQUATE LAW WITH PR

Jack Goldsmith and Ben Wittes have an op-ed up in which, claiming that the PR value to military commissions is minimal, Obama should just not give KSM a trial of any sort. They make a clever move in which they first cursorily dismiss the value of civilian trials.

A trial potentially adds three things: the option of the death penalty; enhanced legitimacy in some quarters, especially abroad; and a certain catharsis and historical judgment in the form of a criminal verdict.

These are non-trivial benefits, but as the battle over the past few months has shown, they come at great cost.

Domestically, the political costs of trying high-level terrorists in federal courts have become exorbitant for the administration – unaffordably high, it seems to be turning out.

They make no consideration of the importance of a trial for our rule of law, our system of justice. And fail to consider any potential direct benefit in showing potential terrorists that we don't stoop to the arbitrary authoritarian ways of the oppressive countries many of them are fighting. This is not about impressing Europe, as they seem to suggest, but about impressing young Saudis or Pakistanis, showing them the rule of law.

And from there, Goldsmith and Wittes treat the political debate over civilian trials equally cursorily. They might consider, after all, the reasons why civilian trials have become so costly: the fact that Dick Cheney and his daughter, trying to avoid any consequences for instituting a torture regime, are paying a lot of money to sow fear about civilian trials.

It's a political ploy. Nothing more. Yet one that plays to the weaknesses of someone like Rahm, who apparently doesn't see much value in defending principle. But the political cost doesn't have to be that high; Obama has just let it be made so.

And so, with those five lines dismissing the value of the rule of law on which our country is based, they go on to focus more on their straw man target, military commissions.

The legal and political risks of using the ill-fated military commission system are also significant. After the Supreme Court offered a road map for a legally defensible system, Congress has twice given its blessing. But serious legal issues remain unresolved, including the validity of the non-traditional criminal charges that will be central to the commissions' success and the role of the Geneva Conventions. Sorting out these and dozens of other novel legal issues raised by commissions will take years and might render them ineffectual. Such foundational uncertainty makes commissions a less than ideal forum for

trying Mohammed.

Moreover, the public relations and related legitimacy benefits of trying Mohammed in a commission are not that great, especially since the administration insists that he will remain in detention even if acquitted. The possibility that the administration might try him in a commission has been met with anger and disdain by the American left and many European elites, who think commissions are as illegitimate as they believe the underlying detention system to be. They will work hard to delegitimize their proceedings too.

In short, a military commission trial might achieve slight public relations and legitimacy benefits over continued military detention of Mohammed, and might facilitate his martyrdom by ultimately allowing the government to put him to death. But this would add so little to the military detention that the administration already regards as legitimate that a trial isn't worth the effort, cost and political fight it would take.

Now, there's a reason Goldsmith and Wittes focus so much more closely on military commissions than civilian trials. That's because there are real drawbacks to them. They are legally dicey, they are likely to result in years of delay, they actually offer fewer tools with which to try KSM successfully. And of course, Goldsmith and Wittes don't acknowledge that that is one key basis for criticism of military commissions: they simply won't be as effective as civilian trials. Instead, they falsely suggest that leftist opposition to military commissions is some nihilist attempt to discredit the trials just for the sake of principle. By making the criticism of not just the left but the military into a strawman, they avoid the fundamental

agreement between us and them about the weaknesses of military commissions.

And so, with that canard, Goldsmith and Wittes dismiss the PR value of military commissions, too.

Poof! By weighing our entire legal system as one big PR gimmick (and failing to do that very well) Goldsmith and Wittes manage to decide it's just not worth all that much.

But the clever op-ed is valuable for something. It shows what a slippery slope Obama is on. Because once you fail to make the case for the principle of rule of law, when you fail to point out the benefits it offers both as a necessary step to reclaim the America that used to inspire others rather than inflame them and as a proven way to adjudicate crimes, then there's little to distinguish the benefits of civilian trials and the arbitrary rule of indefinite detention. (I'd also say that, short of pointing out that most candidates for indefinite detention are such because they've been tortured into craziness by Goldsmith's former employers, you fail to point out how Cheney's mistakes have gotten us here.)

Even Eric Holder, who genuinely wants civilian trials, has conceded the possible efficacy of military commissions and indefinite detention. And once you've done that, rather than defend the principle and efficacy of civilian trials, you're on the slippery slope where our entire rule of law is just a big PR ploy. One that can be discarded for arbitrary indefinite detention when it becomes convenient.

**IN 2007, RAHM
OPPOSED INDEFINITE**

DETENTION

✖ On June 29, 2007, Congressman Norm Dicks sent George Bush an eloquent letter urging him to close Gitmo. It said, among other things,

Since the time that captured “enemy combatants” were first brought to Guantanamo Bay in 2002, the detainment facility has undermined America’s image as the model of justice and protector of human rights around the world. **Holding prisoners for an indefinite period of time, without charging them with a crime goes against our values, ideals and principles as a nation governed by the rule of law.** Further, Guantanamo Bay has become a liability in the broader global war on terror, as allegations of torture, **the indefinite detention of innocent men**, and international objections to the treatment of enemy combatants has hurt our credibility as the beacon for freedom and justice. Its continued operation also threatens the safety of U.S. citizens and military personnel detained abroad.

[snip]

The closure of the detention facilities at Guantanamo Bay would represent a positive first step toward restoring our international reputation as the leader of democracy and individual rights. [my emphasis]

Guess whose signature appears right at the top of the long list of those who signed this letter?

Then-Congressman Rahm Emanuel.

I wonder what changed between the time when Rahm recognized how unacceptable indefinite detention is and his willingness now, in cahoots with Lindsey Graham, to set up a system of indefinite

detention? Heck, **this** Rahm has even called closing Gitmo a distraction.

Would I be foolish to ask for that other Rahm back?