

A TRIAL SHOWING TORTURE WAS UNNECESSARY

I'm not amused that the Wall Street Journal solicited an op-ed attacking the decision to try KSM in civilian court from one of the people—John Yoo—with the biggest conflict on such a decision. It's yet more proof that Rupert Murdoch is engaged in a partisan pursuit, even with the WSJ.

But I am amused at the way John Yoo dismantles his own argument. Take these two claims, for example:

Prosecutors will be forced to reveal U.S. intelligence on KSM, the methods and sources for acquiring its information, and his relationships to fellow al Qaeda operatives. The information will enable al Qaeda to drop plans and personnel whose cover is blown. It will enable it to detect our means of intelligence-gathering, and to push forward into areas we know nothing about.

[snip]

For a preview of the KSM trial, look at what happened in the case of Zacarias Moussaoui, the so-called 20th hijacker who was arrested in the U.S. just before 9/11. His trial never made it to a jury. Moussaoui's lawyers tied the court up in knots.

All they had to do was demand that the government hand over all its intelligence on him. The case became a four-year circus, giving Moussaoui a platform to air his anti-American tirades. The only reason the trial ended was because, at the last minute, Moussaoui decided to plead guilty. That

plea relieved the government of the choice between allowing a fishing expedition into its intelligence files or dismissing the charges.

The first claim suggests the prosecutors will have to reveal all the information they've got against KSM. That's a lie, one that presumably Professor Yoo knows is a lie. Eric Holder has made it quite clear that there is some set of evidence—much of it not public yet—that should be enough to prove KSM's guilt, independent of all the information they collected pursuant to Yoo's opinions authorizing torturing KSM.

And I highly doubt that Yoo's really worried about revealing the details of other al Qaeda figures. We've already worked our way through about seven new generations of "al Qaeda Number Threes" since we captured KSM, so I doubt the network looks anything like it did when KSM had first-hand knowledge of it. Besides, if after eight years of waging full-scale war against al Qaeda we haven't captured these people, then chances are we either won't or can't.

You know—can't. Like Osama bin Laden.

Of course, what John Yoo is really worried about are precisely those sources and methods: that is, torture. He's worried that prosecutors may have to reveal the details of the torture they did to KSM.

So turn now to Moussaoui. What Yoo is really talking about when he invokes the length of Moussaoui's trial is his demand to interview—or in some way introduce evidence from, disproving the charges against him—top al Qaeda detainees: Abu Zubaydah and Ramzi bin al-Shibh among them.

The delay, of course, came from the Administration's refusal to turn over that evidence, much less to allow Moussaoui to interview them.

The delay came, at least partly, because the CIA was busy destroying tapes that might have shown

that prosecutors had the wrong charges against Moussaoui.

The delay, in short, was not because of anything Moussaoui was doing. It was because of things CIA was doing to protect Yoo, among others.

Now it's conceivable that KSM would try to call Abu Zubaydah to testify at trial; but now that we all know Abu Zubaydah was tortured on Yoo's advice, there's no big reason to prevent KSM from introducing evidence from AZ.

Now that Yoo's crimes have been exposed, there just isn't going to be the hold-up created over the need to introduce evidence from those who might exonerate KSM or the others (and AZ did not, apparently, do so).

But there's one further premise that makes this entire argument wrong. Yoo's concerns about the exposure of torture-related information—to the extent that they might be valid—are all premised on the notion that the only information we got is so secret that introducing it at trial would violate sources and methods. Aside from the issue of competency hearings (which I think does risk exposing details on torture), torture (and illegal wiretapping—but it wouldn't be illegal against any of these terrorists) would only be exposed if that's the only kind of evidence the government has.

And Eric Holder is convinced there's plenty that comes from clean sources.

John Yoo pretends he knows the universe of information on KSM. His argument suggests that the only evidence came from illegal or highly sensitive means.

What the trial will likely show, instead, is that there was a great deal of information **already available** before they started torturing KSM. It'll show that the KSM expert in FBI—who we know was never allowed to get close to the Yoo-sanctioned torture sessions—knew much if not all of the stuff that KSM was blabbing away after being waterboarded the 183rd time.

That's the real risk for Yoo: not the illegal actions that the trial will expose. But how much evidence there was independent of Yoo's little torture shop.