

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.