

“INCENTIVES FOR COOPERATION”

David Kris gave a speech at the Brookings Institute last week, largely intended to make the case for civilian trials. Here’s the main framework of the speech:

Today, however, the consensus that developed in the aftermath of 9/11 shows some signs of unraveling. In particular, there are some who say that law enforcement can’t – or shouldn’t – be used for counterterrorism. They appear to believe that we should treat all terrorists exclusively as targets for other parts of the Intelligence Community or the Defense Department.

The argument, as I understand it, is basically the following:

- 1. We are at war.*
- 2. Our enemies in this war are not common criminals.*
- 3. Therefore we should fight them using military and intelligence methods, not law enforcement methods.*

This is a simple and rhetorically powerful argument, and precisely for that reason it may be attractive.

In my view, however, and with all due respect, it is not correct. And it will, if adopted, make us less safe. Of course, it’s not that law enforcement is always the right tool for combating terrorism. But it’s also not the case that it’s never the right tool. The

reality, I think, is that it's sometimes the right tool. And whether it's the right tool in any given case depends on the specific facts of that case.

Here's my version of the argument:

- 1. We're at war. The President has said this many times, as has the Attorney General.*
- 2. In war you must try to win – no other goal is acceptable.*
- 3. To win the war, we need to use all available tools that are consistent with the law and our values, selecting in any case the tool that is best under the circumstances.*

We must, in other words, be relentlessly pragmatic and empirical. We can't afford to limit our options artificially, or yield to pre-conceived notions of suitability or "correctness." We have to look dispassionately at the facts, and then respond to those facts using whatever methods will best lead us to victory.

Put in more concrete terms, we should use the tool that's designed best for the problem we face. When the problem looks like a nail, we need to use a hammer. But when it looks like a bolt, we need to use a wrench. Hitting a bolt with a hammer makes a loud noise, and it can be satisfying in some visceral way, but it's not effective and it's not

smart. If we want to win, we can't afford that.

If you take this idea seriously, it complicates strategic planning, because it requires a detailed understanding of our various counterterrorism tools. If you're a pragmatist, focused relentlessly on winning, you can't make policy or operational decisions at 30,000 feet. You have to come down, and get into the weeds, and understand the details of our counterterrorism tools at the operational level.

And that leads me to this question: as compared to the viable alternatives, what is the value of law enforcement in this war? Does it in fact help us win? Or is it categorically the wrong tool for the job – at best a distraction, and at worst an affirmative impediment?

It really summarizes the Obama Administration's embrace of man-ego-driven "pragmatism" and wonkiness in all things. The response to outright demagoguery (the "we are at war so we must torture and kill kill kill" perspective), the Obama Administration presents an alternative, purportedly pragmatic formulation that suffers from its own problems.

"We are at war either because of or as evidenced by the fact that the two big men keep saying we are." Sure, Kris' speechwriter might just have been trying to rebut the nutters who like to score points by claiming that Obama doesn't agree with Dick Cheney that This Is War. But note what it does for this entire "pragmatic" argument: it presents the fact—"we are at war" with no examination of either the statement itself or the nuance covered up by it. It avoids questions like, "Against whom are we at war?" "Are we just at war against formal members of al Qaeda, or are we also at war against American losers who read Anwar al-Awlaki on the interToobz and go on to buy a GPS but never

actually succeed at contacting anyone from al Qaeda?" "Why are we at war against some terrorism but not other terrorism and, at this point, are we even targeting the most effective and dangerous terrorists?" "What is the objective of this war?" "If we've embraced the concept of war, have we also embraced the legal concepts of war?" The Obama Administration has, like the Bush Administration, actually picked and chosen when it wants to claim to be at war and when that's inconvenient; with a little more examination of the premise itself, we might be able to find a more reasonable way to resolve these inconsistencies. But "pragmatic" claim notwithstanding, this entire thought exercise starts by refusing to examine the foundational premise.

"We're at war and so we must win!" Here's where unexamined first principles, driven by man-ego, really introduce problems into this formula. Sure, if you're at war, you want to win it (though it helps to define what winning looks like). But it assumes certain sorts of acts in its definition: "We must crush those Islamic extremists in our bare hands and eat them for breakfast!" (If you're John Yoo, you must crush the testicles of Islamic extremists' children...) It assumes an ego victory against our nominal opponent. And that, to some degree, rules out the more logical objective: "We must make our country and our allies safe from preventable terrorist attacks and minimize the damage any one attack can cause." That's the difference between focusing on infrastructure and persuasion rather than arresting losers with an internet connection and a fondness for extremist speech, of whatever type. It's also a perspective that allows you, at the same time, to address other, larger threats, such as that a deep water oil drilling platform will blow up and destroy one of your most important ecosystems. It's the difference between single-minded myopia and protecting the country against all threats, including international terrorists, domestic terrorists, environmental disaster, and financial disaster using means that are adequate

to the relative danger of the threat.

“We must use the best tools available to win this war.” I don’t so much have a problem with using the best tool available, but if doing so is not tied to the most logical objective because you’ve injected unexamined man-ego into the equation, the “best tool” may not in fact be the best tool. Pragmatism is no good if it serves an unexamined goal that may not, in fact, be the “pragmatic” solution to our problem. Obama has said that persuasion needs to be an important goal, but once you’ve declared a fight to the death with your “enemies”—particularly given the expansive definition of enemy—then you radically undercut the effectiveness of persuasion.

All this discussion about unexamined assumptions is just background to this paragraph, which I find to be the most fascinating (in a car wreck way) paragraph in the speech. In the middle of list of advantages civilian trials offer over military commissions, Kris lays out the critical issue of incentives for cooperation.

Incentives for Cooperation. The criminal justice system has more reliable and more extensive mechanisms to encourage cooperation. While the military commissions have borrowed a plea and sentencing agreement mechanism from the courts-martial system which could be used for cooperation – Rule 705 – this system has not yet been tested in military commissions and its effectiveness is as yet unclear. In law of war detention, interrogators can offer detainees improvements in their conditions of confinement, but there is no “sentence” over which to negotiate, and no judge to enforce an agreement. Detainees may have little incentive to provide information in those circumstances. On the other hand, in some circumstances law of war detainees may lawfully be held in conditions that

many believe are helpful to effective interrogation.

Kris makes an absolutely critical point: everything about the nature of our military commissions system precludes making deals with suspects (though Kris doesn't get into some of the biggest impediments to cooperation, such as the embrace of inaccurate information if it feeds the man-ego war narrative, and the sheer arbitrary nature of the system). We got Reid and Abdulmutallab and Shahzad to cooperate because they faced worse punishment if they didn't. But thus far, the most successful way we've had to convince military detainees to cooperate is to kidnap and threaten the innocent family members of those detainees, which whether we're at war or just fighting terrorism is patently illegal. So it's a slam-dunk that civilian trials offer more tools to get detainees to cooperate, right?

Which is when Kris throws in his last sentence: "On the other hand, in some circumstances law of war detainees may lawfully be held in conditions that many believe are helpful to effective interrogation." He sounds like a bad DC journalist here, with his "many believe" qualifier to the claim that certain "conditions" used "in some circumstances [with] law of war detainees" "are helpful to effective interrogation." This feels like another sentence—even more than the "we're at war sentence"—that Kris' speech-writer put into this speech for him. It effectively turns the paragraph from, "only civilian detention offers real incentives to get detainees to cooperate" to "plea agreements work like a charm, but we've got to keep Appendix M's abusive techniques around because 'many believe' that they can be 'helpful' to interrogation."

We are at war, the big men have told us, so we must win this war. And that means keeping detainee abuse around as a tool because it's the only thing that can replace the very effective plea bargain in the Kafkaesque detention system we've created because we are at war.