

## KSM trial: it's Obama's call

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President Obama has said it was Attorney General Eric Holder who decided to try Khalid Sheik Mohammed, the self-proclaimed 9/11 mastermind, and four other Guantanamo Bay detainees in civilian federal court in New York City. Yet, as a matter of law, that *can't* be true.

"You know, I said to the attorney general, 'make a decision based on the law,' " the president told CNN.

In Holder's testimony before the Senate Judiciary Committee, he confirmed that Obama had left it up to him: "This was a tough call, and reasonable people can disagree with my conclusion that these individuals should be tried in federal court rather than a military commission." He reiterated, "I made this decision."

If Holder and Obama are telling the truth, they have a problem.

The attorney general has no constitutional or statutory authority to unilaterally order the Defense Department to hand over military detainees so they can stand trial in civilian court. He can no more order the military to transfer such prisoners than he can order the Air Force to bomb a particular target. (Similarly, the defense secretary has no authority to order the Justice Department to do anything.)

Former Attorney General John Ashcroft noted this problem in an interview on Wednesday: "The attorney general doesn't have the authority to mandate that the secretary of defense turn somebody over to him and yield jurisdiction so that something that would have been done in a military setting is done in a civilian setting."

The only one who *does* have the authority is the superior of both the AG and the defense secretary: President Obama himself.

Evidently, this hasn't yet dawned on the administration.

For this to be done legally, it can't be Holder's decision alone. Either Obama must step up to the plate and personally order the transfer of the detainees or Defense Secretary Robert Gates must jointly agree with Holder to transfer custody of the detainees.

I'm betting it'll be the latter.

After all, the public plainly sees the move as a huge misstep that will delay justice for years, endanger New York City and possibly reveal national-security secrets to the enemy. The Rasmussen Poll found that Americans disapprove of the decision 51 percent to 29 percent, with 19 percent uncertain.

Holder endured withering criticism for "his" decision in the Senate on Wednesday. Meanwhile, the president continued his parade on the international stage -- appropriately enough, since the only community happy with the decision is that part of the international community that loves to hate the United States.

It was at this point, after the well-deserved criticism started rolling in, that observers expected Obama to step up and take the leadership role -- explaining why he ordered Holder to bring the cases in civilian court and ordered Gates to transfer the detainees to Justice's custody.

But that didn't happen. Instead, Obama pointed to the attorney general.

The president seems to be in no hurry to take responsibility for this decision -- one of the most significant his administration has made to date.

Whatever happened to President Harry Truman's principle that "the buck stops here"?

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