

DAVID KRIS: OUR ONLY MILITARY COMMISSION CONVICTIONS MAY BE ILLEGAL

I was interested in one particular detail in David Kris' testimony before the Senate Armed Services Committee hearing on military commissions the other day. He said that we probably couldn't charge and try people with "material support for terrorism" in military commissions.

There are two additional issues I would like to highlight today that are not addressed by the Committee bill that we believe should be considered. The first is the offense of material support for terrorism or terrorist groups. While this is a very important offense in our counterterrorism prosecutions in Federal court under title 18 of the U.S. Code, there are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war. The President has made clear that military commissions are to be used only to prosecute law of war offenses. Although identifying traditional law of war offenses can be a difficult legal and historical exercise, our experts believe that there is a significant risk that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense, thereby reversing hard-won convictions and leading to questions about the system's legitimacy. However, we believe conspiracy can, in many cases, be properly charged consistent with the law of war in military commissions, and that cases that yield material support charges could often

yield such conspiracy charges. Further, material support charges could be pursued in Federal court where feasible.

I've always thought the "material support for terrorism" to be a fairly arbitrary crime. That's particularly true given that Eric Holder, back in his high-priced Defense Attorney days, got powerful white corporate executives off with no charges after they knowingly supported right wing terrorist violence, but as Attorney General, Holder recently oversaw DOJ win 15 year penalties on Muslims who claimed to believe their donations had supported charity.

But Aussie Lawyer reminded me of something more important.

Two of the only people (maybe the only people?) who have been convicted thus far in our kangaroo court Guantanamo military commission system are David Hicks and Salim Hamdan. The charge both were convicted on?

Material support for terrorism.

Of course, both have served their sentence and been freed, so I question whether either will challenge their conviction based on Kris' statement.

But the current Assistant Attorney General for National Security seems to be suggesting that the only two convictions the Bush White House got from his military commissions would not hold up under appeal.