

ARE THEY TRYING THE 9/11 CONSPIRATORS IN NYC TO GET MATERIAL SUPPORT CHARGES?

There are a lot of reasons it makes sense to try the 9/11 plotters in NYC. But as I was reviewing this article on the five who will be charged in NY, I wondered whether one central reason the Obama Administration is doing so is for greater justification for material support for terrorism charges.

In addition to the two big names being charged in NY—KSM and Ramzi bin al-Shibh—the three others are:

- Walid bin Attash: Allegedly participated in early casing of targets, also admitted to involvement in Cole bombing
- Ali Abdul Aziz Ali: Allegedly transferred \$100,000 to the hijackers and facilitated their travel to the US
- Mustafa Ahmad al-Hawsawi: Allegedly served as money-man for the attack and received unused money from hijackers in days before the attack

It's the latter two that have me wondering. Both claim to have had no advance knowledge of the attack. Both claim to have some separation from al Qaeda itself (a claim that KSM has supported in the case of Ali, who is KSM's nephew).

In other words, these guys are alleged to be financiers with (they claim) little operational

knowledge of the attack itself. While I presume the government may have evidence refuting that claim, the ultimate backstop here would seem to be a material support charge which—the Holy Land Foundation trial makes clear—has been used to give wide leeway to prosecutors to charge those for whom intent to commit terrorism may not be easy to prove.

Now consider something Assistant Attorney General David Kris said when testifying before Congress regarding Military Commissions—in advance of changes the Obama Administration made to Military Commissions which in turn led to Friday's announcement.

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.**
[my emphasis]

I think the Military Commissions, as currently incarnated, may not take as stark a view as Kris. But his statement makes it clear that those involved in discussions of where these men would be tried believed that material support charges were not a violation of the law of war, and therefore should not be charged in Military Commissions.

So if you want to charge Ali and Hawsawi and be sure the charges will stick, does that mean you've got to charge them in civilian court?

Update: From DOJ spokesperson Dean Boyd:

The reforms that Congress made to the Military Commissions Act which were ultimately enacted into law recently, kept the charge of material support as a charge in the military commissions system. So material support charges remain a possibility in both federal trials and military commissions.

Update: Here's the referral process the DOJ published in July. It lists the following as factors for where you prosecute:

Factors for Determination of Prosecution. There is a presumption that, where feasible, referred cases will be prosecuted in an Article III court, in keeping with traditional principles of federal prosecution. Nonetheless, where other compelling factors make it more appropriate to prosecute a case in a reformed military commission, it may be prosecuted there. The inquiry turns on the following broad sets of factors, which are based on forum-selection factors traditionally used by federal prosecutors.

A. Strength of Interest. The factors to be considered here are the nature of the offenses to be charged or any pending charges; the nature and gravity of the conduct underlying the offenses; the identity of victims of the offense; the location in which the offenses occurred; the location and context in which the individual was apprehended; and the manner in which the case was investigated and evidence gathered, including the investigating entities.

B. Efficiency. The factors to be considered here are protection of intelligence sources and methods; the venue in which the case would be tried; issues related to multiple-defendant trials; foreign policy concerns; legal or evidentiary problems that might attend prosecution in the other jurisdiction; and efficiency and resource concerns.

C. Other Prosecution Considerations. The factors to be considered here are the extent to which the forum, and the offenses that could be charged in that forum, permit a full presentation of the wrongful conduct allegedly committed by the accused, and the available sentence upon conviction of those offenses.