

HAMDAN GETS A FULL PANEL REVIEW

This is a rather interesting pre-holiday document dump:

The Pentagon's war crimes appeals court announced without explanation Friday that the full U.S. Court of Military Commission Review, not a smaller panel, would review the conviction of Osama bin Laden's driver, now free and living in Yemen.

[snip]

A three-judge panel heard both sides of the case in January, in Washington D.C. All the briefs had already been filed, and attorneys were anticipating a decision.

Now, five judges on the appeals court – Navy Capts. Daniel E. O'Toole and Eric E. Geiser, Air Force Cols. Cheryl H. Thompson and Barbara Brand and Army Col. David Conn – announced the "en banc" or full court review in a single page order issued to attorneys hours before the start of the long Labor Day weekend.

Rosenberg goes on to note that Geiser retired today—I'm asking for clarification whether that means he'll be part of this full panel or not. [Update from Rosenberg: He's retired and will not be deciding. He did decide though to vote for en banc review.]

At issue is whether the charges Salim Hamdan was ultimately convicted of—material support and conspiracy—were legitimate charges for him since they were not war crimes in 2001, when Hamdan was captured. In fact, Assistant Attorney General David Kris has said he doesn't think material support charges can be used in military commissions at all (though he was okay with

charging conspiracy 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.
[my emphasis]

Gosh, these military commissions sure aren't holding up to scrutiny, are they?