DAVID FRAKT ON MATERIAL SUPPORT CHARGES AND MILITARY COMMISSIONS

In both my post wondering whether a trial in NYC makes a material support for terrorism charge more viable for the alleged 9/11 financiers, and in my post linking to Jonathan Hafetz' post criticizing the "lawless" system of justice imposed for Gitmo detainees, pow wow has linked to Lt. Col. and Associate Professor David Frakt's testimony to the House earlier this year, arguing that almost none of the charges filed under military commissions are actually war crimes.

You'll recall that Frakt represented Mohammed Jawad; in the course of representing Jawad through his release, he made some of the most powerful statements that have been made against the military commissions system. Given the fascinating discussion in these threads, I decided to email Frakt and put some of these questions to him directly.

I asked Frakt his general thoughts about Friday's announcements.

> I reject the government's claim that the nature of the crime determines the forum (federal court or military commission). I believe it is largely political considerations that are the basis for these determinations. Basically, if there is a U.S. Attorney who wants to try the case and they think they can prove it, they get priority and it goes to federal court. Clearly, there weren't any federal prosecutors who wanted to touch the Khadr case with a ten-foot pole. Who wants to be the first person to try a 15 year old child soldier as a war criminal in history? (Answer – the

> prosecutors at OMC) It is absolutely appalling that AG Holder has approved this case to continue in the military commissions. This is truly one of the great disappointments of the Obama Administration to date. The claim that the nature of the crime determines the forum is similarly false. The Administration claims that "law of war offenses" will be tried in commissions, but there are precious few, if any, legitimate law of war violations to try. The attack on the U.S.S. Cole looks like a war crime (because it was perpetrated by suicide bombers pretending to be harmless civilian fishermen) but the law of war only applies during an armed conflict. The military commission prosecutors are relying on an incredibly dubious claim that the U.S. was engaged in an armed conflict with al Qaeda since 1996 based on declarations of jihad by Osama bin Laden, even though everyone knows that the armed conflict really didn't start until 9/11. I was on active duty with the Air Force from 1995 to 2005. There was absolutely no armed conflict taking place between the U.S. and al Qaeda prior to 9/11.

I asked Frakt specifically about Noor Uthman Mohammed—who was captured with Abu Zubaydah—because I think it presents interesting questions about the way the government is tying people to Al Qaeda.

> The Noor Uthman Mohammed charges illustrate the wholesale deficiency of most of the military commission charges. He is charged with conspiracy and material support. Basically, he is alleged to have been a member of al Qaeda and to have been involved in training. All of the overt acts which support the conspiracy and material support charges occurred prior to 9/11,

> except for this last one: “On or about March 28, 2002, Muhammed, along with several others, attempted to escape from a terrorist safe house in Faisalabad, Pakistan, after a raid by local authorities, but was captured during his attempt.” Despite the bald assertion that he was staying at a “terrorist safe house,” attempting not to be caught by “local authorities” is not a law of war offense. This is an obvious and pathetic effort to expand his “terrorist” acts to activities that occurred after 9/11.

He went on to compare Mohammed’s case to that of other detainees.

> Most of the military commission charges so far are of a similar kind. As far as I can tell, none of the detainees are actually charged with violating the law of war during the actual armed conflict that started on 9/11 (such as by using illegal weapons, targeting civilians, torturing or abusing captured personnel, etc.. The best war crimes charge that the government has is against the 9/11 defendants and that case has now been moved to federal court. Arguably, the 9/11 attacks themselves were war crimes because they targeted civilians and because they utilized unlawful weapons (hijacked civilian airliners), but this requires accepting the dubious claim that these acts of terrorism and mass murder were tantamount to armed conflict, rather than simply large-scale crimes.

I asked Frakt whether he thought the military commissions would retain the material support charge—which is legal under the recent military commissions statute but which AAG David Kris has said should not be used.

> As you have pointed out, the Justice

> Department this summer repeatedly expressed doubt about whether material support to terrorism was a legitimate law of war violation. I, and other law of war scholars have concluded that it is not and I testified as much to Congress in July, at one of several hearings where David Kris raised doubts. Salim Hamdan's lawyers challenged the use of this charge against their client in the summer of 2008, but lost. Captain Keith Allred concluded that material support to terrorism was a traditional war crime. He said it was a close question and that the name "material support to terrorism" was clearly new, but that the conduct encompassed by the statute was within the range of conduct over which military commissions had traditionally had jurisdiction. Ultimately, material support was the only charge of which Mr. Hamdan was convicted. The conviction was approved by the Convening Authority in July.
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> His lawyers will be appealing this ruling to the Court of Military Commission Review. Their brief was due October 16 and the government's reply is due in December. It will be very interesting to see if the government continues to assert that material support is a legitimate law of war charge after Kris' testimony to the contrary.
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> This issue is also squarely presented in U.S. v. al Bahlul. You will recall that I was the defense counsel in this case at trial (he was denied the right to represent himself and I was foisted upon him by the court, but I honored his wishes and put on no defense), Mr. al Bahlul was also charged and convicted of material support, among other things, and the conviction was approved by the

> Convening Authority in April (during the period when all military commission actions were ordered suspended by the President). His assigned appellate counsel were ordered to file an appeal on his behalf, even though Mr. al Bahlul refused to meet with them. In their appellate brief, they argue that the application of a material support to terrorism charge violates the *ex post facto* clause of the Constitution and general principles of illegal retroactive application of laws.
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> Any decision of the CMCR will be binding on the military commissions, unless and until overruled by the D.C. Circuit or the Supreme Court, so the outcome of these appeals will determine whether subsequent defendants can be charged with material support in the military commission. Of course, the chief military prosecutor could decline, as a matter of prosecutorial discretion, to charge such a questionable crime, but given the track record of OMC-P, it seems unlikely that he would decline to use any tool in his toolbox. Since Congress has included the offense in the list of offenses which can be charged under the MCA and the Chief Prosecutor has complete discretion, I am sure he will continue to charge it unless there is an unfavorable ruling. Of course, the Convening Authority could decline to refer such charges to trial, but as long as the Convening Authority remains Susan Crawford, you can guarantee that she will not hesitate to refer additional material support charges. Having already confirmed three convictions for material support (David Hicks was the first), she has already made her view clear that it is a legitimate charge.

I asked about how the legal case for the five

9/11 detainees will transition from Gitmo's military commissions to NY's civilian Courts.

> … any pending legal issues in the 9/11 case in the military commissions are now moot. The federal case will start completely from scratch. Of course, the lawyers are free to bring the same motions if relevant, even those they may have previously lost in front of Judge Henley. Obviously, the issue of the mental competency of some of the defendants is an important issue that will have to be resolved. There may also be motions to sever the trial (try the defendants separately), although thus far the 9-11 5 have stuck together. Another issue that will have to be relitigated is whether any or all of the defendants will be authorized by the judge to represent themselves and what role, if any, the lawyers will get to have. More than once, the 9/11 defendants expressed their desire to plead guilty and be executed. If the defendants win the right to defend themselves, there may not be any legal motions filed at all.

Update: Frakt added one more set of thoughts which are—by far—the most interesting to this discussion.

> I had another couple of thoughts about why the 9/11 case was transferred to federal court, aside from purely political considerations. The Judge in the case, Colonel Stephen Henley, had made a couple of rulings in the Jawad case (my case) which made the government very nervous. First, he ruled in response to a motion to dismiss that I filed on the basis of torture that he "beyond peradventure" had the power to dismiss all charges on the basis of pretrial abuse of the detainee. Although he declined to dismiss the charges

> against Jawad, the fact that he would even entertain such a thought was very frightening for the prosecution, since they knew that other detainees had been tortured and abused far worse that Jawad, especially the high value detainees. Judge Henley also indicated that he was declining to dismiss because there were other remedies available, such as giving extra sentencing credit against any ultimately adjudged sentence. Assuming that KSM and his brethren were to get the death penalty, the only remedy for their prior abuse would be to commute the death penalty, the government's worse nightmare. Also, in response to multiple motions to suppress statements that I filed, he had ruled not only that Jawad's initial confession was obtained by torture, but that all subsequent confessions were presumptively tainted by the earlier tortured confession. He held that the burden was on the prosecution to prove that subsequently obtained statements were no longer tainted by the earlier torture or coercion. Judge Henley applied the law correctly in each of these rulings, applying well-settled principles of due process from U.S. Supreme Court cases. These rulings provide an opportunity for the defense to put the U.S.' treatment of these detainees on trial, potentially for months, before ever getting to the merits of the case. And in order for the defense to make comprehensive motions, they would have to be made privy to the full scope of the abuses that had been meted out by the U.S. on their clients and should be given the opportunity to develop such evidence in pre=trial evidentiary hearings, as I did in Mohammed Jawad's case, including allowing the defendants to testify about the abuses they experienced. Those who

> claim that this type of sideshow can be avoided in federal court simply don't understand criminal procedure. The real question will be whether the 9/11 defendants authorize their counsel to make such motions or whether they will continue to seek martyrdom and forgo the opportunity to fully litigate the torture issues. [my emphasis]