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## Hamdan v. United States: A Death Knell for Military Commissions?

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## *Hamdan v. United States*

A Death Knell for Military Commissions?

Jennifer Daskal\*

### Abstract

*In October 2012, a panel of the D.C. Circuit dealt a blow to the United States' post-September 11, 2001 decade-long experiment with military commissions as a forum for trying Guantanamo Bay detainees. Specifically, the court concluded that prior to the 2006 statutory reforms, military commission jurisdiction was limited to violations of internationally-recognized war crimes; that providing material support to terrorism was not an internationally-recognized war crime; and that the military commission conviction of Salim Hamdan for material support charges based on pre-2006 conduct was therefore invalid. Three months later, a panel of the D.C. Circuit reached the same conclusion with respect to conspiracy and solicitation charges, and vacated the conviction and life sentence of Guantanamo Bay detainee Ali Hamza Ahmad al Bahlul. That case is now on appeal to an en banc (full court) panel of the D.C. Circuit. This article analyses the D.C. Circuit's ruling in Hamdan's case, explaining why the ultimate holding is the right one, even though some of the reasoning is flawed, and why the ruling should be upheld on appeal. It also highlights the many unresolved questions and the implications for the future of military commissions at Guantanamo Bay. As the article explains, the D.C. Circuit's rulings are a major victory for the rule of law and a major defeat for commissions.*

### 1. Introduction

Salim Hamdan is a familiar name to those steeped in the United States' post-September 11, 2001, experiment with military commissions. Among the first Guantanamo Bay detainees to be charged by the Bush administration's hastily

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concocted commissions, he filed multiple pre-trial challenges to their legality. In 2006, the United States (US) Supreme Court ruled in his favour, declaring that the commission system then in place violated US statutory and international law, and precluding his trial from going forward before it even began.<sup>1</sup> Just a few months later, Congress stepped in to fill the statutory gap — first in the Military Commissions Act of 2006 (the ‘2006 MCA’) and then again in the Military Commissions Act of 2009.<sup>2</sup> The US government charged Hamdan once again, and he was ultimately convicted of one count of providing material support for terrorism and acquitted of one count of conspiracy.<sup>3</sup>

In October 2012, a US federal appeals court vacated the conviction.<sup>4</sup> The three-judge panel from the D.C. Circuit Court of Appeals (the ‘D.C. Circuit’) concluded that, prior to passage of the 2006 MCA, military commissions had jurisdiction over violations of the international laws of war only; providing material support for terrorism was not a recognized international law of war offence; and, based on its analysis of Congress’s intent, could not be applied retroactively to conduct that took place prior to 2006.<sup>5</sup> Three months later, another three-judge panel of the D.C. Circuit reached the same conclusion with respect to the charges of conspiracy and solicitation, and vacated the life sentence of Ali Hamza Ahmad al Bahlul.<sup>6</sup> An *en banc* (full court) panel of the D.C. Circuit subsequently agreed to review the *Al Bahlul* decision, which also provides a vehicle for reconsidering the underlying ruling in Hamdan’s case.<sup>7</sup>

The D.C. Circuit’s rulings — which ought to, and likely will, be upheld by the *en banc* court — cast a pall on the work of the commissions to date. The other five convictions meted out by the commissions since their inception all involve charges of material support and conspiracy. In three out of the

1 *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

2 See Pub. L. No. 109-366, 120 Stat. 2600 (2006) (hereinafter 2006 MCA); Pub. L. No. 111-84, 123 Stat. 2190, 2574–2614 (2009) (repealing and replacing parts of the 2006 MCA) (hereinafter 2009 MCA).

3 W. Glaberson, ‘Bin Laden’s Former Driver is Convicted in Split Verdict’, *New York Times* (NYT), 6 August 2008, available online at <http://www.nytimes.com/2008/08/06/washington/07gitmo.html?ref=salimahmedhamdan> (visited 25 June 2013).

4 *Hamdan v. U.S.*, 696 F.3d 1238 (D.C. Cir. 2012).

5 *Ibid.*, at 1241–1253.

6 *Al Bahlul v. United States*, 2013 WL 297726 (D.C. Cir. 25 January 2013) (rehearing *en banc* granted, order vacated (23 April 2013)). Al Bahlul was convicted by military commission of conspiracy to commit war crimes, solicitation of others to commit war crimes, and providing material support for terrorism in violation of §§ 950v(b)(25), 950v(b)(28), and 950u of the 2006 Military Commissions Act. See *U.S. v. Al Bahlul*, 830 F. Supp. 2d 1141, 1155 (C.M.C.R. 2011). Al Bahlul represented himself at trial, and did not contest evidence that he had served as Osama bin Laden’s personal secretary for public relations, prepared ‘martyr wills’ for two of the 9/11 hijackers, and produced propaganda calling for volunteers to join the jihad against the United States, among other allegations. *ibid.*, at 1163–1164. He is currently being held at the detention centre in Guantanamo Bay.

7 Order, *Al Bahlul v. United States*, No. 11-1324 (D.C. Cir. 23 April 2013).

five, providing material support for terrorism and/or conspiracy were the *only* charges.<sup>8</sup> The rulings also fatally undermine the Obama administration's ability to try several of the 30-plus Guantanamo detainees it previously deemed eligible for prosecution — for whom civilian, federal courts are not currently a viable option due to statutory restrictions on bringing the detainees to the United States.<sup>9</sup>

At the same time, the *Hamdan* panel's ruling (*Hamdan II*) leaves critical issues about the future of military commissions unresolved. It does not preclude the ongoing prosecution of Khalid Sheikh Mohammad and his three co-defendants accused of planning the 9/11 attacks, or other high-value detainees who are charged with what most scholars agree constitute internationally recognized war crimes. But it sidesteps central questions about the application of US constitutional law protections to military trials at Guantanamo, and about the viability of material support, conspiracy, and

- 8 The other detainees convicted by military commission include: David Hicks, who pleaded guilty to one count of providing material support to terrorism in April 2007, was transferred to Australia, and released in December 2007, see R. Bonner, 'Australian Terrorism Detainee Leaves Prison', *NYT*, 29 December 2007, at A10; Ibrahim Ahmed Mahmoud al-Qosi, who pleaded guilty to one count of providing material support to terrorism and one count of conspiracy in July 2007, and was transferred to Sudan in July 2012, see C. Savage, 'Ibrahim al Qosi Is Freed from Guantanamo and Sent Back to Sudan', *NYT*, 11 July 2012, available online at <http://www.nytimes.com/2012/07/12/world/africa/convicted-al-qaeda-member-is-transferred-from-guantanamo-to-sudan.html?r=0> (visited 25 June 2013); Noor Uthman Mohammed, who pleaded guilty to one count of providing material support for terrorism and one count of conspiracy in February 2011 and remains in Guantanamo subject to a cooperation agreement, see News Release, US Department of Defense, 'DOD Announces Sentence for Detainee Noor Uthman Muhammed', No. 139-11 (18 February 2011), available online at <http://www.defense.gov/releases/release.aspx?releaseid=14278> (visited 25 June 2013); Omar Khadr, who pleaded guilty to murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, providing material support for terrorism, and spying, and was transferred to Canada in September 2012, see I. Austin, 'Sole Canadian Detained at Guantanamo Bay is Repatriated', *NYT*, 29 September 2012, available online at <http://www.nytimes.com/2012/09/30/world/americas/canadian-held-at-guantanamo-bay-is-repatriated.html?pagewanted=all> (visited 25 June 2013); and Majid Khan, who pleaded guilty to conspiracy, murder, attempted murder, providing material support for terrorism and spying in February 2012, and remains in Guantanamo pending sentencing, see S. Shane, 'Testimony on Al Qaeda is Required in Plea Deal', *NYT*, 29 February 2012, available online at <http://www.nytimes.com/2012/03/01/us/majid-khan-pleads-guilty-to-terrorism-plots-in-military-court.html> (visited 25 June 2013).
- 9 See 'Final Report', *Guantanamo Review Task Force*, 22 January 2010, available online at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf> (visited 24 June 2013), at 19–22 (detailing decision to refer 36 of the Guantanamo detainees for prosecution). At the time of the Task Force Report, detainees were slated for either federal court *or* military commission prosecution. Since that date, however, Congress has employed funding restrictions to effectively prohibit the transfer of Guantanamo detainees to the United States, including for federal court trial. See Nat'l Def. Auth. Act of 2013, Pub. L. No. 112-239, 126 Stat. 1632, § 1027 (prohibiting the use of funds to transfer Guantanamo detainees to the United States). That said, pending legislation in the US Senate would lift this restriction and allow transfers to the US for trial, if certain conditions are met. See S.1197, National Defense Authorization Act for FY 2014 (introduced 20 June 2013), § 1033, available online at [lawfareblog.com/wp-content/uploads/2013/06/2014-NDAA-GTMO-Provisions-SASC-1.pdf](http://lawfareblog.com/wp-content/uploads/2013/06/2014-NDAA-GTMO-Provisions-SASC-1.pdf) (visited 22 July 2013).

other analogous charges to conduct that takes place *after* the passage of the 2006 MCA. The answers to these still-unresolved questions matter critically to the outcome of the still-ongoing trials and to the viability — and effectiveness — of the military commissions system going forward.

This article examines both the importance and limitations of the decisions, and explains why the government is likely to — and should — lose its appeal. Section 2 provides key background on the military commissions at issue and the relevant facts and permutations of Salim Hamdan's and Ali Hamza Ahmad al Bahlul's cases. Section 3 analyses the *Hamdan II* ruling in detail. It illustrates the lengths to which the panel went to avoid key questions about the extraterritorial reach of the US Constitution to Guantanamo and why that aspect of the opinion should be overturned. Contrary to the government's assertion, however, the flawed analysis does not change the ultimate holding — that commission jurisdiction is limited to violations of recognized international law offences, at least with respect to any offences that took place prior to 2006. Section 4 addresses the policy implications for the detentions at Guantanamo Bay, the future of military commissions, and the US counterterrorism policy going forward.

Both for what the panel rightly concluded and for what it left unresolved, the opinion underscores the hubris of the entire military commission experiment, and why, despite the commendable efforts of those currently involved, it is an experiment that ought to finally come to an end.

## 2. The Background

On 13 November 2001, President George W. Bush authorized the trial by military commission of any non-citizen who 'is or was' a member of al Qaeda, or 'has engaged in, aided or abetted, or conspired to commit, acts of international terrorism' aimed at or harmful to the United States.<sup>10</sup> Four months later, the Department of Defense issued Military Commissions Order Number 1, laying out the trial procedures for military commissions.<sup>11</sup> Among other notable features, the procedures granted the presiding judge wide latitude to exclude the defendant from portions of the trial and deny him access to 'protected information' — broadly defined — that was presented to the military commission panel (the military commission equivalent of a jury).<sup>12</sup>

On 3 July 2003, the Bush administration named Hamdan as among the first Guantanamo detainees eligible for trial by these newly-created military commissions.<sup>13</sup> Hamdan promptly raised pre-trial challenges to the prosecution,

10 Military Order of 13 November 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (16 November 2001), at § 2(a).

11 Dept. of Def. Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (21 March 2002).

12 *Ibid.*, §§ 6(D)(2)(d); 6(D)(5).

13 See *Hamdan*, 548 U.S., at 569.

and his case wound its way to the US Supreme Court. In *Hamdan v. Rumsfeld* (*Hamdan I*), the US Supreme Court declared the commissions then in place unlawful — ruling that they violated both the US and international law. The Court highlighted commission rules that gave the presiding judge wide discretion to close the courtroom to the accused, prevent him from viewing ‘protected information,’ and permit the liberal introduction of hearsay — thereby denying him the opportunity to confront evidence and witnesses against him.<sup>14</sup> The Supreme Court concluded that these and other deviations between military commissions and courts-martial systems (which are used to try US servicepersons) violated the US statutory requirement of uniformity between the two systems of justice ‘insofar as practicable.’<sup>15</sup> The Supreme Court also concluded that these deviations violated the international law requirement that trials be conducted by ‘regularly constituted courts.’<sup>16</sup>

In its analysis of the statutory basis for commissions, the court further emphasized that the jurisdiction of military commissions was limited to what was authorized by the relevant statute in place, 10 U.S.C. § 821 — which confined commission jurisdiction to those offences that ‘by statute or the law of war may be tried by military commissions.’<sup>17</sup> Of particular relevance to *Hamdan II* and the pending appeal, a majority of the Justices defined the term ‘law of war’ referenced in 10 U.S.C. § 821 as referring to the international law of war.<sup>18</sup>

A plurality of the court (four Justices) went even further — concluding that the charge of ‘conspiracy’ is not a cognizable offence under the law of war.<sup>19</sup> In reaching this conclusion, the plurality emphasized that ‘[t]he crime of “conspiracy” has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague

14 *Ibid.*, at 621–625.

15 *Ibid.*, at 622 (citing 10 U.S.C. § 836(b)).

16 *Ibid.*, at 632–633 (‘At a minimum, a military commission can be “regularly constituted” by the standards of our military justice system only if some practical need explains deviations from court-martial practice. As we have explained ... no such need has been demonstrated here.’) (Citations omitted).

17 *Ibid.*, at 593 note 23 (‘Whether or not the President has independent power, absent congressional authorization, to convene military commissions, *he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.*’) (emphasis added). See also *ibid.*, at 641 (Kennedy, J., concurring) (describing the authority to convene military commissions as ‘limited’ by what was authorized in 10 U.S.C. § 821). Although the court described *Ex Parte Quirin’s* conclusion that 10 U.S.C. § 821 and its predecessor (10 U.S.C. § 815) provided ‘authorization’ for military commissions as ‘controversial’, it declined to revisit the issue. *Ibid.*, at 593.

18 548 U.S., at 641 (Kennedy, J., concurring) (defining ‘law of war’ referenced in 10 U.S.C. § 821 as the ‘body of international law governing armed conflict’); *Ibid.*, at 603 (plurality) (describing act as a cognizable ‘law of war’ offence when ‘universal agreement in this country and internationally’ recognize it as such).

19 *Ibid.*, at 595–612 (plurality opinion). But see *ibid.*, at 697–705 (Thomas, J., dissenting) (concluding that conspiracy is a law of war crime). Justice Kennedy did not address the issue and Chief Justice Roberts did not take part in the case.

Conventions — the major treaties on the law of war.<sup>20</sup> It also highlighted the importance of ‘clear and unambiguous’ precedent when, as was the case prior to 2006, neither the elements of the offence nor range of punishments are specified in statute.<sup>21</sup>

Several members of the Court suggested that Congress could remedy the commissions’ flaws with legislation — an invitation that Congress took up with haste.<sup>22</sup> In October 2006, just four months after the Court issued its *Hamdan* ruling, Congress passed the Military Commissions Act of 2006. Of particular relevance to Hamdan’s and al Bahlul’s cases, the Act listed and defined 28 offences triable by military commissions — including ‘providing material support for terrorism’<sup>23</sup> and ‘conspiracy’.<sup>24</sup> The statute further asserted that it did ‘not establish new crimes that did not exist before enactment’, and instead ‘codif[ies] offenses that have traditionally been triable by military commissions’.<sup>25</sup> According to Congress, the newly codified offences could thus be applied retroactively.<sup>26</sup> In Congress’s words: ‘Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.’<sup>27</sup>

Scholars, commission defendants, and international observers promptly challenged the accuracy of Congress’s claims as to the state of exiting law. As numerous commentators noted, several of the listed charges — including conspiracy, material support for terrorism, and murder in violation of the law of war — were *not* recognized war crimes as of 2006, despite Congress’s assertion to the contrary.<sup>28</sup> In the lead-up to the 2009 reforms, Obama administration officials likewise warned Congress of a ‘significant’ litigation risk that appellate

20 *Ibid.*, at 603–604 (plurality opinion).

21 *Ibid.*, at 603.

22 *Ibid.*, at 636 (Breyer, J., concurring) (‘Nothing prevents the President from returning to Congress to seek the authority he believes necessary.’); *ibid.*, at 637 (Kennedy, J., concurring) (‘If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.’).

23 2006 MCA, *supra* note 2, § 950v(b)(25).

24 *Ibid.*, § 950v(b)(28).

25 *Ibid.*, § 950p(a).

26 *Ibid.*, § 950p(b).

27 *Ibid.*

28 See e.g. J. Elsea, ‘The Military Commissions Act of 2006: Background and Proposed Amendments’, *Congressional Research Service* R40752 (11 August 2009), at 9–11 (raising questions about assertion with respect to conspiracy, murder in violation of the law of war, and material support for terrorism charges); D. Glazier, ‘A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantánamo Military Commissions’, 12 *Lewis & Clark Law Review* (2008) 131, at 177 (‘[W]hile providing material support to terrorism is clearly an offense against U.S. federal law, its trial as a war crime seems unprecedented.’); *Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Addendum, Human Rights Council 12*, UN Doc. A/HRC/6/17/Add.3, 22 November 2007 (by Martin Scheinin) (‘[T]he offences listed in Section 950v(24)-(28) of the [MCA] (terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying, and conspiracy) go beyond offences under the laws of war.’).

courts would conclude that provision of material support to terrorism was not a traditional law of war offence and therefore not triable by military commissions.<sup>29</sup>

Congress, however, was undeterred. The 2009 legislation included the same 28 offences that had been listed in the 2006 Act, plus an additional four.<sup>30</sup> In language similar to that included in the 2006 Act, the 2009 Act claimed to be 'codify[ing] offenses that have traditionally been triable by military commissions'.<sup>31</sup> Congress further asserted that it did 'not establish new crimes that did not exist before the date of enactment', and thus, the Act 'does not preclude trial for offenses that occurred before the date of enactment'.<sup>32</sup> In other words, Congress sought to legislate away any potential *ex post facto* concerns.

### A. *The Trial, Conviction, and Appeal*

With new statutory authority in hand, in 2007 the US Department of Defense re-charged Hamdan with one count of conspiracy and one count of providing material support for terrorism. The charges were based, among other things, an alleged agreement to murder US or coalition service members (the conspiracy charge) and his role as a driver and body guard for Osama bin Laden (the material support for terrorism charge). After a two-week trial, a military commission panel found him not guilty of the conspiracy charge, but guilty of five of the eight factual specifications supporting the material support for terrorism charge.<sup>33</sup>

Hamdan was sentenced to 66 months' confinement, and credited with 61 months and 7 days for the time already detained. In November 2008, the United States transferred Hamdan to Yemen. He was released in January 2009.<sup>34</sup>

Hamdan appealed the conviction, arguing that providing material support for terrorism was not a traditional law of war offence, and therefore Congress lacked the authority to make it a crime triable by military commission.<sup>35</sup>

29 Statement of D. Kris, 'Military Commissions,' *Hearing Before the Senate Armed Services Committee* (7 July 2009), available online at <http://www.justice.gov/nsd/testimony/2009/AAG-Kristestimony-7-7-09.pdf> (visited 25 June 2013), at 3–4 (warning of the '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'); Testimony of J.C. Johnson, 'Military Commissions,' *Hearing Before the Senate Armed Services Committee* (7 July 2009), available online at <http://www.armed-services.senate.gov/statemnt/2009/July/Johnson%2007-07-09.pdf> (visited 25 June 2013), at 4 (warning that 'courts may find that "material support for terrorism" ... is not a traditional violation of the law of war. ... We thus believe it would be best for material support to be removed from the list of offenses triable by military commission').

30 2009 MCA, *supra* note 2, § 950t.

31 *Ibid.*, § 950p(d).

32 *Ibid.*

33 *Hamdan*, 696 F. 3d at 1244.

34 *Ibid.*

35 See Brief on Behalf of Appellant, *Hamdan v. U.S.*, CMCR Case No. 09-002 (15 October 2009), at 3, 12–22 (hereinafter *Hamdan* CMCR Brief); see also Brief for Petitioner, *Hamdan v. U.S.*, 11-1257 (D.C. Cir. 15 Nov. 2011) at 11–48 (hereinafter *Hamdan* DC Cir. Brief).



Alternatively, he argued that even if Congress could *prospectively* define material support for terrorism as a law of war offence, its *retroactive* application to conduct that pre-dated the 2006 Military Commissions Act violated the Ex Post Facto clause.<sup>36</sup> Hamdan further argued that the application of military commissions to aliens only — and not United States citizens — violated the Equal Protection Clause.<sup>37</sup>

In a lengthy opinion, a full panel of the Court of Military Commissions Review (CMCR) — an intermediate appellate court created by the 2006 Act and comprised of military judges<sup>38</sup> — upheld the conviction.<sup>39</sup> The CMCR concluded that Congress's authority to safeguard the nation during the time of war — as reflected in its war powers granted by Article I of the US Constitution — included the discretion to broadly define offences triable by military commissions, and that, in any event, the material support charge codified a pre-existing law of war violation.<sup>40</sup> The CMCR garnered what it deemed extensive support for the proposition that providing material support for terrorism was a pre-existing offence, citing Civil War and World War II cases, UN Security Council resolutions and municipal laws on terrorism.<sup>41</sup> The CMCR also rejected the Equal Protection challenge, concluding that the relevant part of the Fifth Amendment of the US Constitution did not apply to aliens in Guantanamo, and that even if it did, there would be no Equal Protection violation.<sup>42</sup>

Hamdan appealed to the D.C. Circuit.<sup>43</sup> In a notable about-face, the government eschewed much of the CMCR's analysis, as well as its own arguments to

36 Hamdan CMCR Brief, at 4–12; Hamdan DC Cir. Brief, at 48–59.

37 *Ibid.*, at 22–30; *Ibid.*, at 59–70.

38 The CMCR is modelled after the Courts of Criminal Appeals in the military justice system, which conducts *de novo* review for factual sufficiency. See 2009 MCA, *supra* note 2, § 950f(d). Cf. *United States v. Sills*, 56 M.J. 239, 240–241 (C.A.A.F. 2002) (describing standard and scope of review carried out by the military's Courts of Criminal Appeals).

39 *U.S. v. Hamdan*, 801 F. Supp. 2d 1247 (C.M.C.R. 2011).

40 *Ibid.*, at 1262–1270, 1310–1312. The CMCR failed to define the precise source or limits to Congress's authority to define war crimes — widely citing Congress's authority to Define and Punish offences against the law of nations, to provide for the common defence, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, and to declare war and make rules concerning captures, along with the necessary and proper clause. US Const., Art. I. sec. 8, cls. 1, 10–14, 18. The CMCR also cited the President's Article II executive power and commander in chief authority, as well his duty to take care that the laws be faithfully executive and his power to appoint and commission officers of the United States. U.S. Const., Art. II, sec. 1, cl. 1, sec. 2, cl. 1, sec. 3, as grounds for deferring to the decision to employ military commissions in this case. *Hamdan*, 801 F. Supp. 2d at 1264 note 20 and 1267.

41 *Ibid.*, at 1280–1310 (noting United Nation Security Council Resolutions, other international agreements, and municipal statutes that criminalized or encouraged the criminalization of both terrorism and material support for terrorism). See Hamdan DC Cir. Brief, *supra* note 35, at 25–44 (highlighting the faults in this aspect of the CMCR's analysis).

42 *U.S. v. Hamdan*, 801 F. Supp. 2d, at 1318–1322.

43 Pursuant to the Military Commissions Act of 2009, there is a right of direct appeal from the CMCR to the D.C. Circuit. See 2009 MCA § 950i.

the CMCR. Thus, whereas the government had previously argued that material support for terrorism was an internationally recognized law of war offence — a position that the CMCR adopted — it abandoned this claim on appeal.<sup>44</sup> It instead offered a new — and novel — theory that material support for terrorism was a recognized offence under the so-called ‘U.S. common law of war.’<sup>45</sup> It defined the ‘U.S. common law of war’ as reflecting the ‘longstanding historical practice of the Executive Branch,’<sup>46</sup> and focused the court’s attention on many of the same Civil War era precedents that it had formerly relied on to assert an international law of war violation.<sup>47</sup> The government thus claimed the existence of a *separate* domestic law of war independent of the international law of war — derived solely from domestic law precedent, and without regard to its acceptance (or lack thereof) by the international community.

A three-judge panel of the D.C. Circuit reversed. The panel rejected the government’s newfound reliance on a domestic common law of war, and instead concluded that the relevant statute at the time of Hamdan’s conduct — 10 U.S.C. § 821 — authorized military commission trials for violations of the *international* law of war only.<sup>48</sup> It further concluded that the Act itself — independent of the constitutional Ex Post Facto Clause — prohibited the retroactive prosecution of crimes that were not international law of war offences or (like spying) explicitly described by relevant statutes at the time they were committed.<sup>49</sup> Because — as the government now conceded — material support for terrorism was not an international law of war offence, the charge could not be applied retroactively and Hamdan’s conviction was invalid.<sup>50</sup>

### **B. Related Ruling in Al Bahlul**

In subsequent briefing, the government conceded that the D.C. Circuit ruling in Hamdan’s case (*Hamdan II*) compelled the same result with respect to conspiracy and solicitation offences based on pre-2006 conduct.<sup>51</sup> Thus, a panel of the D.C. Circuit vacated the conviction and life sentence of Ali Hamza

44 Govt Br., *Hamdan v. U.S.*, 11-1257 (D.C. Cir. 3 May 2012), at 55–56 (conceding that ‘providing material support for terrorism has not attained recognition at this time as a violation of customary international law’); cf. Br. on Behalf of Appellee, *Hamdan v. U.S.*, 09-002 (C.M.C.R. 4 December 2009), at 15 (describing providing material support of terrorism as having long ‘violated both US and international law’) (emphasis added).

45 Govt Br., *Hamdan v. U.S.*, *supra* note 44, at 21, 24.

46 *Ibid.*, at 27.

47 *Ibid.*, at 30–38.

48 *Hamdan*, 696 F. 3d, at 1248–1252.

49 *Ibid.*, at 1247–1248.

50 The court also raised — and ultimately rejected — a mootness argument based on the fact that Hamdan had already been released from custody and was living as a free man in Yemen. *Ibid.*, at 1244–1246; cf. *ibid.*, at 1253 (Ginsburg, J., concurring) (arguing that Hamdan’s appeal should be considered moot, but conceding that the panel is bound by Supreme Court precedent to the contrary).

51 Supplemental Brief by the United States, *Al Bahlul v. U.S.*, 11-1324 (D.C. Cir. 9 January 2013) (hereinafter Govt Supp. Al Bahlul Br.), at 1–3.

Suliman al Bahlul for conspiracy, solicitation, and providing material support for terrorism.<sup>52</sup>

The government's briefing also made clear that it disagreed with the underlying — and controlling — ruling in *Hamdan II*.<sup>53</sup> Thus, while it did not appeal the *Hamdan* ruling directly, it sought *en banc* (full court) review of the *Al Bahlul* decision, which provided an alternative and arguably more favourable vehicle for the government to attack the *Hamdan II* decision.<sup>54</sup> Specifically, the government challenged *Hamdan II*'s conclusion that military commissions are limited to the retroactive prosecution of recognized *international* law of war offences, and instead argued that it can prosecute offences that fall under a separate domestic common law of war.<sup>55</sup>

To the surprise of many, the D.C. Circuit granted *en banc* review, which is discretionary and, in the case of the D.C. Circuit, exceedingly rare, with oral arguments scheduled for 30 September 2013.<sup>56</sup> The central questions are whether conspiracy, solicitation and material support can be applied retroactively to conduct that took place prior to passage of the 2006 MCA. The D.C. Circuit also asked the parties to brief the following specific questions: (i) Does the US Constitution's Ex Post Facto Clause apply in cases involving the Guantanamo detainees? and (ii) Is conspiracy a recognized international law crime?<sup>57</sup> For the reasons described below, the answers to the D.C. Circuit's questions are: Yes, the Ex Post Facto Clause applies;<sup>58</sup> and no, conspiracy is not — as the government has already conceded in prior briefing<sup>59</sup> — a recognized international law of war offence.

52 *Al Bahlul v. U.S.*, 2013 WL 297726 (25 January 2013). Under US law, panels of the court of appeals are bound by prior decisions rendered by panels with that circuit. For an interesting analysis of the ways in which precedential rules operate in the US court system, see J.C. Dobbins, 'Structure and Precedent', 108 *University of Michigan Law Review* (2010) 1453.

53 Govt Supp. *Al Bahlul Br.*, *supra* note 51, at 3–22.

54 The government did *not* seek further D.C. Circuit or Supreme Court review of the *Hamdan* opinion itself, and its time for doing has now expired. The *Al Bahlul* appeal, therefore, provided an indirect means of overruling the *Hamdan* panel. This was likely a strategic move: The government seems to have concluded that it has a better argument with respect to conspiracy than material support, and may have wanted to pursue a case that presented both charges. In addition, *Hamdan* is a free man, whereas *al Bahlul* remains in US custody pursuant to a life sentence, thus obviating any potential mootness concerns.

55 Govt Supp. *Al Bahlul Br.*, *supra* note 51.

56 Order, *Al Bahlul v. United States*, 11-1324 (D.C. Cir. 23 April 2013).

57 *Ibid.*

58 In fact, the US government has now acknowledged that the Ex Post Facto Clause applies, and there is thus agreement among the parties as to this issue. See Brief for the United States, *Al Bahlul v. United States*, On Petition for Review from the United States Court of Military Commission Review, 11-1324 (D.C. Cir. 10 July 2013) at 54 ('Although neither the Supreme Court nor this Court has specifically addressed whether an alien unprivileged belligerent detained at Guantanamo may assert rights pursuant to the Ex Post Facto Clause, its application is supported by the unique combination of circumstances in this case.')

59 Brief for the United States, *Al Bahlul v. United States*, On Petition for Review From the United States Court of Military Commissions Review, 11-1324 (D.C. Cir. 16 May 2012), at 50 (conceding that 'material support for terrorism, conspiracy, and solicitation have *not* attained international recognition at this time as offenses under customary international law') (emphasis added).

I predict that the government will lose its appeal, as it should.

### 3. Analysis

*Hamdan II*'s statutory analysis, which appears to be motivated by a deep aversion to the application of constitutional law provisions (in this case, the Ex Post Facto Clause) to the detentions at Guantanamo Bay, is fatally flawed. But, contrary to the government's assertions, the flawed statutory analysis does not change the ultimate holding. Rather it converts what the *Hamdan II* panel deemed a statutory violation into a constitutional one. The government is still prohibited from retroactively prosecuting as a war crime pre-2006 conduct that did not amount to a recognized international law of war offence at the time it was committed, but as a matter of constitutional rather than statutory law. Because, as the government itself has conceded, neither providing material support for terrorism, nor conspiracy, nor solicitation were recognized international law of war offences as of 2006, the convictions of both Hamdan and al Bahlul are unlawful and should be vacated.

#### A. Contorted Constitutional Avoidance

One of the most notable features of the *Hamdan II* panel's opinion is the length to which it goes to avoid addressing the underlying question about the application of the US Constitution to Guantanamo. The *Hamdan II* panel takes Congress's clear statements that the offences listed in the 2006 MCA can be applied retroactively, and reads into it an unstated Congressional intent: Congress 'would *not* have wanted *new* crimes to be applied retroactively'.<sup>60</sup> Thus, it turns what seems an unambiguous assertion by Congress that the listed offences could be applied retroactively into a conditional one — the offences can be applied retroactively *so long as* they describe pre-existing crimes. In so doing, the panel incorporates an ex post facto principle into the terms of the MCA itself, and thereby avoids the question as to whether or how the US Constitution's Ex Post Facto Clause applies.<sup>61</sup>

While clever, this re-interpretation of the statute's plain language is insupportable.<sup>62</sup> As the US Supreme Court has stated over and over again, statutory analysis should begin with the text and end there, absent ambiguity.<sup>63</sup> Here, there was no ambiguity. Congress did not state that '*to the extent* the provisions

60 *Hamdan II*, 696 F.3d at 1248. The panel analyses the 2006 Act, as that was the statute under which Hamdan was tried.

61 See *ibid.*, at 1248 note 7 ('To be clear, we do not here decide whether or how the Ex Post Facto Clause might apply to this case. As we interpret the statute, that ultimate constitutional question need not be decided.').

62 See also Govt Br., *Al Bahlul v. U.S.*, 11-1324 (D.C. Cir. 10 July 2013), at 20–23 (correctly and persuasively arguing that *Hamdan II*'s statutory analysis is flawed).

63 See e.g. *BedRoc LLC v. U.S.*, 541 U.S. 176, 183 (2003) (stating that 'our inquiry begins with the statutory text, and ends there as well if the text is unambiguous' and listing sources).

are declarative of existing law, they do not preclude trial for crimes that occurred before the date of enactment'. Instead, it asserts without qualification that '[b]ecause the provisions ... are declarative of existing law ... they do not preclude trial for crimes that occurred before the date of enactment'. The fact that Congress was wrong — and authorized the retroactive application of new crimes— presents a classic *ex post facto* problem.<sup>64</sup>

Moreover, the legislative history suggests that Congress was well aware of the disputed nature of its assertion, but chose to include this seemingly unequivocal language nonetheless. The House of Representatives' Armed Service Committee Report, for example, explicitly notes the unresolved debate as to whether conspiracy constitutes a traditional war crime, yet concludes that it is. The Committee Report cites Justice Thomas's opinion in *Hamdan I* as providing the relevant support for this conclusion.<sup>65</sup> Notably, Justice Thomas *rejects* a requirement of plain and unambiguous precedent as a precondition for identifying a traditional war crime. Yet, the *Hamdan II* reads such a requirement of into the statute, and then claims that it is what Congress intended.<sup>66</sup>

The question that the panel worked so hard to avoid — whether or not the *Ex Post Facto* Clause applies — should not have been a difficult one for the court. Notably, the presiding military judge in Hamdan's commission case, the Court of Military Commissions Review, and the government *all* implicitly assumed that the *Ex Post Facto* clause applies.<sup>67</sup> The government has

64 For an argument that the D.C. Circuit has misapplied the doctrine of constitutional avoidance, see T. Morrison, "Thoughts on Hamdan II", Lawfare Blog 19 October 2012, available online at <http://www.lawfareblog.com/2012/10/thoughts-on-hamdan-ii/> (visited 25 June 2013) (arguing that the doctrine of constitutional avoidance applies when the meaning of a statute is ambiguous, but that in this case the statute does not appear to be ambiguous).

65 Report of the Committee on Armed Services on H.R. 6054, *Amending Title 10, United States Code to Authorize Trial by Military Commission for Violations of the Law of War and for Other Purposes*, H. Rep't 109-664 (15 September 2006), at 27 ('For the reasons stated in Justice Thomas's opinion, the Committee views conspiracy as a separate offense punishable by military commissions').

66 *Hamdan*, 548 U.S., at 690 (Thomas, J., dissenting) ('The plurality holds that where, as here, "neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent [establishing whether an offense is triable by military commission] must be plain and unambiguous". ... This is a pure contrivance, and a bad one at that.').

67 Ruling on Motion to Dismiss *Ex Post Facto*, *U.S. v. Hamdan*, D012 (Military Comm. 14 July 2008), at 2 ('This Commission concludes that Congress is not authorized to pass *ex post facto* legislation'); *Hamdan*, 801 F.Supp. 2d, at 1310–1312 (implicitly assuming the application of the *Ex Post Facto* clause and finding no *Ex Post Facto* violation); Govt Br., *Hamdan v. U.S.*, *supra* note 44, at 68 (describing the CMCR as having 'assumed' that the *Ex Post Facto* Clause applies and suggesting that the D.C. Circuit should make the same assumption).

since explicitly acknowledged that it does apply.<sup>68</sup> This is in stark contrast to arguments with respect to the Equal Protection Clause.<sup>69</sup>

As the government now recognizes, the US Supreme Court's ruling in *Boumediene v. Bush* effectively compels this result. In *Boumediene*, the Supreme Court ruled that the Suspension Clause — which prohibits Congress from suspending the writ of habeas corpus except in limited circumstances — applies to the United States' detentions in Guantanamo.<sup>70</sup> While the *Boumediene* ruling was limited to the application of the Suspension Clause only, and did not address the applicability of other Constitutional provisions, the similarities in both form and function between the Suspension Clause and Ex Post Facto make it exceedingly unlikely that the Suspension Clause would apply, and the Ex Post Facto would not.

As a matter of form (i.e. placement), both the Suspension Clause and Ex Post Facto Clause are found in Article I, section 9 of the US Constitution.<sup>71</sup> As a matter of function, both the Suspension Clause and the Ex Post Facto Clause, operate as structural limits on the government's power — preventing Congress from legislating in certain ways.<sup>72</sup> The Suspension Clause prohibits Congress from suspending the writ of habeas corpus, except in narrow circumstances, and the Ex Post Facto Clause prohibits Congress from retroactively criminalizing conduct.<sup>73</sup> These structural provisions are in contrast to the

68 See *supra* note 58. The government, however, suggests that it applies differently (less stringently) than in ordinary criminal cases, and does not preclude al Bahlul's prosecution; Govt Br., *Al Bahlul v. U.S.*, *supra* note 62, at 65 ('Acknowledging, as the government does, that the Ex Post Facto Clause applies here, it does not follow that the Clause applies in the same fashion as it does to ordinary criminal proceedings.').

69 See *Hamdan*, 801 F. Supp. 2d, at 1318 (agreeing with military commission judge that constitutional equal protection guarantees do not extend to aliens tried by military commissions at Guantanamo); Govt Br., *Hamdan v. U.S.*, *supra* note 44, at 76 (describing the 'hurdle' that Hamdan faces in convincing the court that the Equal Protection Clause applies).

70 553 U.S. 723 (2006).

71 See U.S. Const. Art. I, sec. 9, cl. 2 ('The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Invasion or Rebellion ...'); *ibid.*, cl. 3 ('No ... ex post facto law shall be passed.').

72 The Suspension Clause prohibits Congress from suspending the writ of habeas corpus, except in narrow circumstances, and the Ex Post Facto Clause prohibits Congress from retroactively criminalizing conduct. See *Weaver v. Graham*, 450 U.S. 24, 29 note 10 ('The *ex post facto* prohibition ... upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law.'). See *Downes v. Bidwell*, 182 U.S. 244, 277 (1901) (describing Ex Post Facto Clause as addressing the 'very root of the power of Congress to act at all').

73 The fact that the Ex Post Facto clause is also found in Art. I, Section 10 of the US Constitution makes it even more obviously a structural limit on government power than the Suspension Clause — setting limits not just on what Congress can do, but on what states can do as well. See U.S. Const. Art. I, cl. 10 ('No state shall ... pass any ... ex post facto law ...').

Due Process Clause and other constitutional law provisions (like the Equal Protection Clause) which are deemed to confer individual rights,<sup>74</sup> and which the D.C. Circuit has said (wrongly, in my opinion) do not apply to aliens held at Guantanamo, even after the Supreme Court's ruling in *Boumediene*.<sup>75</sup>

In fact, the applicability of the Ex Post Facto Clause to the Guantanamo Bay detainees ought to be even easier than the Suspension Clause analysis. In *Boumediene*, the court focused extensively on the practical considerations and obstacles in running the writ, noting the 'costs' to holding the Suspension Clause applicable, but ultimately finding them non-dispositive.<sup>76</sup> No analogous practical obstacles arise with respect to the application of the Ex Post Facto Clause, which simply prohibits Congress from legislating in particular ways without generating any corresponding procedural or attorney-access rights for detainees.

Ultimately, the panel's flawed statutory interpretation, while notable, is not fatal to the Court's holding. It illustrates the lengths to which the *Hamdan II* panel was willing to go to avoid extending any constitutional rights protections to the Guantanamo Bay detainees, yet does not change the ultimate result. Application of the Ex Post Facto Clause yields the same non-retroactivity rule, albeit as a matter of constitutional, not statutory law. Put simply, Congress may have thought it was merely 'codify[ing]' extant law of war offenses; but if it was wrong — which it was — their retroactive application violates the Ex Post Facto Clause.<sup>77</sup>

Moreover, even if the court somehow concluded that the Ex Post Facto Clause does not apply, the prohibition on retroactive application of new crimes — and the corollary of fair notice — is also required as a matter of international law. The non-retroactivity rule is enshrined in both Article 75 of Additional

74 For a powerful argument as to the distinction between individual right provisions and structural limitations on Congress's power included in the US Constitution, see *Boumediene v. Bush*, 476 F.3d 981, 995–999 (D.C. Cir. 2007) (Rogers, J., dissenting) (reversed and vacated, *Boumediene v. Bush*, 553 U.S. 723 (2008); *Boumediene v. Bush*, 282 Fed.Appx. 844 (D.C. Cir. 25 June 2008)).

75 See e.g. *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009) (holding that Guantanamo detainees cannot invoke the Due Process Clause), vacated, 130 S. Ct. 1235 (per curiam), reinstated as modified, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), cert. denied, 131 S. Ct. 1631 (2011). But see S.I. Vladeck, 'Access to Counsel, Res Judicata, and the Future of Habeas at Guantanamo', 161 *University of Pennsylvania Law Review PENNumbra* (2012) 78, at 87–88 (critiquing *Kiyemba's* holding that the Due Process Clause does not apply and arguing that 'a number of subsequent decisions in Guantanamo cases have implied that the Due Process Clause *could* apply').

76 *Boumediene v. Bush*, 553 U.S., at 769.

77 The government's argument that the Ex Post Clause's purpose of fair notice is not implicated, given al Bahlul's 'self-evidently' criminal conduct, totally fails to acknowledge the significant substantive and procedural differences between prosecution in federal court as a common criminal and prosecution in a military commission (where, among many other key differences,

Protocol I,<sup>78</sup> which the United States has concluded is customary international law at least for purposes of international armed conflict, and Article 6(3) of Additional Protocol II to the Geneva Conventions, and is a non-derogable provision of the International Covenant on Civil and Political Rights.<sup>79</sup> It almost certainly constitutes one of the ‘judicial guarantees which are recognized as indispensable by civilized people’ required by Common Article 3 of the Geneva Conventions. Notably, the 2006 MCA affirmed the relevance of Common Article 3 to the commission system it created — asserting that Common Article 3’s requirements were satisfied.<sup>80</sup> Thus, even if constitutional law provisions were somehow deemed inapplicable, international law standards incorporated into the text of the 2006 MCA (the governing statute at the time of both Hamdan’s and al Bahlul’s trials) ought to yield the same result.

### ***B. The Court’s Embrace (Hardly!) of International Law***

In deciding the relevant body of law, the *Hamdan II* panel makes two key moves: First, it reiterates the Supreme Court’s opinion in *Hamdan I* that the

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the right to a jury does not apply) for a war crime. Govt Br., *Al Bahlul v. U.S.*, *supra* note 62, at 68–70.

78 Additional Protocol I relating to the Protection of Victims of International Armed Conflicts, Arts 86–87, 8 June 1977, 1125 *U.N.T.S.* 3, (hereinafter API), Art. 75 (‘No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed.’). See also *Hamdan*, 548 U.S. at 633 (plurality) (describing Article 75 as incorporating ‘the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I)’. The Obama administration has since declared Art. 75 of API to be customary international law, at least for purposes of international armed conflicts, and statements by Chief Military Commission Prosecutor, Brig. Gen. Mark Martins suggest that the government deems the provisions applicable to military commissions. See White House, ‘Fact Sheet: New Actions on Guantanamo and Detainee Policy’, 7 March 2011, at 3, available online at <http://www.lawfareblog.com/wp-content/uploads/2011/03/Fact-Sheet-Guantanamo-and-Detainee-Policy.pdf> (visited 23 June 2013) (‘The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict.’); Mark Martins, ‘Chatman House Speech’, available online at: <http://www.lawfareblog.com/2012/09/brig-gen-mark-martins-address-at-chatham-house/> (visited 23 June 2013) (describing Art. 75 of API and APII as ‘components of the international legal framework that bear upon military commissions’).

79 International Covenant on Civil and Political Rights Art. 1, 16 December 1966, 999 *U.N.T.S.* 171, Art. 15 (‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.’); Art. 4(2) (precluding derogations from Article 15).

80 See 2006 MCA § 948b(f) (A military commission established under this chapter is a regularly constituted court, affording all the necessary “judicial guarantees which are recognized as indispensable by civilized peoples” for purposes of common Article 3 of the Geneva Conventions.’). This provision is not included in the 2009 MCA.



relevant statute in place prior to the 2006 MCA — 10 U.S.C. § 821 (Article 21) — limits the jurisdiction of pre-2006 military commissions to ‘offenses that by statute or by the *law of war* may be tried by military commissions.’<sup>81</sup> Second, the court concludes that the ‘law of war’ referenced in Article 21 refers to the ‘international law of war.’<sup>82</sup>

As an initial matter it is worth noting that the *Hamdan II* panel’s interpretation of military commission jurisdiction as being restricted to international law of war violations should not be confused with a newfound embrace of international law. Rather, the panel makes clear that it deems itself bound by Supreme Court precedent in its interpretation of Article 21, and is rife with scepticism about the ‘imprecise’ and ‘vague’ contours of international law.<sup>83</sup> It demands ‘significant caution’ before permitting civil or criminal liability based on an alleged violation of international law.<sup>84</sup> Thus, while the panel describes Article 21 as one of those discrete instances in which Congress has explicitly incorporated international law into the text of a statute, it makes clear it does not endorse this form of legislating.<sup>85</sup> In fact, Judge Kavanaugh, albeit writing for himself alone, explicitly reminds Congress that it could be a ‘leader’ and not just a ‘follower’ in the international community in defining prospective military commission jurisdiction.<sup>86</sup>

The government, however, challenges even this reluctant reliance on international law. According to the government, Article 21 was a ‘savings statute’ designed to *preserve*, not restrict, the full range of previously exercised military commission jurisdiction.<sup>87</sup> In the government’s view, previously exercised jurisdiction encompasses conspiracy, solicitation and providing material support for terrorism — offences that fall under the so-called ‘U.S. law of war.’<sup>88</sup>

The government’s argument is unconvincing for three main reasons: First, it is unsupported by the relevant precedent, which overwhelmingly describe

81 *Hamdan*, 696 F. 3d, at 1248 (‘Before enactment of the Military Commissions Act in 2006, U.S. military commissions could prosecute war crimes under 10 U.S.C. § 821 for violations of the “law of war.”’); 10 U.S.C. § 821 (asserting that the extension of court-martial jurisdiction in the UCMJ does ‘not deprive military commissions. ... or concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commission.’). See discussion of *Hamdan I*’s interpretation of 10 U.S.C. § 821, *supra* at 879 *et seq.*

82 *Hamdan*, 696 F. 3d at 1245.

83 *Ibid.*, at 1250 note 10; see also *ibid.*, at 1248 (‘The Supreme Court’s precedents tell us: The “law of war” referenced in 10 U.S.C. § 821 is the international law of war.’).

84 *Ibid.*, at 1250 note 10.

85 *Ibid.*; *cf. Al-Bihani v. Obama*, 619 F.3d 1, 13–15 & 25 (2010) (Kavanaugh, J., concurring in denial of rehearing *en banc*) (rejecting claim that the 18 September 2001 Authorization to Use Military Force (AUMF) incorporates any international-law limits and contrasting the AUMF with statutes that explicitly reference and incorporate international law).

86 *Hamdan*, 696 F.3d at 1246 n. 6 (Kavanaugh, J., writing for himself alone).

87 Petition of the United States for Rehearing *En Banc*, *Al Bahlul v. U.S.*, 11-1324 (D.C. Cir. 5 March 2013) (hereinafter *Govt En Banc Pet.*), at 9–10.

88 The government also notes that Congress amended Art. 21 in the 2006 MCA to make it inapplicable to military commissions. See *Govt Br., Al Bahlul v. U.S.*, *supra* note 62, at 16. But this does not change the fact that its jurisdictional and substantive limits clearly applied at the time that both al Bahlul and Hamdan committed their offences.

Article 21 as referring to the ‘international law of war’. Second, and perhaps most importantly, it runs afoul of the fundamental, rule-of-law principle of fair notice. Third, it potentially replaces one constitutional law problem with another one — the jury trial requirement. The following describes each in turn.

### 1. *Why the ‘Law of War’ Means the International Law of War*

The government concedes — as it must — that ‘courts and other authorities have often stated that the “law of war” included in Article 21, generally refers to the international law of war.’<sup>89</sup> After all, in *Hamdan I*, five sitting justices of the US Supreme Court interpreted Article 21 as referring to international law — what Justice Kennedy called ‘the body of international law governing armed conflict.’<sup>90</sup> In *Ex Parte Quirin*, a unanimous Supreme Court described the ‘law of war’ referenced in Article 21 as a ‘branch of international law.’<sup>91</sup> And, as pointed out by the *Hamdan II* panel, the Lieber Code, and even the Office of Legal Counsel Opinion issued in support of the President Bush-era military commissions describe Article 21’s phrase ‘law of war’ as referring to international law.<sup>92</sup>

Not persuasive, explains the government: The Court and commentators were merely describing one set of offences that could be tried by military commissions — not the full range of permissible jurisdiction.<sup>93</sup> But outside a single, and unclear, reference by Justice Stevens as to Article 21 requiring compliance with the ‘American law of war,’<sup>94</sup> the government does not produce any judicial sources that describe Article 21 as referring to anything akin to a ‘U.S. common law of war’, as distinct from the international law of war. (Nor does it anywhere explain the quantum and quality of precedent necessary to establish a ‘domestic’ law of offence.) The government’s interpretation thus runs headlong

<sup>89</sup> *Ibid.*, at 11.

<sup>90</sup> *Hamdan*, 548 U.S., at 641 (Kennedy, J., concurring). See also *ibid.*, at 603 (plurality) (concluding that an act is a law of war offence when ‘universal agreement and practice both in this country and internationally’ recognize it as such) (internal quotation marks omitted); *ibid.*, at 610 (analysing international sources to determine whether conspiracy was ‘recognized violation of the law of war’).

<sup>91</sup> 317 U.S., at 29; see *ibid.*, at 27–28 (The ‘law of war’ is ‘that part of the *law of nations* which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.) (emphasis added).

<sup>92</sup> 696 F.3d, at 1248–1249 (providing additional citations in support of its conclusion that the law of war referenced in 10 U.S.C., § 821 is the ‘international’ law of war: [S]ee also ‘Instructions for the Government of Armies of the United States in the Field (Lieber Code)’, General Orders No. 100, Arts 27 and 40 (24 April 1863) (describing the law of war as a ‘branch’ of the ‘law of nations’); O.L.C. Memorandum from P.F. Philbin to A.R. Gonzales 5 (6 November 2001) ... (‘the term “law of war” used in 10 U.S.C., § 821 refers to the same body of international law now usually referred to as the “laws of armed conflict”’).

<sup>93</sup> Govt En Banc Pet., at 16 (‘[T]he relevant judicial precedents do not hold that international law is the *exclusive source* of the offenses that may be tried by U.S. military commissions.’) (emphasis in original).

<sup>94</sup> *Hamdan*, 548 U.S., at 613.

into what appears to be perhaps the key motivating concerns of the *Hamdan II* panel — the need for ‘fair notice.’<sup>95</sup>

## 2. Fair Notice and International Law

The *Hamdan II* panel rightly emphasizes the importance of fair notice as ‘a foundation of the rule of law in the U.S.’ It thus expresses deep scepticism about imposing criminal law liability based on ‘vague’ and ‘imprecise’ standards — demanding ‘firm grounding’ as a pre-condition for imposing criminal liability based on a purported international law violation.<sup>96</sup> The D.C. Circuit panel’s analysis echoes a plurality of Supreme Court justices that, in *Hamdan I*, similarly emphasized importance of ‘plain and unambiguous precedent’ in cases where the relevant, prosecutable offences are not defined by statute or treaty — as was the case with respect to most offences subject to military commission jurisdiction prior to 2006.<sup>97</sup>

At the broadest level, the very *concept* of a distinct US common law of war fails to satisfy this requirement of firm grounding and fair notice. In fact, even the US government, prior to its about-face in its initial appeal to the D.C. Circuit, did not rely on the so-called domestic law of war in prior arguments to the CMCR. Not only is there no clarity as to what constitutes this distinct body of law, but, as Jens Ohlin has noted, the notion of a ‘U.S. common law of war’ that is distinct from an ‘international law of war’ contravenes the very essence and purpose of the law of war as a reciprocally-binding body of law.<sup>98</sup> As al Bahlul put it to the D.C. Circuit: ‘[i]f there is a “U.S. law of war” then there is a “Syrian law of war,” a “Russian law of war” and an “Iranian law of war”’ — a state of affairs that would undercut the very purpose of the law of war in setting ‘minimum standards of conduct applicable in armed conflict’.<sup>99</sup>

Moreover, even if one accepts the concept of a ‘U.S. law of war’, the government only produces a small number of cases in support of its specific claims with respect to providing material support for terrorism, conspiracy and solicitation — many of which do not directly support its claims. As the *Hamdan II* panel observed, the handful of obscure Civil War era cases cited in support of material support charges being as covered by the ‘U.S. law of war’ do not actually involve a charge of providing material support for terrorism, but instead

<sup>95</sup> *Hamdan*, 696 F. 3d at 1250 note 10.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Hamdan*, 548 U.S., at 602 (plurality).

<sup>98</sup> See J. Ohlin, ‘The American Obsession with the Concept of Support,’ Liebercode Blog, 26 October 2012, available online at: <http://www.liebercode.org/2012/10/the-american-obsession-with-concept-of.html> (visited 24 June 2013) (‘[T]he idea that each country has its own municipal law of war runs counter to the very reciprocal nature of the law of war as an international body of law that binds all parties to an armed conflict. If each side has its own international law of war, that reciprocity vanishes.’).

<sup>99</sup> Al Bahlul’s Reply Sup. Brief, *Al Bahlul v. U.S.*, 11-1324 (D.C. Cir. 9 January 2013), at 10.

involve charges akin to aiding and abetting.<sup>100</sup> The offences of conspiracy and solicitation fare no better. While the government calls the ‘traditional practice ... particularly clear with respect to conspiracy’, and cites World War II cases alongside the Civil War cases in support of this proposition,<sup>101</sup> this purported clarity has already been disagreed with by a plurality of the Supreme Court. As the *Hamdan I* plurality concluded, the precedent cited by the government includes cases in which either the conspiracy charge was also accompanied by a completed offence or the overt acts were substantial enough to independently constitute an attempt offence.<sup>102</sup> It does *not* include cases in which inchoate conspiracy is charged a stand-alone offence, as was done in al Bahlul’s case. This hardly satisfies the requirement of fair notice that the *Hamdan II* panel rightly demanded.<sup>103</sup>

The government responds to this critique by both repeating claims that have been largely rejected by a plurality of the Supreme Court<sup>104</sup> and effectively shifting the burden to al Bahlul. In its briefing in support of rehearing en banc, the government emphasized the *absence* of any authority supporting a requirement that conspiracy be accompanied by a completed offence or attempt.<sup>105</sup> But the *absence* of a counterfactual does not establish firm grounding; rather, it turns the entire concept of fair notice on its head. The burden is not on al Bahlul to show that such prosecutions were categorically

100 See *Hamdan*, 696 F. 3d at 1252 (describing government-cited precedent as providing ‘at best murky guidance’).

101 See Govt Supp. Al Bahlul Br., *supra* note 51, at 20. See also Govt Br., *Al Bahlul v. U.S.*, *supra* note 62, at 35–40.

102 See *Hamdan*, 548, at 603–610 (plurality).

103 While I do not purport to specify exactly what would be sufficient to satisfy the requirement of fair notice, this clearly is not it. In apparent recognition of this fact, amici in support of the government argue that, even though inchoate conspiracy is not an established international law of war offence, the facts of the case support a conviction under a theory of joint criminal enterprise liability, which is a well-established theory of liability — and that the conviction should be upheld on those grounds. See Brief of Amici, Former Government Officials, Former Military Lawyers, and Scholars of National Security Law in Support of Respondent, *Al Bahlul v. U.S.*, On Petition for Review from the United States Court of Military Commission Review, 11-1324 (D.C. Cir. 25 July 2013). These amici thus ask the court to affirm al Bahlul’s conviction based on a charge — and theory of liability — that was never submitted to or ruled on by the military commission jury. As Professors Steve Vladeck and Kevin Jon Heller note, such an approach is in gross violation of basic norms of fundamental fairness, not to mention the 5th and 6th amendments to the U.S. Constitution. See e.g. S. Vladeck, ‘The Two Fundamental Flaws in the New al Bahlul Amicus Brief’, Lawfare Blog, 26 July 2013, available at <http://www.lawfareblog.com/2013/07/the-two-fundamental-flaws-in-the-new-bahlul-amicus-brief/> (visited 26 July 2013); K.J. Heller, ‘Wherein I Break Godwin’s Law in Relation to the New Al Bahlul Amicus Brief’, *Opinio Juris*, 25 July 2013, available at <http://opiniojuris.org/2013/07/25/wherein-i-break-godwins-law-in-relation-to-the-new-al-bahlul-amicus-brief/> (visited 26 July 2013); K.J. Heller, ‘An Additional Problem with the Al-Bahlul Amicus Brief (Updated)’, *Opinio Juris*, 26 July 2013, available at <http://opiniojuris.org/2013/07/26/an-additional-problem-with-the-al-bahlul-amicus-brief/> (visited 26 July 2013).

104 See Govt Br., *Al Bahlul v. U.S.*, *supra* note 62, at 35–45.

105 *Ibid.*, at 19 (noting that ‘neither Bahlul nor the *Hamdan I* plurality pointed to any authority establishing such a requirement [that conspiracy be accompanied by the allegation of a completed offence]’).

prohibited, but on the government to show sufficiently clear precedent to provide fair notice. The government's reliance on a handful of cases and commentators simply failed to do so here.

### 3. Jury Trial Requirement

Even were the reliance on US common law somehow convincing to the *en banc* court, the government's approach bumps up against yet another constitutional law concern. As Professor Stephen Vladeck has persuasively argued, the jury trial provisions of the US Constitution pose an independent limit to the scope of military commissions.<sup>106</sup> This is because the US Constitution's jury trial requirements allow for only a small number of implicit and explicit exceptions. While in *Ex Parte Quirin*, a unanimous Supreme Court concluded that 'offenses committed by enemy belligerents against *the law of war*' were among the implicit exceptions,<sup>107</sup> the Court interpreted the 'law of war' as tethered to the *international* law of war. Elsewhere, the Supreme Court has emphasized that such exceptions ought to be narrowly construed.<sup>108</sup>

Whether an implicit exception to the jury trial requirements also extends to prosecutions for violations of the 'U.S. common law of war' is an open question. Professor Vladeck has persuasively argued it should not.<sup>109</sup> At a minimum, it is an issue that needs to be squarely addressed if the government's theory of commission jurisdiction based on a US common law of war were to be accepted.<sup>110</sup>

106 See e.g. S.I. Vladeck, 'The Laws of War as a Constitutional Limit on Military Commission Jurisdiction', 4 *Journal of National Security Law and Policy* (2010) 295, 338 (describing 'the jury trial protections in Article III and the Fifth and Sixth Amendments [as] vital constraints on military jurisdiction'). See also *idem*, 'Government Brief in Hamdan: The Looming Article III Problem', Lawfare Blog, 17 January 2012, available online at <http://www.lawfareblog.com/2012/01/government-brief-in-hamdan-the-looming-article-iii-problem/> (visited 24 June 2013).

107 *Ex Parte Quirin*, 317 U.S. 1, 41 (1942) (per curiam) (emphasis added).

108 See e.g. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 note 22 (1955) ('Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care').

109 Vladeck, *supra* note 106, at 340 (concluding that 'there is every reason to construe [the jury trial] exception narrowly, and to require more than just scattershot support in historical practice before allowing Congress to subject to trial by military commission offenses that have not yet crystallized as violations of the laws of war').

110 There is, of course, a threshold question as to whether Guantanamo detainees, as non-citizens outside the United States, are protected by the jury trial provisions. See e.g. *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012) (concluding that alien civilian contractor that lacked substantial connections to the United States was not entitled to the Fifth and Sixth Amendment jury protections and upholding constitutionality of his court-martial). The government has not yet taken a stance on this issue with respect to the Guantanamo detainees.

## 4. Implications and the Future

In attempt to avoid *en banc* review, al Bahlul's attorneys underplay the significance of the Hamdan ruling — describing it as affecting only a 'trifling handling of legacy cases to arise out of Guantanamo Bay' and being of minimal importance. But this argument, while strategic,<sup>111</sup> misses both the symbolic and practical importance of these cases, both to the legitimacy of the United States' actions and to the stated goal of closing down Guantanamo Bay.

The significance operates on a number of different levels. *First*, the ruling significantly undermines the 10-year military commission project to date. Of the seven detainees prosecuted, all have been convicted of material support for terrorism or conspiracy charges; for five of the seven (including al Bahlul and Hamdan), they are the only charges.<sup>112</sup> One of these detainees — Noor Mohammed — entered a cooperation agreement as part of his plea deal. That cooperation agreement is presumably in jeopardy if the conviction is invalid.<sup>113</sup>

*Second*, it complicates the efforts to close the detention centre at Guantanamo Bay — an effort that has long slowed to a relative standstill, but that has been reinvigorated over the past few months.<sup>114</sup> Two days after coming to office, President Obama launched a Guantanamo Review Task Force to assess the status of the detainees and make recommendations for prosecution, transfer or continued law-of-war detention.<sup>115</sup> Some 36 of the now-166 detainees left at Guantanamo were deemed eligible for prosecution.<sup>116</sup>

111 Under US federal court rules, *en banc* review is generally only warranted if necessary to ensure uniformity (not an issue here) or involves a question of 'exceptional importance'. Fed. R. App. Pro. 35(a).

112 See *supra* note 6.

113 See News Release, US Dep't of Def., 'DOD Announces Sentence for Detainee Noor Uthman Muhammed', *supra* note 7.

114 See President Barack Obama, US Dep't of Def., 'Manual for Military Commissions' (2010), available online at <http://www.defense.gov/news/d2010manual.pdf> (visited 24 June 2013), at II-240 ('[E]ven in the face of an acquittal, continued detention may be authorized by statute, such as the 2001 Authorization for Use of Military Force, as informed by the laws of war.'). 'Remarks by the President at the National Defense University' (Washington D.C., 23 May 2013), available online at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (visited 24 June 2013) (announcing renewed efforts to close the detention centre at Guantanamo Bay).

115 Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4898 (22 January 2009).

116 Although the Task Force did not distinguish between civilian, federal court prosecution and military commission prosecution, Congress has repeatedly prohibited the expenditure of money to transfer any Guantanamo detainee to the United States — including for prosecution. See *supra* note 8. Thus, at least for now, military commissions are the only viable prosecution option, absent a decision to bring federal court trials to Guantanamo (which would raise its own host of legal and logistical issues).

But, at least in part a result of the D.C. Circuit Court's ruling, the military commission Chief Prosecutor, Brigadier General Mark Martins, now puts that number at 20 at most.<sup>117</sup>

The rulings thus deprive some subset of detainees what is may be their best ticket out. Of the four detainees transferred out of Guantanamo over the past two years, two were convicted by military commission. (The other two were the only remaining detainees cleared for outright release, as opposed to transfer; they had been cleared for release by the Bush administration.) Meanwhile, the rulings arguably complicate closure efforts — making it politically more difficult to make transfer decisions without being able to point to a conviction and sentence as setting a reasonable end date on the period of detention.

*Third*, the rulings highlight, once again, the difficulty of setting up a new system of justice from scratch. To be sure, the trials of Khalid Sheikh Mohammed and co-defendants accused of plotting the September 11 attacks, and Abd al-Rahm al-Nashiri, accused of participating in the 1998 USS Cole bombing, can continue relatively unaffected.<sup>118</sup> The ruling also did not deter the Department of Defense from initiating charges against the alleged al Qaeda operative Abd al Hadi Iraqi for, among other things, perfidy and an alleged attack on a military helicopter.<sup>119</sup> The Chief Prosecutor, Brig. Gen. Mark Martins, is committed to making these trials as fair and transparent as possible. But no matter how successful he ends up being (and I have a lot of faith in him), the cases will be undoubtedly subject to host of legal challenges — with key issues still unresolved, including the scope of constitutional law protections, the start of hostilities as it relates to the jurisdiction of commissions (at issue in Nashiri's case), and day-to-day issues related to the management of the courtroom and attorney–client communications.<sup>120</sup>

117 See J. Sutton, 'United States scales back plans for Guantanamo prosecutions', *Reuters*, 11 June 2013, available online at <http://uk.reuters.com/article/2013/06/11/uk-usa-guantanamo-idUKBRE95A0P320130611> (visited 23 June 2013) (citing comments by Brig. Gen. Mark Martins).

118 The government did, however, dismiss the conspiracy charges against Khalid Sheikh Mohammed and his co-conspirators, and Nashiri has moved to dismiss both the conspiracy and terrorism charges on the grounds that they were not internationally recognized war crimes at the time of his alleged conduct. See Defense Renewed Motion to Dismiss the Charge of Conspiracy, *U.S. v. Nashiri*, AE048 (Mil. Comm. Guantanamo Bay, 11 January 2013); Defense Renewed Motion to Dismiss the Charge of Terrorism, *U.S. v. Nashiri*, AE049 (Mil. Comm. Guantanamo Bay, 11 January 2013).

119 See Dep't of Def. Press Release, 'DOD Announces Charges Against Abd al Hadi al-Iraqi', No. 426-13, 10 June 2013; 'Sworn Charges, Abd al Hadi al-Iraqi', 7 June 2013, available online at <http://www.lawfareblog.com/wp-content/uploads/2013/06/ChargingDocumentsAbdalHadialIraqi2013.pdf> (visited 23 June 2013).

120 See e.g. C. Savage, 'Judge Overrules Censors in 9/11 Guantanamo Hearing', *NYT*, 30 January 2013, available online <http://www.nytimes.com/2013/01/31/us/politics/transcript-of-guantanamo-hearing-points-to-outside-censors.html> (visited 24 June 2013) (detailing incident in which courtroom temporarily closed by outside censors, without approval of the commission judge); *idem*, 'Email Security Issue Delays Hearing in USS Cole Bombing', *NYT*, 11 April 2013, available online <http://www.nytimes.com/2013/04/12/us/e-mail-security-issue-delays-hearing-in-uss-cole-bombing.html> (visited 25 June 2013) (describing computer

Meanwhile, the *prospective* viability of commissions as a vehicle for prosecuting material support, conspiracy and other analogous charges remains an open question. Only Judge Kavanaugh, writing for himself alone, reached the issue — concluding that international law norms need not bind the commissions going forward.<sup>121</sup> In Kavanaugh's view, the international law limits on commission jurisdiction imposed by 10 U.S.C. § 821 only apply retroactively; nothing precludes Congress from lifting these restrictions prospectively.<sup>122</sup> Thus, according to Kavanaugh's analysis, the offences of providing material support for terrorism, conspiracy and solicitation could all form the basis for prospective commission liability, even if they could not be tried retroactively.

In reaching this conclusion, Judge Kavanaugh derives the authority to prescribe military commission jurisdiction from Congress's Article I war powers. He explicitly contrasts Congress's Article I war powers, which he describes as 'not defined or constrained by international law' with Congress's power to 'define and Punish...Offenses against the Law of Nations', which on its face is delimited at least to some extent by international law.<sup>123</sup> But this analysis ignores the potential jury trial problem described above — a constraint that may ultimately prove fatal to this approach.<sup>124</sup> Even where Congress is permitted to subject international terrorism suspects to civilian, criminal charges not recognized by international law (such as material support for terrorism), the viability of prosecution by military court does not necessarily follow. Rather, the jury trial requirement poses a separate and additional constraint on the breadth of military commission jurisdiction.

Whether the rest of the court demurred from addressing the prospective scope of commission jurisdiction out of disagreement with Judge Kavanaugh or genuine respect for the doctrine of constitutional avoidance is unclear. But as a practical matter the ruling leaves the prospective viability of military commissions as a vehicle for prosecuting material support for terrorism, conspiracy and solicitation — often the most (or only) viable charges if there is neither a completed offence nor clear evidence of a defendant's involvement in a completed law of war offence — in question. Resolution of this question is essential to the future viability and relative effectiveness of the commissions.

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problems that led to potential breach of the attorney-client privilege). But see J. Goldsmith, 'The Continuing Importance of Military Commissions', *Hoover Institution*, 14 June 2013, available online at <http://www.advancingafreesociety.org/the-briefing/the-continuing-importance-of-military-commissions/> (visited online 25 June 2013) (refuting assertions of intentional breaches of the attorney-client privilege and censorship); see also 'Guantanamo Official: Meeting room Microphones Gone', *Associated Press*, 14 June 2013.

121 *Hamdan*, 696 F.3d at 1246 note 6.

122 *Ibid.*

123 *Ibid.*, cf. *United States v. Bellaizac-Hurtado*, 700 F.3d 1245 (11<sup>th</sup> Cir. 2012) (adopting the view that the Define and Punish Clause incorporates customary international law limits and concluding that Congress exceeded its powers in criminalizing the extraterritorial drug trafficking of non-citizens).

124 For an extensive analysis of this issue, see Brief of National Institute of Military Justice as Amicus Curiae in Support of Petitioner, *al-Bahlul v. United States*, No. 11-1324 (10 June 2013); see also discussion, *supra*, Part 2.B.iii.



Such continued uncertainty makes the future use of commissions in such cases risky at best.<sup>125</sup>

## 5. Conclusion

In *Hamdan II*, a panel — a conservative panel no less — of the D.C. Circuit threw a wrench in the viability of military commissions to prosecute a large portion of the 30-some cases once slated for such prosecutions. While the panel engaged in contorted statutory analysis to declare Hamdan's prosecution unlawful, its ultimate holding is sound. The *en banc* panel should, and likely will, affirm the holding, albeit on constitutional, rather than statutory, law grounds.

This is a momentous — and correct — result. It curtails the ability of commissions to prosecute any but the few Guantanamo detainees accused of traditional law of war offences. It is both a stark reminder of the difficulties — and pitfalls — of trying to set up a new system of justice from scratch, and a testament to judicial checks and balance put in place by the 2006 MCA and the United States' ultimate respect for judicial review and the rule of law. Meanwhile, the ruling leaves open key and pressing questions about the viability of commissions to prospectively prosecute offences of providing material support for terrorism, conspiracy and solicitation — and other offences not well established under the international law of war. When compared with the track record of federal courts, which have successfully prosecuted approximately 500 terrorism cases during the same 11 years that the Guantanamo commissions have struggled to prosecute seven,<sup>126</sup> it is hard to see why — other than blind ideological commitment — commissions of the type created in Guantanamo Bay ought to be the way forward.

125 As Professor Goldsmith notes, other secondary liability tools like conspiracy accompanied by a predicate crime, aiding and abetting, and, possibly, joint criminal enterprise may still be available, even if material support, conspiracy, and solicitation are not. But as Goldsmith also notes, 'all of [these other secondary liability tools] are somewhat harder to prove than material support.' Goldsmith, *supra* note 119.

126 See Dep't of Justice, National Security Division, *Introduction to National Security Division Statistics on Unsealed International Terrorism and Terrorism-Related Convictions* (updated 6 June 2012), available online at <http://www.humanrightsfirst.org/wp-content/uploads/DOJ-Terrorism-Related-Convictions.pdf> (visited 23 June 2013). At least a dozen of the federal court cases also appear to meet the criteria for military commission prosecution.