# DC APPEALS COURT THROWS OUT HAMDAN CONVICTION

Back in 2009, then Assistant Attorney General David Kris predicted that appellate courts might throw out material support military commission convictions because material support is not a law of war crime.

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

Today, the DC District Court did just that, though making a slightly narrower ruling. In a ruling overturning Salim Hamdan's conviction on material support, conservative judge Brett Kavanaugh notes that material support still is not a law of war crime, and did not become a crime covered by military commissions in the US

until the 2006 Military Commissions Act.

> First, despite Hamdan's release from custody, this case is not moot. This is a direct appeal of a conviction. The Supreme Court has long held that a defendant's direct appeal of a conviction is not mooted by the defendant's release from custody.
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> Second, consistent with Congress's stated intent and so as to avoid a serious Ex Post Facto Clause issue, we interpret the Military Commissions Act of 2006 not to authorize retroactive prosecution of crimes that were not prohibited as war crimes triable by military commission under U.S. law at the time the conduct occurred. Therefore, Hamdan's conviction may be affirmed only if the relevant statute that was on the books at the time of his conduct – 10 U.S.C. § 821 – encompassed material support for terrorism.
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> Third, when Hamdan committed the relevant conduct from 1996 to 2001, Section 821 of Title 10 provided that military commissions may try violations of the "law of war." The "law of war" cross-referenced in that statute is the international law of war. See Quirin, 317 U.S. at 27-30, 35-36. When Hamdan committed the conduct in question, the international law of war proscribed a variety of war crimes, including forms of terrorism. At that time, however, the international law of war did not proscribe material support for terrorism as a war crime. Indeed, the Executive Branch acknowledges that the international law of war did not – and still does not – identify material support for terrorism as a war crime. Therefore, the relevant statute at the time of Hamdan's conduct – 10 U.S.C. § 821 – did not proscribe material support

> for terrorism as a war crime.
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> Because we read the Military Commissions Act not to retroactively punish new crimes, and because material support for terrorism was not a pre-existing war crime under 10 U.S.C. § 821, Hamdan's conviction for material support for terrorism cannot stand. We reverse the judgment of the Court of Military Commission Review and direct that Hamdan's conviction for material support for terrorism be vacated.

Hamdan has already been released. Only one other detainee has been convicted on just material support, Ibrahim al-Qosi, who has been repatriated to Sudan and is in a reintegration program [oops—I forgot David Hicks, though he too has been released]. As Carol Rosenberg points out, three other Gitmo detainees were convicted of material support: Majid Khan, Noor Uthman Muhammed, and Ali al-Bahlul, but they were also convicted of other crimes. So assuming the Administration doesn't appeal this, it probably doesn't affect all that much.

Then again, the Administration could appeal this and have SCOTUS decide whether material support should be covered by military commissions more generally.

Update: I was wondering how this would affect al-Bahlul's appeal. Steve Vladeck says it might affect it significantly.

> And that's where the *next* military commission case, *al-Bahlul*, comes in—one of the claims al-Bahlul raises in his appeal is that *conspiracy* was not recognized as a violation of the laws of war when the MCA was enacted, and so, as in *Hamdan*, the commission could not try him for that offense, either.
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> [snip]
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> Judge Kavanaugh adopts Justice Stevens's

> reasoning for the plurality in *Hamdan I* as the law of the D.C. Circuit in *Hamdan II*. As a result, an individual can only be tried in a military commission under the MCA for conduct that, prior to 2006, was *clearly* in violation of international law. Applying that standard, the *Hamdan II* majority easily brushes aside various Civil War-era examples, suggesting that, whatever their implications, they hardly meet such a requirement for a "firmly grounded" norm proscribing MST.
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> If this is the standard that the D.C. Circuit applies in *al-Bahlul*, then the government will have an uphill battle in convincing that panel that conspiracy satisfies it, especially given the *Hamdan I* plurality's conclusion that it does not. And if conspiracy is knocked out, as well, that will probably preclude most of the non-9/11 cases going forward—or at least require the government to find more conventional charges.