

University of Miami Law School
University of Miami School of Law Institutional Repository

University of Miami National Security & Armed Conflict Law Review

10-1-2013

The Eyes of the World: Charges, Challenges, and Guantánamo Military Commissions After *Hamdan* *II*

Christina M. Frohock

University of Miami School of Law, cfrohock@law.miami.edu

Follow this and additional works at: <http://repository.law.miami.edu/umnsac>

 Part of the [Military, War, and Peace Commons](#), and the [National Security Law Commons](#)

Recommended Citation

Christina M. Frohock, *The Eyes of the World: Charges, Challenges, and Guantánamo Military Commissions After Hamdan II*, 3 U. Miami Nat'l Security & Armed Conflict L. Rev. 7 (2013)

Available at: <http://repository.law.miami.edu/umnsac/vol3/iss1/3>

This Article is brought to you for free and open access by University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami National Security & Armed Conflict Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

ARTICLE

The Eyes of the World: Charges, Challenges, and Guantánamo Military Commissions After *Hamdan II*

Christina M. Frohock*

Abstract

*Guantánamo military commissions are under a spotlight, scrutinized by the judiciary and the public. Just the word “Guantánamo” can trigger impassioned reactions from both advocates and detractors. This Article takes a measured view, examining a recent opinion from the U.S. Court of Appeals for the D.C. Circuit, *Hamdan v. United States* (“*Hamdan II*”), that speaks to the legitimacy of military commissions convened in Guantánamo to try the September 11th defendants and others. While several media commentators seized on the opinion as striking a blow to Guantánamo proceedings, in fact the opinion approves military commissions and offers a roadmap for prosecutors. After describing the history of *Hamdan II*, this Article shows how the opinion reaches terrorism cases in both military commissions and federal courts.*

Table of Contents

I. INTRODUCTION.....	8
II. THE <i>HAMDAN</i> OPINIONS	9
III. THE IMPACT OF <i>HAMDAN II</i> ON MILITARY COMMISSIONS.....	14
IV. THE REACH OF <i>HAMDAN II</i> BEYOND MILITARY COMMISSIONS.....	20
V. CONCLUSION.....	25

* Lecturer in Law, University of Miami School of Law; J.D. *magna cum laude*, New York University School of Law; M.A., University of Michigan; B.A., University of North Carolina. My thanks to Joel Feigenbaum and Tricia Robinson for their editorial support and to Allison Brede for her tireless research.

I. INTRODUCTION

The use of military commissions to try alleged terrorists in Guantánamo Bay, Cuba, has attracted worldwide scrutiny. A military commission is a court convened before a military judge rather than an Article III judge, designed to try individuals accused of offenses during war.¹ The United States relies on such trials in the armed conflict against al Qaeda and associated forces,² and the current trial in Guantánamo for the September 11th attacks has intensified the political debate and public criticism of this form of justice.³ But not every voice is undermining. The U.S. Court of Appeals for the D.C. Circuit recently spoke in *Hamdan v. United States* (“*Hamdan II*”),⁴ an opinion that both legitimates Guantánamo military commissions and offers guidance in terrorism cases more broadly.

This Article sets *Hamdan II* against the backdrop of the U.S. Supreme Court’s prior opinion in *Hamdan v. Rumsfeld* (“*Hamdan I*”),⁵ describing the progression of cases involving Guantánamo detainee Salim Ahmed Hamdan. Next, the Article argues that, contrary to its occasionally sensationalist portrayal in the media, the D.C. Circuit Court’s opinion invites further military commissions and offers a roadmap for the proceedings. Certain charges, including “providing material support for terrorism,” are available for conduct only after enactment of the Military Commissions Act (“MCA”) of 2006, as

¹ See JENNIFER ELSEA, CONG. RESEARCH SERV., R41163, THE MILITARY COMMISSIONS ACT OF 2009: OVERVIEW AND LEGAL ISSUES 4 (2010).

² Military commissions have a long history and were an early component of the United States’ response to the September 11th attacks. See Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 § 1(e) (Nov. 16, 2001) [hereinafter Military Order]; George W. Bush, Remarks by the President on National Security, Speech at National Archives (May 21, 2009) (“Military commissions have a history in the United States dating back to George Washington and the Revolutionary War. They are an appropriate venue for trying detainees for violations of the laws of war.”); GUANTÁNAMO REVIEW TASK FORCE, FINAL REPORT 19 (2010).

³ See, e.g., U.S. GOV’T ACCOUNTING OFFICE, GAO 13-31, GUANTÁNAMO BAY DETAINEES: FACILITIES AND FACTORS FOR CONSIDERATION IF DETAINEES WERE BROUGHT TO THE UNITED STATES (2012) [hereinafter GAO REPORT] at 1–4 (transfer study requested by Senator Dianne Feinstein); Andrea Prasow, *A Failed Experiment*, N.Y. TIMES, Nov. 19, 2012, <http://www.nytimes.com/roomfordebate/2012/11/18/should-obama-close-guantanamo-and-end-military-tribunals/close-guantanamo-and-stop-the-military-commissions> (“The system lacked fundamental protections required for fair trials.”); Laura Pitter, *Guantánamo’s System of Injustice*, SALON (Jan. 19, 2012), http://www.salon.com/2012/01/19/guantanamos_system_of_injustice/ (“The US does not need to use this fundamentally flawed military commission system.”).

⁴ 696 F.3d 1238 (D.C. Cir. 2012).

⁵ 548 U.S. 557 (2006).

revised in 2009.⁶ Finally, the Article argues that *Hamdan II* reaches beyond military commissions and suggests constitutional challenges in federal cases outside the MCA.

“The eyes of the world are on Guantánamo Bay,” observed one district court judge who ruled on Hamdan’s filings for several years.⁷ *Hamdan II* provides a new lens through which the world may view military commissions and terrorism cases.

II. THE *HAMDAN* OPINIONS

The attacks of September 11, 2001, “created a state of armed conflict,” in the words of then-President George W. Bush.⁸ One week after the attacks, Congress passed its Authorization for Use of Military Force (“AUMF”), a joint resolution authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks.”⁹ War had begun, and the U.S. military soon invaded Afghanistan.

In November 2001, during clashes between American forces and the Taliban, an Afghan militia captured Salim Ahmed Hamdan and transferred him to U.S. custody.¹⁰ In June 2002, the military brought him to the U.S. Naval Station in Guantánamo Bay, Cuba, where he was detained as an enemy combatant.¹¹ After Hamdan had spent more than a year in detention,

⁶ Pub. L. No. 109-366, 120 Stat. 2600, 2630 (2006) (codified at 10 U.S.C. § 948a note). Congress enacted the 2009 MCA as part of its National Defense Authorization Act for Fiscal Year 2010. See Pub. L. No. 111-84, 123 Stat. 2574 (2009) (codified at 10 U.S.C. § 948a note); accord Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009) (halting all proceedings under the 2006 MCA pending detainee review). Although the 2009 MCA replaced the 2006 MCA, many provisions remained the same. Cf. 123 Stat. at 2612 § 1804 (ratifying convictions under 2006 MCA). Given that the original Act was at issue in *Hamdan II* and the changes are not relevant to the case, this Article refers to the 2006 MCA unless otherwise noted.

⁷ *Hamdan v. Gates*, 565 F. Supp. 2d 130, 137 (D.D.C. 2008).

⁸ Military Order, *supra* note 2, § 1(a); cf. Jeh Johnson, General Counsel, U.S. Dep’t of Def., *The Conflict Against Al Qaeda and Its Affiliates: How Will It End?*, Oxford Union Address at Oxford University (Nov. 30, 2012) (proposing “a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured” as the end of armed conflict).

⁹ Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note).

¹⁰ *Hamdan I*, 548 U.S. at 566.

¹¹ *Id.*; *Hamdan II*, 696 F.3d at 1243; cf. Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal 1 (July 7, 2004), available at <http://www.defense.gov/news/Jul2004/d20040707review.pdf>. (defining “enemy combatant” as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners”).

President Bush declared that he was to be tried by military commission.¹² After another year in detention, Hamdan learned his charge: one count of conspiracy “to commit . . . offenses triable by military commission,” including attacking civilians, murder, and terrorism.¹³

Hamdan is a Yemeni national who had served as driver and bodyguard for Osama bin Laden from 1996 to 2001.¹⁴ A member of the “international terrorist organization” al Qaeda,¹⁵ he was alleged to have transported weapons and received weapons training in al Qaeda camps.¹⁶ Facing trial by military commission for conspiracy, Hamdan filed petitions for writs of habeas corpus and mandamus to challenge the legality of the proceedings.¹⁷

In 2006, the Supreme Court in *Hamdan I* ruled in his favor. The Bush Administration’s system of military commissions was sparse, to say the least, as the President had declared it “not practicable to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”¹⁸ For example, a detainee could be excluded from his own trial and convicted based on evidence he had never seen.¹⁹ The Court held that this system of military commissions lacked congressional authorization and failed to adhere to both the Uniform Code of Military Justice and the Geneva Conventions.²⁰ Exigency lent legitimacy to a military commission, “but did not further justify the wholesale jettisoning of procedural protections.”²¹ If the Executive wanted to try detainees by military commission, it would have to afford “at least the barest of those trial protections that have been recognized by customary international law.”²² In a plurality opinion, four justices also decided that conspiracy was not an offense against the law of war and, so, not triable by military commission.²³

¹² *Hamdan I*, 548 U.S. at 566.

¹³ Charge: Conspiracy, *United States v. Hamdan*, available at <http://www.defense.gov/news/Jul2004/d20040714hcc.pdf>; see *Hamdan I*, 548 U.S. at 566; *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1259 (C.M.C.R. 2011) (en banc), *rev'd*, 696 F.3d 1238 (D.C. Cir. 2012). Hamdan was formally charged on July 13, 2004, after two years and eight months in detention. See *Hamdan*, 565 F. Supp. 2d at 131.

¹⁴ See *Hamdan I*, 548 U.S. at 570; *Hamdan II*, 696 F.3d at 1242.

¹⁵ *Hamdan II*, 696 F.3d at 1240.

¹⁶ See *Hamdan I*, 548 U.S. at 570; *Hamdan II*, 696 F.3d at 1242.

¹⁷ *Hamdan I*, 548 U.S. at 567.

¹⁸ Military Order, *supra* note 2, § 1(f).

¹⁹ *Hamdan I*, 548 U.S. at 614-16.

²⁰ *Id.* at 567, 594-95, 624-25, 635.

²¹ *Id.* at 624.

²² *Id.* at 633.

²³ Compare *id.* at 603-04, 611 (Stevens, J., plurality) (“The crime of ‘conspiracy’ has rarely if ever been tried as such in this country by any law-of-war military commission not exercising

Within four months after the Supreme Court's opinion in *Hamdan I*, Congress responded by enacting the Military Commissions Act of 2006.²⁴ The MCA restyled the military commissions system by codifying procedural safeguards for defendants.²⁵ It also enumerated twenty-eight specific offenses as “triable by military commission . . . at any time without limitation.”²⁶ Among these offenses, the MCA allowed punishment by military commission for anyone who “conspires to commit” substantive offenses and for anyone who knowingly or intentionally provides “material support or resources” for terrorism.²⁷ The Act defined “material support or resources” broadly to mean “any property, tangible or intangible, or service.”²⁸

With the MCA in hand and a more robust trial structure in place, the government prosecuted Hamdan anew—and added a charge of material support for terrorism to the original charge of conspiracy.²⁹ Just as he did

some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war.”) *with id.* at 698–703 (Thomas, J., dissenting) (“[T]he experience of our wars is rife with evidence that establishes beyond any doubt that conspiracy to violate the laws of war is itself an offense cognizable before a law-of-war military commission.”) (internal quotations omitted).

²⁴ See *Hamdan II*, 696 F.3d at 1243–44. The Supreme Court decided *Hamdan I* on June 29, 2006, and Congress passed the MCA on October 17, 2006.

²⁵ See, e.g., 10 U.S.C. §§ 948k (effective assistance of counsel), 948r (no compulsory self-incrimination nor admission of statements obtained by torture), 948s (access to charges in defendant's native language and “sufficiently in advance of trial”), 949a(b)(1)(B) (right to be present at trial), 949c(b)(7) (right to cross-examine witnesses), 949l (presumption of innocence); *accord Hamdan*, 565 F. Supp. 2d at 132 (comparing structure of military commissions to courts-martial and federal trials). The 2009 MCA went further by prohibiting “the use of statements obtained by cruel, inhuman and degrading treatment—what was once the most controversial aspect of military commissions.” Jeh Johnson, National Security Law, Lawyers and Lawyering in the Obama Administration, Speech at Yale Law School (Feb. 22, 2012); see 10 U.S.C.

§ 948r (2009).

²⁶ 10 U.S.C. § 950v(b).

²⁷ *Id.* § 950v(b)(25), (28). Congress included the same proscription of material support for terrorism in the 2009 MCA, over the objection of the Obama Administration. See 10 U.S.C. § 950t(25) (2009); *Military Commissions: Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War Before the S. Comm. on Armed Services*, 111th Cong. 1 (2009) (“[T]here 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.”) (statement of Assistant Attorney General David Kris).

²⁸ 10 U.S.C. § 950v(b)(25)(B) (incorporating definition of “material support or resources” from 18 U.S.C. § 2339A(b)).

²⁹ See *Hamdan II*, 696 F.3d at 1243–44; see also Charge Sheet for Salim Ahmed Hamdan (April 5, 2007), [http://www.mc.mil/Portals/0/pdfs/Hamdan%20\(AE001\).pdf](http://www.mc.mil/Portals/0/pdfs/Hamdan%20(AE001).pdf). The later prosecution of Hamdan did not constitute double jeopardy because, under the MCA, jeopardy attaches only

when facing his first military commission, Hamdan sought to stop the proceedings as unlawful.³⁰ He filed a petition for habeas corpus and a motion for preliminary injunction in the U.S. District Court for the District of Columbia, seeking relief from the same judge who had granted his prior habeas petition.³¹ This time around, the district court refused Hamdan's requests in light of "enactment of the MCA."³² Absent federal court intervention, Hamdan was tried by military commission in Guantánamo and received a mixed verdict. He was acquitted of conspiracy but convicted of two types of providing material support for terrorism: providing "material support for carrying out an act of terrorism" and providing "material support to an international terrorist organization."³³

In August 2008, Hamdan was sentenced to a prison term of sixty-six months.³⁴ With credit for his many years detained in Guantánamo, he served only a few more months in prison.³⁵ In November 2008, the military transferred Hamdan to his native Yemen to serve the remaining weeks of his sentence, and in January 2009 Yemeni authorities released him.³⁶ Even after release, Hamdan continued to appeal his conviction.³⁷

As a first appellate step, the U.S. Court of Military Commission Review affirmed the trial court's finding and sentence.³⁸ Hamdan then appealed as of right to the U.S. Court of Appeals for the D.C. Circuit, which holds "exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission."³⁹ In October 2012, the civilian appellate court reversed and

when a "finding of guilty has become final after review of the case has been fully completed." 10 U.S.C. § 949h. Far from yielding a completed review of a guilty finding, Hamdan's prior litigation effectively shut down the military commissions system through his habeas and mandamus petitions.

³⁰ See *Hamdan*, 565 F. Supp. 2d at 131; *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 10 (D.D.C. 2006); *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557 (2006).

³¹ See *Hamdan*, 344 F. Supp. 2d at 173 (granting pre-MCA habeas petition).

³² *Hamdan*, 565 F. Supp. 2d at 136 (denying post-MCA motion for preliminary injunction); see *Hamdan*, 464 F. Supp. 2d at 19 (denying post-MCA habeas petition), *rev'd sub nom.*, *Boumediene v. Bush*, 553 U.S. 723 (2008).

³³ *Hamdan*, 801 F. Supp. 2d at 1258-59; see *Hamdan II*, 696 F.3d at 1244. Hamdan's charge of providing material support for terrorism contained eight specifications; he was convicted of five of those specifications. See 696 F.3d at 1244.

³⁴ *Hamdan II*, 696 F.3d at 1244.

³⁵ *Id.* at 1241, 1244.

³⁶ *Id.* at 1244; *Hamdan*, 801 F. Supp. 2d at 1260.

³⁷ *Hamdan II*, 696 F.3d at 1244. The court held that Hamdan's completed sentence and release did not render his appeal moot. See *id.* at 1244-45.

³⁸ *Hamdan*, 801 F. Supp. 2d at 1254.

³⁹ 10 U.S.C. § 950g(a); see 10 U.S.C. § 950g(a) (2009).

vacated the conviction.⁴⁰

The D.C. Circuit Court accepted the Executive Branch's view that the United States is at war against the terrorist organization al Qaeda.⁴¹ From that starting point, the court reviewed Hamdan's conviction with an eye toward achieving Congress' intent stated in the MCA and avoiding an Ex Post Facto Clause violation.⁴² Congress intended the MCA to "codify offenses that have traditionally been triable by military commissions" and not to "establish new crimes."⁴³ As merely "declarative of existing law," the Act allowed prosecution of crimes that occurred before enactment.⁴⁴ On the court's interpretation, however, the MCA did "codify some new war crimes, including material support for terrorism."⁴⁵ Consistent with Congress' intent and the Constitution's ex post facto prohibition, the MCA could not authorize retroactive prosecution for these new crimes.⁴⁶ Given that the Act passed in 2006, its proscription of material support for terrorism could not apply to Hamdan's alleged activities supporting bin Laden and al Qaeda between 1996 and 2001.⁴⁷ Accordingly, he could be convicted only if a prior law criminalized material support for terrorism.⁴⁸

The court examined the relevant law at the time of Hamdan's alleged misconduct and found it wanting.⁴⁹ Specifically, Section 821 of U.S. Code Title 10 provides "jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions."⁵⁰ Two longstanding statutory offenses called for military commissions: spying in time of war and aiding the enemy.⁵¹ Neither was at issue for Hamdan. So the court focused on "law of war" offenses and interpreted that language by reference to international law.⁵² Certain forms of terrorism, including targeting civilians and aiding and abetting terrorist acts, are long recognized as international-law

⁴⁰ *Hamdan II*, 696 F.3d at 1241.

⁴¹ *See id.* at 1240.

⁴² *See id.* at 1241, 1247–48; U.S. CONST. art. I, § 9, cl. 3 ("No bill of attainder or ex post facto Law shall be passed.").

⁴³ 10 U.S.C. § 950p(a). Congress restated this intent in the 2009 MCA. *See* 10 U.S.C. § 950p(d) (2009) ("This chapter does not establish new crimes . . .").

⁴⁴ 10 U.S.C. § 950p(b).

⁴⁵ *Hamdan II*, 696 F.3d at 1247.

⁴⁶ *See id.* at 1247–48 ("Congress would *not* have wanted *new* crimes to be applied retroactively.") (emphasis in original).

⁴⁷ *Id.* at 1248.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1248–51.

⁵⁰ 10 U.S.C. § 821.

⁵¹ *See id.* §§ 904, 906

⁵² 696 F.3d at 1248–51 (citing *Hamdan I*, 548 U.S. at 603, 610, 641).

war crimes.⁵³ Not so for material support for terrorism.⁵⁴ Observing that even the Executive Branch acknowledged that material support for terrorism was not a war crime under international law, the court concluded that there was no timely proscription of that offense.⁵⁵ Hamdan's conviction could not stand.⁵⁶ Essentially, the conviction collapsed under the statute's internal ex post facto tension: punishment for prior commission of a new crime, specified by an Act that did not authorize retroactive punishment for new crimes.⁵⁷

The outcome in *Hamdan II* borders on the self-referential, bringing the defendant's involvement in the post-9/11 world full circle. Hamdan was convicted of a crime specified in the MCA, a law that Congress passed in direct response to the Supreme Court's opinion in *Hamdan I*. Thus, the law that codified the new crime of material support for terrorism, which became a charge against Hamdan in his second foray into the military commissions system, came into being only because Hamdan had challenged his first foray into the military commissions system. And that law's untimely passage was the basis for the appellate court's vacatur of Hamdan's conviction.⁵⁸

In the end, after years of litigation and more than a decade after the September 11th attacks, Hamdan is home and his name is clear.

III. THE IMPACT OF *HAMDAN II* ON MILITARY COMMISSIONS

During Congressional debates on the 2009 revisions to the MCA, the Obama Administration expressed concern that reversals of convictions for material support for terrorism would "lead[] to questions about the system's legitimacy."⁵⁹ Those questions rose quickly and loudly in the media after

⁵³ *Id.* at 1250–51.

⁵⁴ *Id.* at 1250.

⁵⁵ *Id.* at 1251–52.

⁵⁶ *Id.* at 1253.

⁵⁷ Following the doctrine of constitutional avoidance, the court declined to decide the "ultimate constitutional question" of whether the Ex Post Facto Clause applied to Hamdan's conviction. *Id.* at 1248 & n. 7.

⁵⁸ The same constitutional clause that prohibits ex post facto laws also prohibits bills of attainder. See U.S. CONST. art. I § 9, cl. 3. A bill of attainder is a "special legislative act prescribing punishment, without a trial, for a specific person or group." BLACK'S LAW DICTIONARY 188 (9th ed. 2009). While the MCA did not name anyone, Congress undoubtedly had Hamdan and other Guantánamo detainees in mind when passing the MCA immediately after *Hamdan I*. See *Boumediene v. Bush*, 476 F.3d 981, 986 (D.C. Cir. 2007) ("Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule *Hamdan*."), *rev'd*, 553 U.S. 723 (2008). Nonetheless, the military judge overseeing Hamdan's trial considered and rejected his constitutional challenge based on bill of attainder. See *Hamdan*, 565 F. Supp. 2d at 133.

⁵⁹ *Military Commissions: Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War Before the S. Comm.*

Hamdan II. The opinion was portrayed as “strik[ing] a powerful blow to the legitimacy” of the terrorism trials in Guantánamo.⁶⁰ Some commentators raised the volume on their terminology: this “blockbuster opinion”⁶¹ from a conservative circuit struck “the biggest blow yet against the legitimacy of the Guantánamo military commissions”⁶² and served to rein in “executive branch officials [who] stubbornly sought to manipulate the rule of law.”⁶³

Guantánamo is a sensitive topic. *Hamdan II* bears close and measured scrutiny as a recent addition to federal courts’ detainee jurisprudence. Contrary to its media depiction, the D.C. Circuit Court’s opinion poses no existential threat to Guantánamo military commissions. Quite the opposite: the opinion is good authority to convene future military commissions. While formal convening authority rests with the Secretary of Defense, courts offer the complementary authority of judicial review.⁶⁴ *Hamdan I* recognized exigency as lending legitimacy to military commissions.⁶⁵ Six years later, *Hamdan II* recognized the trial process as lending further legitimacy. The D.C. Circuit Court accepted that the United States is at war, upheld the structure of military commissions, and guided prosecutors to charge defendants carefully for conduct before or after enactment of the MCA. Upon examination, the opinion is a typical appellate disapproval of a trial result—based not on the illegitimacy of the proceedings but on the misapplication of a new law.

Just as appellate courts do every day, the D.C. Circuit Court in *Hamdan II* reviewed a lower-court criminal proceeding and found a flaw. This was a fatal flaw, to be sure, as all governmental branches agreed that the MCA should not be construed to violate the Constitution’s Ex Post Facto Clause.⁶⁶ That clause embodies a basic and ancient notion of fairness in our jurisprudence:

on Armed Services, 111th Cong. 1 (2009) (statement of Assistant Attorney General David Kris).

⁶⁰ Andy Worthington, *Conservative Judges Demolish the False Legitimacy of Guantánamo’s Terror Trials*, EURASIA REV., Nov. 11, 2012, <http://www.eurasiareview.com/11112012-conservative-judges-demolish-the-false-legitimacy-of-guantanamos-terror-trials-oped/>.

⁶¹ Kevin Jon Heller, *D.C. Circuit: Material Support for Terrorism Not a War Crime (Prior to 2001)*, OPINION JURIS, Oct. 16, 2012, <http://opiniojuris.org/2012/10/16/d-c-circuit-material-support-for-terrorism-not-a-war-crime-prior-to-2001/>.

⁶² John H. Cushman, Jr., *Appeals Court Overturns Terrorism Conviction of Bin Laden’s Driver*, N.Y. TIMES, Oct. 16, 2012, http://www.nytimes.com/2012/10/17/us/politics/appeals-court-overturns-terrorism-conviction-of-salim-ahmed-hamdan-bin-ladens-driver.html?_r=0 (quoting ACLU attorney Zachary Katznelson).

⁶³ Andrew Cohen, *This Month in Terror Law: Salim Hamdan Wins Again!*, THE ATLANTIC, Oct. 16, 2012, <http://www.theatlantic.com/national/archive/2012/10/this-month-in-terror-law-salim-hamdan-wins-again/263692/>.

⁶⁴ See 10 U.S.C. § 948h (2009); cf. *Boumediene*, 553 U.S. at 738 (respecting the “ongoing dialogue between and among the branches of Government” with respect to the MCA).

⁶⁵ 548 U.S. at 624.

⁶⁶ See *Hamdan II*, 696 F.3d at 1247–48.

“individuals should have an opportunity to know what the law is and to conform their conduct accordingly.”⁶⁷ But the panel struck no blow to the legitimacy of the whole proceeding. Immediately upon directing that “Hamdan’s conviction for material support for terrorism be vacated,” the court wrote a significant clarification: its opinion does *not* “preclude any future military commission charges against Hamdan—either for conduct prohibited by the ‘law of war’ under 10 U.S.C. § 821 or for any conduct since 2006 that has violated the Military Commissions Act.”⁶⁸ The opinion rejected Hamdan’s conviction on a reasoned basis, but not the process that generated that conviction. The court offered a straightforward timeliness analysis and took pains to spell out that it offered nothing more. Indeed, the D.C. Circuit Court’s many rulings in *ex post facto* cases underscore the importance of a timely prohibition.⁶⁹

Thus, *Hamdan II* invites future trials by military commission and provides an appellate-sanctioned roadmap for the proceedings. Should the Executive seek to try an individual by military commission for actions that were criminalized before he undertook them, it may do so—just as it may do so in the ordinary course in Article III courts. For conduct before 2006, international-law war crimes have long included terrorism, aiding and abetting terrorism, and targeting civilians.⁷⁰ Additionally, many decades ago Congress codified spying

⁶⁷ *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (finding damages and jury trial provisions not retroactive); see *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) (“principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal”); *Dash v. Van Kleeck*, 7 Johns. 477, 503 (N.Y. 1811) (“It is a principle of the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect.”) (Kent, C.J.). As far back as *The Federalist Papers*, Alexander Hamilton condemned the “creation of crimes after the commission of the fact” as one of “the favorite and most formidable instruments of tyranny.” THE FEDERALIST NO. 84 (Alexander Hamilton).

⁶⁸ *Hamdan II*, 696 F.3d at 1241 & n.1.

⁶⁹ See, e.g., *Fletcher v. Reilly*, 433 F.3d 867, 879 (D.C. Cir. 2006) (finding *prima facie* case that defendant’s “rights under the Ex Post Facto Clause have been violated, because he is a D.C. Code offender whose parole was revoked based on an offense that was not a D.C. Code offense”); *United States v. Rezaq*, 134 F.3d 1121, 1141 n.13 (D.C. Cir. 1998) (declining to apply recently amended restitution statute because “the Ex Post Facto Clause prohibits the application of this amendment” to defendant); *United States v. Booze*, 108 F.3d 378, 381 n.3 (D.C. Cir. 1997) (considering proper sentence for drug offender and noting that “resentencing occurs under the version of the Guidelines in effect at the time of resentencing, unless such an application would violate the Ex Post Facto Clause”); *United States v. Lam Kwong-Wah*, 924 F.2d 298, 304 (D.C. Cir. 1991) (vacating sentence for conspiracy and remanding because, where later sentencing guidelines would “adversely affect” defendant’s sentence, they “may not be applied retroactively without violating the *ex post facto* clause”).

⁷⁰ See *Hamdan II*, 696 F.3d at 1250–51.

and aiding the enemy as war crimes, on penalty of death.⁷¹ For conduct after 2006, the MCA specifies a myriad of crimes including material support for terrorism.

Hamdan II clarifies the military commissions procedure, and that clarity is legitimating. Given the D.C. Circuit Court's exclusive jurisdiction to review military commission judgments,⁷² there is neither an opportunity for forum shopping nor a chance of a circuit split. On military commission matters, the D.C. Circuit answers only to itself and the Supreme Court.⁷³ But clarity should not be mistaken for simplicity. Any MCA charges of "new war crimes,"⁷⁴ including material support for terrorism, are vulnerable under *Hamdan II*'s timeliness analysis. While Guantánamo holds al Qaeda leaders directly involved in terrorist plots against the United States, many of the current 166 detainees are "low-level foreign fighters" who lacked a significant role in terrorist organizations.⁷⁵ Seven detainees have military commission charges pending.⁷⁶ The task of swearing and proving charges remains difficult, and the stakes for both prosecutors and defendants remain high.

The stakes are particularly high in the military commission trial underway in Guantánamo against "those we believe were responsible for the 9/11 attacks," most notably Khalid Shaikh Mohammad.⁷⁷ Mohammad is a "high-value" detainee who has proclaimed himself a "jackal" and the "mastermind" behind the September 11th attacks.⁷⁸ He and four co-defendants⁷⁹ are charged under

⁷¹ See 10 U.S.C. §§ 904, 906. Both offenses are also included in the MCA. See 10 U.S.C. § 950v(26), (27); 10 U.S.C. § 950t(26), (27) (2009).

⁷² See 10 U.S.C. § 950g(a).

⁷³ See *id.* § 950g(e) ("The Supreme Court may review by writ of certiorari pursuant to section 1254 of title 28 the final judgment of the United States Court of Appeals for the District of Columbia Circuit under this section."); see also *Hamdan v. Gates*, 565 F. Supp. 2d 130, 137 (D.D.C. 2008) ("If the Military Commission judge gets it wrong, his error may be corrected by the CMCR. If the CMCR gets it wrong, it may be corrected by the D.C. Circuit. And if the D.C. Circuit gets it wrong, the Supreme Court may grant a writ of certiorari.").

⁷⁴ *Hamdan II*, 696 F.3d at 1247.

⁷⁵ GUANTÁNAMO REVIEW TASK FORCE, FINAL REPORT 19 (2010).(describing categories of detainees); GAO REPORT, *supra* note 3, at 8–9 (166 detainees as of November 2012).

⁷⁶ GAO REPORT, *supra* note 3, at 8–9.

⁷⁷ Press Release, Dep't of Justice, Departments of Justice and Defense Announce Forum Decisions for Ten Guantánamo Bay Detainees (Nov. 13, 2009), available at <http://www.justice.gov/opa/pr/2009/November/09-ag-1224.html> (statement of Attorney General Eric H. Holder, Jr.). Attorney General Holder initially planned to try the 9/11 defendants in the U.S. District Court for the Southern District of New York. *Id.*

⁷⁸ See GAO REPORT, *supra* note 3, at 15, 31; *Khalid Shaikh Mohammed (Guantánamo 9/11 Attacks Trial)*, N.Y. TIMES, Oct. 18, 2012, http://topics.nytimes.com/top/reference/timestopics/people/m/khalid_shaikh_mohammed/index.html.

⁷⁹ The co-defendants are Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali

the 2009 MCA with eight offenses: “conspiracy, murder in violation of the law of war, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, destruction of property in violation of the law of war, hijacking aircraft, and terrorism.”⁸⁰

The September 11th defendants do not face charges of material support for terrorism.⁸¹ *Hamdan II* nonetheless weakens the MCA charge of conspiracy, especially given the Supreme Court’s plurality opinion in *Hamdan I* that rejected conspiracy as a war crime.⁸² Even the chief prosecutor has assessed the conspiracy charge to fail under the D.C. Circuit Court’s analysis.⁸³ And the government chose not to oppose defendants’ motion to dismiss conspiracy as a separate and standalone offense, on the basis that dismissal would “avoid introducing additional uncertainty and appellate risk into this capital case” and allow the case “to proceed without unnecessary delay.”⁸⁴

Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. See Brigadier General Mark Martins, Chief Prosecutor, Memorandum Thru Legal Advisor to the Convening Authority (Jan. 6, 2013) at 2. The government dropped charges against another detainee, Mohammed al Qahtani, because he had been tortured during interrogations. See Bob Woodward, *Guantánamo Detainee Was Tortured, Says Official Overseeing Military Trials*, WASH. POST, Jan. 14, 2009, <http://www.washingtonpost.com/wpdyn/content/article/2009/01/13/AR2009011303372.html>.

⁸⁰ Press Release, Dep’t of Defense, DOD Announces Charges Sworn Against Five Detainees Allegedly Responsible for 9/11 Attacks (May 31, 2011), available at

<http://www.defense.gov/releases/release.aspx?releaseid=14532>; see Charge Sheet of Khalid Shaikh Mohammad, United States v. Khalid Shaikh Mohammad (May 31, 2011), available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

⁸¹ Previous charges included material support to terrorism. See Dep’t of Defense News Transcript, *DoD News Briefing with Brig. Gen. Hartmann from the Pentagon* (Feb. 11, 2008), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4142>.

⁸² See 548 U.S. at 603–04.

⁸³ See Brigadier General Mark Martins, Chief Prosecutor, Memorandum Thru Legal Advisor to the Convening Authority (Jan. 6, 2013) at 2. The convening authority for the military commission, retired Vice Admiral Bruce MacDonald, informed Brigadier General Martins that it would be “premature to withdraw and dismiss the conspiracy charge.” Dep’t of Defense News Release No. 029-13, *Convening Authority for Military Commissions Declines to Withdraw Conspiracy Charge Against Alleged 9/11 Co-Conspirators Pending Appellate Ruling* (Jan. 18, 2013), <http://www.defense.gov/releases/release.aspx?releaseid=15779>.

⁸⁴ Brigadier General Mark Martins, Chief Prosecutor, Remarks at Guantánamo Bay (Jan. 27, 2013) (adding condition that “the Commission agrees to approve minor conforming changes to the charge sheet” to “preserve the existing co-conspirator theory of liability”); see Charlie Savage, *U.S. To Press Fight of Detainee’s Appeal*, N.Y. TIMES, Jan. 9, 2013, at A14 (quoting Brigadier General Martins’ recommendation to drop conspiracy charges in order to “remove an issue that could otherwise generate uncertainty and delay”). As is plain from the disagreement between plurality and dissenting opinions in *Hamdan I*, the issue of whether conspiracy is a war crime is not new. See 548 U.S. at 603–04, 611, 698–703. Although *Hamdan* was acquitted of conspiracy in *Hamdan II*, this issue is squarely presented in another Guantánamo detainee case appealed from the Court of Military Commission Review to the D.C. Circuit Court. See

Dropping the conspiracy charge against the September 11th defendants would reduce the number of charges from eight to seven. It would not end the case. Applying the strictest reading of *Hamdan II* and including only offenses that were “firmly grounded” international-law war crimes before Congress passed the MCA,⁸⁵ serious charges remain. Attacking civilians and terrorism are established offenses against the law of war,⁸⁶ and those charges suffice to try Mohammad and his co-defendants by military commission.⁸⁷

The logic of *Hamdan II* also applies to prior convictions obtained by military commission in Guantánamo: to the extent convictions for pre-2006 conduct were based on offenses recognized as war crimes, those convictions should stand. Seven Guantánamo detainees have been convicted through military commissions; four were subsequently transferred to other countries.⁸⁸ In addition to Hamdan, one other detainee was convicted solely of providing material support for terrorism.⁸⁹ Australian citizen David Hicks pleaded guilty in 2007 to one count of providing material support for terrorism.⁹⁰ He was

United States v. Al Bahlul, 820 F. Supp. 2d 1141 (C.M.C.R. 2011) (en banc) (affirming convictions for conspiracy, material support for terrorism, and solicitation), *rev'd*, No. 11–1324, 2013 WL 297726, at *1 (D.C. Cir. Jan. 25, 2013). There, the government filed a brief advising the D.C. Circuit Court that “*Hamdan II* requires reversal of Bahlul’s convictions by military commission,” but preserving its arguments for further review. Supplemental Brief for United States at 1, *Al Bahlul v. United States*, No. 11-1324 (D.C. Cir. Jan. 9, 2013) (No. 1414342), 2013 WL 122618, at *1; *see Al Bahlul*, 2013 WL 297726, at *1 (vacating convictions). Attorney General Holder is pressing forward with the *Bahlul* case despite recommendations otherwise. *See* Charlie Savage, *U.S. To Press Fight of Detainee’s Appeal*, N.Y. TIMES, Jan. 9, 2013, at A14.

⁸⁵ *Hamdan II*, 696 F.3d at 1250 n.10.

⁸⁶ *See id.* at 1249–50 (“It is true that international law establishes at least some forms of terrorism, including the intentional targeting of civilian populations, as war crimes.”) (emphasis in original).

⁸⁷ Jane Sutton, *Guantánamo Prosecutor Wants Conspiracy Charge Dropped in 9/11 Case*, NBCNEWS.COM (Jan. 10, 2013), http://usnews.nbcnews.com/_news/2013/01/10/16442972-guantanamo-prosecutor-wants-conspiracy-charge-dropped-in-911-case?lite (quoting Brigadier General Martins that “[t]here is a clear path forward for legally sustainable charges”).

⁸⁸ GAO REPORT, *supra* note 3, at 8–9 & n.17; *see also The Guantánamo Trials*, HUM. RTS. WATCH, <http://www.hrw.org/features/Guantanamo> (last visited Mar. 28, 2013). One detainee, Ahmed Khalfan Ghailani, was transferred from Guantánamo to federal court in the Southern District of New York, where he was convicted of conspiracy. *See* GAO REPORT, *supra* note 3, at 11; Human Rights Watch, *Ahmed Khalfan Ghailani* (2012), <http://www.hrw.org/news/2012/10/25/ahmed-khalfan-ghailani>.

⁸⁹ *See Military Commissions Cases*, MILITARY COMMISSIONS, <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (last visited Mar. 28, 2013); *The Guantánamo Trials*, HUM. RTS. WATCH, <http://www.hrw.org/features/Guantanamo> (last visited Mar. 28, 2013); *Names of the Detained in Guantánamo Bay*, WASH. POST (Dec. 20, 2012), <http://projects.washingtonpost.com/guantanamo/>.

⁹⁰ *See* Dep’t of Defense News Release No. 362–07, *Detainee Convicted of Terrorism Charge at Guantánamo Trial* (Mar. 30, 2007), <http://www.defense.gov/releases/release.aspx>.

sentenced to seven years, which by plea agreement was reduced to nine months' confinement in Australia.⁹¹ He was released on December 29, 2007.⁹² As part of his plea agreement, Hicks waived all appeals.⁹³ Given this waiver, *Hamdan II* undercuts Hicks' conviction in theory if not in practice.⁹⁴

IV. REACH OF *HAMDAN II* BEYOND MILITARY COMMISSIONS

Finally, the reach of *Hamdan II* extends beyond military commissions to Article III courts hearing terrorism cases. In addition to providing guidance on material support for terrorism under the MCA, the opinion suggests a fresh look at the related concepts of substantial support and direct support for terrorism. These concepts are at issue in *Hedges v. Obama*,⁹⁵ a case decided by the U.S. District Court for the Southern District of New York one month before *Hamdan II* and now on appeal to the U.S. Court of Appeals for the Second Circuit.

In *Hedges*, a group of journalists and activists filed suit to enjoin enforcement of Section 1021(b)(2) of the National Defense Authorization Act ("NDAA") for Fiscal Year 2012, which was enacted as an "affirmation" of executive detention authority under the Authorization for Use of Military Force of 2001.⁹⁶ Section 1021(b)(2) permits detention of any "person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States . . . or has directly supported such hostilities in aid of such enemy forces."⁹⁷ Plaintiffs challenged this

⁹¹ See *id.*

⁹² See *The Guantánamo Trials*, HUM. RTS. WATCH, <http://www.hrw.org/features/Guantánamo> (last visited Mar. 28, 2013). Hicks later published a book recounting his time in Guantánamo. See DAVID HICKS, *GUANTÁNAMO: MY JOURNEY* (2010).

⁹³ See Waiver of Appellate Review, *United States v. Hicks* (Mar. 30, 1997), <http://www.mc.mil/CASES/MilitaryCommissions.aspx>; Military Judge Markup of Pretrial Agreement, *United States v. Hicks* (Mar. 30, 1997), <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

⁹⁴ Two Guantánamo detainees were convicted by military commissions of only conspiracy and providing material support for terrorism. See *The Guantánamo Trials*, HUM. RTS. WATCH, <http://www.hrw.org/features/Guantánamo> (last visited Mar. 28, 2013). If the ultimate outcome in *Bahlul* is a rejection of conspiracy as a pre-2006 war crime, see *supra* note 84, then those convictions are similarly undercut.

⁹⁵ No. 12 Civ. 331 (KBF), 2012 WL 3999839, at *1 (S.D.N.Y. Sept. 12, 2012).

⁹⁶ Pub. L. No. 112-81, 125 Stat. 1298, 1562 (2011) (codified at 10 U.S.C. § 801 note); see *id.* at 1562 §§ 1021(a) (Congress "affirms" presidential authority), (d) (not "limit or expand" AUMF), (e) (not "affect existing law or authorities"); AUMF, *supra* note 9; *Hedges*, 2012 WL 3999839, at **6-13.

⁹⁷ 125 Stat. at 1562 § 1021(b)(2); see Johnson, *supra* note 25 (Obama Administration has interpreted AUMF to include "those persons who were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces") (quoting Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay at 2, *In re: Guantánamo Bay Detainee Litig.*, Misc. No. 08-442 (TFH) (D.D.C. Mar. 13, 2009)).

language as impermissibly vague under the Due Process Clause of the Fifth Amendment.⁹⁸ Due process requires, at minimum, “fair notice of what is prohibited.”⁹⁹ Although Section 1021(b)(2) is directed to terrorism, the language of “substantially supported,” “directly supported,” and “associated forces” is so vague that it puts even American citizens in the United States at risk of indefinite detention simply for reporting on terrorist organizations.¹⁰⁰ For example, the law might cover a news article that describes enemy forces favorably or American forces unfavorably.¹⁰¹ The district court agreed, finding that “specificity is absent from Section 1021(b)(2)” and permanently enjoining enforcement.¹⁰²

The government appealed, and in October 2012 the Second Circuit Court stayed the district court’s injunction pending a decision on the merits.¹⁰³ Two months later, plaintiffs filed an emergency application in the Supreme Court directed to Justice Scalia, asking the Court to vacate the Second Circuit’s stay.¹⁰⁴ The Court ultimately denied that application.¹⁰⁵ While plaintiffs’ appeal remains before the Second Circuit,¹⁰⁶ Congress has enacted the NDAA for Fiscal Year 2013.¹⁰⁷ This Act clarifies that nothing in the AUMF or the 2012 NDAA shall be construed to deny the writ of habeas corpus or constitutional rights in an Article III court to anyone in the United States who could otherwise invoke them.¹⁰⁸ The new language has not assuaged the *Hedges* plaintiffs’ concerns,

⁹⁸ See 2012 WL 3999839, at **40–44; U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”).

⁹⁹ *United States v. Williams*, 553 U.S. 285, 304 (2008) (“A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standard less that it authorizes or encourages seriously discriminatory enforcement.”).

¹⁰⁰ 2012 WL 3999839, at **40–44. The lead plaintiff, Christopher Hedges, is a Pulitzer Prize-winning foreign correspondent who engages with terrorists groups for his writing and journalism. See *id.* at **6–8.

¹⁰¹ *Id.* at **33, 39.

¹⁰² *Id.* at **1–2, 40–45. The court had previously issued an order for a preliminary injunction. See *Hedges v. Obama*, No. 12 Civ. 331, 2012 WL 1721124, at *1 (S.D.N.Y. May 16, 2012).

¹⁰³ See *Hedges v. Obama*, Nos. 12–3176 (L) & 12–3644(Con), 2012 WL 4075626, at *1 (2d Cir. Sept. 17, 2012); Order Granting Stay, *Hedges v. Obama*, Nos. 12-3176 & 12-3644 (2d Cir. Oct. 2, 2012) (No. 78).

¹⁰⁴ See Plaintiffs-Petitioners’ Emergent Application to Vacate Temporary Stay of Permanent Injunction, *Hedges v. Obama* (Sup. Ct. Dec. 12, 2012).

¹⁰⁵ *Hedges v. Obama*, No. 12A600, 2013 WL 598441, at *1 (Sup. Ct. Feb. 19, 2013).

¹⁰⁶ The Second Circuit Court heard oral argument on February 6, 2013. See Adam Klasfeld, *2nd Circuit Hearing on Indefinite Detention Focuses on Press Rights*, COURTHOUSE NEWS SERV., (Feb. 6, 2013), <http://www.courthousenews.com/2013/02/06/54640.htm>.

¹⁰⁷ Pub. L. No. 112-239, 126 Stat. 1632 (2013).

¹⁰⁸ *Id.* at 1917 § 1029 (codified at 10 U.S.C. § 801 note). This provision replaced an amendment to the 2013 NDAA introduced by Senators Dianne Feinstein and Mike Lee, which had been

and they continue to press their case.¹⁰⁹

In evaluating the NDAA language of “substantial support” for terrorism, the district court heard echoes of the MCA language of “material support” for terrorism.¹¹⁰ Consideration was fleeting, however, as the court agreed with the government-defendant that “the MCA plays no role in the case before this Court.”¹¹¹ The MCA may play no role in *Hedges* as a civilian case rather than a military case. But the NDAA is cast in a starring role, and *Hamdan II* offers a model for federal courts’ treatment of NDAA Section 1021.

The structure of the MCA’s proscription of material support for terrorism reflects the structure of the NDAA’s proscription of substantial or direct support for al Qaeda, the Taliban, or associated forces. That likeness suggests broader constitutional challenges. Congress enacted the MCA as legislation that “codifies crimes” but “does not establish new crimes.”¹¹² The D.C. Circuit Court in *Hamdan II* disagreed, finding that the MCA did establish new crimes and rejecting Hamdan’s retroactive punishment for the new crime of material support for terrorism.¹¹³ By comparison, Congress enacted NDAA Section 1021 as legislation that “affirms” the President’s detention authority under the AUMF but does not “limit or expand that authority.”¹¹⁴ The President agreed

drafted to “assure that no authorization to use military force, war declaration or any similar authority would allow an American apprehended in the United States to be held without charge or trial.” Press Release, Senator Feinstein, Senators Feinstein, Lee Introduce Amendment to Protect Civil Liberties (Nov. 28, 2012), *available at* <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=b5294991-c86f-4b13-8708-83db770d7740>; see Charlie Savage, *Congressional Negotiators Drop Ban on Indefinite Detention of Citizens, Aides Say*, N.Y. TIMES, Dec. 19, 2012, at A16.

¹⁰⁹ See Chris Hedges, *The Final Battle*, TRUTHDIG (Dec. 23, 2012), http://www.truthdig.com/report/item/the_final_battle_20121223/ (“[R]estoring due process for citizens was something the Republicans and the Democrats, along with the White House, refused to do.”); Michael Kelley, *Actually, The Newest Version Of NDAA Makes It EASIER To Detain Citizens Indefinitely*, BUS. INSIDER (Nov. 29, 2012), <http://www.businessinsider.com/ndaa-americans-indefinite-detention2012-11#ixzz2FVuWSold> (“The newest version of the NDAA seems to be equating the AUMF and section 1021 of the 2012 NDAA—which the government has argued all along—and thereby codifies precisely what the plaintiffs are fighting in court.”) (emphasis in original).

¹¹⁰ *Hedges v. Obama*, No. 12 Civ. 331 (KBF), 2012 WL 3999839, at *43 (S.D.N.Y. Sept. 12, 2012); *accord Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010) (affirming denial of habeas petition by Guantánamo detainee, based on consideration of MCA “material support” language, and noting that the “provisions of the 2006 and 2009 MCAs are illuminating in this case because the government’s detention authority logically covers a category of persons no narrower than is covered by its military commission authority”).

¹¹¹ 2012 WL 3999839, at *43.

¹¹² 10 U.S.C. § 950p(a); see 10 U.S.C. § 950p(d) (2009).

¹¹³ See 696 F.3d at 1247–48, 1253.

¹¹⁴ 125 Stat. at 1562 §§ 1021(a), (d).

with this interpretation,¹¹⁵ and the judiciary is now weighing in. To the extent NDAA Section 1021(b)(2) does expand executive detention authority, an ex post facto challenge emerges reminiscent of the timeliness analysis in *Hamdan II*.

Although *Hedges* focuses on Fifth Amendment due process, the district court's opinion opens the door to just such an ex post facto challenge. The opinion describes NDAA Section 1021(b)(2) as sufficiently punitive, with the possibility of indefinite military detention as "the equivalent of a criminal penalty," or "perhaps in many circumstances, worse."¹¹⁶ *Hedges* takes a prospective stance toward that penalty, as plaintiffs alleged a fear of future detention and sought injunctive relief.¹¹⁷ In rejecting Congress' language as impermissibly vague, the district court found it "reasonable" to interpret the NDAA as drawing "a new, expanded scope for military detention."¹¹⁸ In fact, in its discussion of plaintiffs' standing, the court disparaged Section 1021 as nothing but "a legislative attempt at an ex post facto 'fix.'"¹¹⁹ Congress sought to hand the President "broader detention authority than was provided in the AUMF in 2001 and to try to ratify past detentions which may have occurred under an overly-broad interpretation of the AUMF."¹²⁰

The district court's logic is familiar. Just as the MCA expanded the scope of crimes subject to military commission jurisdiction, so too the NDAA expanded the scope of detentions subject to executive authority.¹²¹ Any individuals detained prior to 2012 under a standard of substantial or direct support for terrorism have a new challenge to their detention: that standard was not part of the AUMF, but established over a decade later in the NDAA. Significantly, this challenge can hold even if the appellate court in *Hedges* reverses on grounds that the plaintiffs lack standing.¹²² Detainee plaintiffs may come

¹¹⁵ See Johnson, *supra* note 25 ("[C]ontrary to some reports, neither Section 1021 nor any other detainee-related provision in this year's Defense Authorization Act creates or expands upon the authority for the military to detain a U.S. citizen.").

¹¹⁶ 2012 WL 3999839, at *23 n.29; see *id.* at **42, 44; Smith v. Doe, 538 U.S. 84, 92 (2003) (for ex post facto inquiry, court must determine whether legislature intended to impose punishment or to establish civil and nonpunitive statutory scheme).

¹¹⁷ The district court found standing despite the fact that no plaintiff had been detained, based on plaintiffs' "reasonable fear of detention." 2012 WL 3999839, at *3; see *id.* at **21, 25–27.

¹¹⁸ *Id.* at *21.

¹¹⁹ *Id.* at *4; see also *id.* at **16 ("retroactive fix"), 18 ("expansion of detention authority . . . is, for the first time, codified in § 1021").

¹²⁰ *Id.* at *4. The district court felt "required" to wade into interpretive issues concerning the AUMF, given the government's position that the AUMF and NDAA Section 1021(b)(2) are coextensive. *Id.* at *13.

¹²¹ See *id.* at *39 ("In other words, the Court finds that § 1021(b)(2) is new.").

¹²² The Second Circuit's stay order suggests grounds for reversal based on the plaintiffs' standing, the reach of the NDAA to individuals within the United States, and the scope of the injunction. See Order Granting Stay at 2, *Hedges v. Obama*, Nos. 12-3176 & 12-3644 (2d Cir.

forward. It can also hold even if the court reverses on grounds that NDAA Section 1021(b)(2) satisfies due process. The standard of substantial or direct support may be clear and constitutional going forward, but still inapplicable to previous detentions.¹²³

Moreover, the constitutional challenge squarely at issue in *Hedges* benefits from a look back at *Hamdan II*. The Second Circuit Court is poised to decide whether the phrase “substantially supported al-Qaeda, the Taliban, or associated forces . . . [or] directly supported” is sufficiently clear to satisfy due process. Statutory interpretation is delicate business, as the meaning of legislation may be informed by more than the exact words in print. Analogous statutes provide a meaningful context. When construing a statute, the Supreme Court has sought to “achieve a uniform interpretation of similar statutory language” and to respect “congressional policy as expressed in other legislation.”¹²⁴ The same guidelines apply to lower federal courts.

To interpret the “substantial or direct support” language of the NDAA, the Second Circuit Court may look to similar statutory provisions. The “material support” language of the MCA is a ready candidate.¹²⁵ Both Acts are components of the federal regulatory scheme governing terrorism, with the NDAA addressed to military detention and the MCA addressed to military prosecution.¹²⁶ As such, they “should be construed harmoniously.”¹²⁷ The MCA has the benefit of clear terminology, incorporating a definition of material support that the Supreme Court recently endorsed.¹²⁸ After *Hamdan II*, it also

Oct. 2, 2012) (No. 78).

¹²³ Cf. *Hamdan II*, 696 F.3d at 1241 n.1. During oral argument on the *Hedges* appeal, U.S. District Judge Lewis Kaplan, sitting on the Second Circuit panel by designation from the Southern District of New York, hinted that he may vote in favor of the government’s position. See Klasfeld, *supra* note 106. Plaintiffs-Appellees’ attorney Carl Mayer invoked the district court’s view that “there would be no reason for a law to codify existing law.” *Id.* Judge Kaplan responded by invoking NDAA Section 1021(e), which provides that “[n]othing in this section shall be construed to affect existing law,” and stating, “It seems to me you might have an insurmountable problem.” *Id.*; 125 Stat. at 1562 § 1021(e).

¹²⁴ *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) (explaining Court’s willingness to overturn its own decisions construing statutes, despite force of stare decisis).

¹²⁵ See 10 U.S.C. § 950v(b)(25); 10 U.S.C. § 950(t)(25) (2009).

¹²⁶ Also within this regulatory scheme are the AUMF, providing for the use of force, and 18 U.S.C. §§ 2339A–2339B, providing for federal prosecution of material support for terrorism.

¹²⁷ *Rodriguez de Quijas*, 490 U.S. at 484–85 (construing terms in Securities Act of 1933 and Securities Exchange Act of 1934).

¹²⁸ See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). There, the Court rejected a vagueness challenge to the material-support statute, 18 U.S.C. § 2339B, brought by activists supporting humanitarian and political causes in Turkey and Sri Lanka. See 130 S. Ct. at 2720–22. Both Section 2339B and the MCA rely on the same definition of “material support or resources.” Compare 18 U.S.C. § 2339B(g)(4) with 10 U.S.C. § 950v(25)(B) and 10 U.S.C.

carries the D.C. Circuit Court's stamp of approval for timely charges.

V. CONCLUSION

Therefore, far from undermining the legitimacy of Guantánamo military commissions, *Hamdan II* fosters a richer understanding of the proceedings. Perhaps most significant in this sensational opinion is the lack of anything sensationalist. By offering an ordinary appellate analysis in the extraordinary context of Guantánamo, the D.C. Circuit Court has placed a military commission judgment squarely in line with district court judgments. *Hamdan II* stands as a reminder that principles of fairness apply in military and civilian trials alike.

