# RECENT CASES

EX POST FACTO CLAUSE — GUANTÁNAMO PROSECUTIONS — D.C. CIRCUIT REINTERPRETS MILITARY COMMISSIONS ACT OF 2006 TO ALLOW RETROACTIVE PROSECUTION OF CONSPIRACY TO COMMIT WAR CRIMES. — *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014).

After the September 11, 2001 terrorist attacks, the Bush Administration began using military commissions rather than Article III courts to try alleged terrorists[1] at Guantánamo Bay, Cuba. In response to the Supreme Court's determination in *Hamdan v. Rumsfeld*[2] (*Hamdan I*) that these military commissions lacked statutory authorization and were thus invalid, Congress explicitly authorized prosecution by military commission for certain enumerated crimes in the Military Commissions Act of 2006[3] (MCA). In *Hamdan v. United States*[4] (*Hamdan II*), the D.C. Circuit held that the MCA did not authorize "retroactive prosecution for conduct committed before [its] enactment . . . unless the conduct was already prohibited under existing U.S. law as a war crime triable by military commission,"[5] fearing that a contrary construction would raise constitutional concerns under the Ex Post Facto Clause.[6] Recently, in *Al Bahlul v. United States*,[7] the en banc D.C. Circuit overruled *Hamdan II*'s statutory analysis and instead considered the constitutional question directly, holding that retroactive prosecution for inchoate conspiracy to commit war crimes[8] under the MCA did not plainly violate the Ex Post Facto Clause.[9] The court found that even before enactment of the MCA, inchoate conspiracy may have been triable by military commission under 10 U.S.C. § 821, which granted military commissions jurisdiction over offenses that "by statute or the law of war may be tried by military commis-

---

[1] *See* Military Order of Nov. 13, 2001, 3 C.F.R. 918 (2002), *reprinted as amended in* 10 U.S.C. § 801 (2012).

[2] 548 U.S. 557 (2006).

[3] Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

[4] 696 F.3d 1238 (D.C. Cir. 2012).

[5] *Id.* at 1248 (emphasis omitted).

[6] *Id.* at 1247–48. The D.C. Circuit consulted the international law of war, *id.* at 1248, to determine whether the defendant's alleged material support for terrorism had been triable by a military commission before 2006; because it had not been, the Court vacated the commission's conviction, *id.* at 1253.

[7] 767 F.3d 1 (D.C. Cir. 2014).

[8] According to the Department of Defense, inchoate conspiracy to commit war crimes requires that the accused know the conspiracy's unlawful purpose, agree to join other members, and take some overt act in furtherance of the agreement; it is not necessary that the war crime that is the object of the conspiracy ever occur. *See* U.S. DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS pt. IV, at 20–21 (2007).

[9] *Al Bahlul*, 767 F.3d at 5, 18.

sions."[10] To reach its holding, the court found that, though inchoate conspiracy was not a crime under the *international* law of war at the time of the defendant's alleged conduct, it nevertheless may have been a crime under the U.S. common law of war[11] — even though the *Hamdan II* court had found that § 821's "law of war" did not encompass this category.[12] Interpreting § 821's "law of war" to include the common law of war would misread congressional intent and historical precedents that sought to avoid the risks such a reading would pose for the stability of the international law of war.

Ali Hamza Ahmad Suliman al Bahlul (Bahlul), a native of Yemen, joined al Qaeda in Afghanistan in the late 1990s.[13] After Bahlul produced a popular propaganda video celebrating the al Qaeda attack on the U.S.S. *Cole* and calling for jihad against the United States,[14] Osama bin Laden appointed Bahlul as his personal assistant and secretary for public relations — roles in which Bahlul soon became indispensable.[15] After the September 11 attacks, Bahlul was captured in Pakistan, turned over to U.S. forces in December 2001, and transferred to the U.S. Naval Base at Guantánamo Bay in 2002.[16] In 2004, after President Bush declared Bahlul eligible for trial by military commission, military prosecutors charged him with conspiracy to commit war crimes.[17] Soon thereafter, the *Hamdan I* Court invalidated the existing military commission procedures,[18] and Congress enacted the MCA to remedy the procedural flaws.[19] The MCA also enumerated thirty war crimes triable by military commission and conferred such jurisdiction for any of those offenses committed "before, on, or after September 11, 2001."[20] In 2008, military prosecutors amended Bahlul's charges to include three of the MCA's enumerated offenses: conspiracy to commit war crimes, providing material support for terrorism, and solicitation of others to commit war crimes.[21]

---

[10] *Id.* at 22 (quoting 10 U.S.C. § 821 (2012)) (internal quotation mark omitted).

[11] *Id.* at 27.

[12] 696 F.3d 1238, 1252 (D.C. Cir. 2012).

[13] *Al Bahlul*, 767 F.3d at 5.

[14] *Id.* at 5–6.

[15] *Id.* at 6. For example, Bahlul prepared the "martyr wills" of two September 11 hijackers for use as propaganda documenting al Qaeda's role in the attacks. *Id.*

[16] *Id.*

[17] *Id.* Proceedings in *Al Bahlul* were stayed pending the *Hamdan I* decision. *See id.*

[18] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 613 (2006) (holding that commission procedures allowing for the defendant and his counsel to be excluded from, and prevented from hearing evidence presented during, a "closed" proceeding violated the Uniform Code of Military Justice (UCMJ) and Common Article III of the Geneva Conventions).

[19] *See Al Bahlul*, 767 F.3d at 6.

[20] 10 U.S.C. § 948(d) (2012).

[21] *Al Bahlul*, 767 F.3d at 7.

In his military commission trial, Bahlul mounted no defense;[22] the military commission convicted him of all three offenses.[23] The Court of Military Commissions Review affirmed Bahlul's convictions.[24] He then appealed to the D.C. Circuit, challenging his convictions as, inter alia, violations of the Ex Post Facto Clause.[25] After the D.C. Circuit held in *Hamdan II* that the MCA did not authorize retroactive prosecution for conduct that was not triable by military commission as a crime under the international law of war at the time the conduct occurred,[26] a panel of the D.C. Circuit vacated Bahlul's convictions.[27] While the government had conceded that the *Hamdan II* reasoning would necessitate that Bahlul's convictions be vacated, it contested the soundness of that reasoning and petitioned the court for en banc review.[28] The D.C. Circuit granted the government's petition for rehearing en banc.[29]

The D.C. Circuit affirmed the military commission's conviction for conspiracy, but vacated and remanded Bahlul's convictions for material support and solicitation. Writing for the en banc court, Judge Henderson[30] first concluded that because Bahlul did not challenge his trial on Ex Post Facto Clause grounds before the military commission, he forfeited this ground for appeal, and the defense needed to show "plain error" to prevail.[31] The Court then explicitly overruled *Hamdan II*'s statutory holding, finding that, because the plain text was clear[32] and the legislative intent was "overwhelmingly in favor of retroactive application,"[33] the MCA *did* authorize retroactive prosecution for certain enumerated crimes when committed before, on, or after September 11, 2001.[34] Then, the Court addressed Bahlul's Ex Post Facto Clause chal-

---

[22] *Id.* Bahlul admitted nearly every factual allegation against him. *Id.* However, he pleaded not guilty to the charged offenses, denying the legitimacy of the military commission. *Id.*

[23] *Id.* The commission sentenced him to life imprisonment and the convening authority, former Judge Susan J. Crawford, approved the findings and sentence. *Id.* at 8.

[24] United States v. Al Bahlul, 820 F. Supp. 2d 1141, 1264 (Ct. Mil. Comm'n Rev. 2011).

[25] *See Al Bahlul*, 767 F.3d at 8.

[26] *Hamdan II*, 696 F.3d 1238, 1253 (D.C. Cir. 2012).

[27] Al Bahlul v. United States, No. 11-1324, 2013 WL 297726, at *1 (D.C. Cir. Apr. 23, 2013).

[28] *See* Supplemental Brief for the United States at 1, *Al Bahlul*, 2013 WL 297726; *see also Al Bahlul*, 767 F.3d at 8.

[29] *Al Bahlul*, 767 F.3d at 8.

[30] Judge Henderson was joined by Chief Judge Garland and Judges Tatel and Griffith.

[31] *Al Bahlul*, 767 F.3d at 8–10. A plain error is "an 'error' that is 'plain' and that 'affect[s] substantial rights.'" United States v. Olano, 507 U.S. 725, 732 (1993) (alteration in original) (quoting FED. R. CRIM. P. 52(b)). If the defendant meets these conditions, an appellate court may notice a forfeited error only if "the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (alteration in original) (quoting United States v. Young, 470 U.S. 1, 15 (1985)).

[32] *Al Bahlul*, 767 F.3d at 12.

[33] *Id.* at 14 n.8.

[34] *Id.* at 11.

lenges to this retroactive prosecution.[35]

The court determined that Bahlul's conviction for conspiracy did not plainly violate the Ex Post Facto Clause for "two independent and alternative reasons."[36] First, the court reasoned that the alleged conspiracy was already a federal crime under 18 U.S.C. § 2332(b) when committed.[37] By the court's logic, the MCA's transfer of jurisdiction to try such conspiracies from Article III courts to military commissions "does not implicate ex post facto concerns"[38] because it does not alter "the definition of the crime, the defenses or the punishment."[39]

Second, even if a mere shift in jurisdiction *were* sufficient to offend the Ex Post Facto Clause, the court reasoned that when Bahlul committed his offense, conspiracy may have been a "law of war" offense already triable by military commission under 10 U.S.C. § 821.[40] The court acknowledged the government's concession that conspiracy was not a crime under the international law of war.[41] However, while the D.C. Circuit in *Hamdan II* concluded that § 821's reference to the "law of war" means only the *international* law of war,[42] here the court entertained the government's argument[43] that § 821's reference to the "law of war" encompasses crimes under the U.S. common law of war as well, thus making conspiracy triable by military commission prior to 2006.[44] The court refused to "hold that . . . precedent[] conclusively

---

[35] *See id.* at 17. The court relied on the government's concession that the Ex Post Facto Clause applies to Bahlul as an alien enemy combatant at Guantánamo, refusing to decide whether the protection would apply without such a concession. *Id.* at 18.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 19 (quoting Brief for the United States at 67, *Al Bahlul*, 767 F.3d 1 (No. 11-1324)) (internal quotation mark omitted). *But see id.* at 77–78 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (raising significant doubt as to this logic).

[39] *Id.* at 19 (majority opinion). Although 18 U.S.C. § 2332(b) would have required the prosecution to prove more elements than did the MCA's analogous conspiracy provision, these additional elements — namely, that the conspiracy occur outside the United States and target U.S. nationals, *id.* at 20 — were clearly established in Bahlul's case, *id.* at 21. Bahlul thus did not meet his burden of establishing a serious effect on "the fairness, integrity, or public reputation of judicial proceedings" necessary for plain error review. *Id.* (quoting United States v. Olano, 507 U.S. 725, 732 (1993)).

[40] *Id.* at 18; *see also* 10 U.S.C. § 821 (2012) (providing that military commissions retain "concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions").

[41] *Al Bahul*, 767 F.3d at 23.

[42] *Hamdan II*, 696 F.3d 1238, 1241 (D.C. Cir. 2012).

[43] *See* Oral Argument at 16:26, *Al Bahlul*, 767 F.3d 1 (No. 11-1324), http://www.cadc.uscourts.gov/recordings/recordings2014.nsf/CFEBB23C01CE26CA85257BF600536FAD/$file/11-1324.mp3 ("[W]e believe the law of war is the international law of war as supplemented by the experience and practice of our wars and our wartime tribunals."); *see also* Brief for the United States, *supra* note 38, at 28.

[44] *See Al Bahlul*, 767 F.3d at 24. The court consulted precedents of military commissions from the Civil War, from World War II, and from the Korean War, *see id.* at 24–26, which the court accepted as sufficient under plain error review to make conspiracy to commit law-of-war

establish[es] conspiracy" as triable under § 821,[45] but it concluded that any Ex Post Facto Clause error was not plain.[46] The court thus rejected Bahlul's Ex Post Facto Clause challenge to his conspiracy conviction[47] and remanded his case back to the D.C. Circuit panel to consider four other issues on appeal.[48]

In finding conspiracy to be a war crime under § 821 of the Uniform Code of Military Justice (UCMJ), the court determined, under a plain error standard of review,[49] that "law of war" may include crimes not only under international law — which do not include conspiracy — but also under the "U.S. common law of war." Such an interpretation would be problematic for two reasons: First, it would incorrectly broaden the ambit of the statute because it runs counter to judicial precedent and because Congress has never before recognized the existence of this category of war crimes. Second, it ignores normative reasons in favor of finding that Congress did not intend this interpretation; the recognition of a so-called "domestic law of war" in this statute

---

violations triable under a U.S. common law of war, *see id.* at 27. For a comprehensive analysis rebutting the government's contention that these precedents establish conspiracy under a U.S. common law of war, see David Glazier, *The Misuse of History: Conspiracy and the Guantánamo Military Commissions*, 66 BAYLOR L. REV. 295, 315–55 (2014).

[45] *Al Bahlul*, 767 F.3d at 26.

[46] *Id.* at 27.

[47] *Id.* at 31. The court could find neither sufficient international nor domestic precedent to establish material support for terrorism or solicitation as war crimes. *See id.* at 29–30. The court accordingly reversed Al Bahlul's convictions for solicitation and material support for terrorism. *Id.* at 29, 31.

[48] *Id.* at 31. The panel was directed to consider Bahlul's contentions that (1) the MCA exceeded Congress's Article I, Section 8, authority; (2) the MCA's military commissions violated Article III; (3) his convictions violated the First Amendment; and (4) the MCA violated the Due Process Clause's equal protection component. *Id.*

Judge Henderson wrote a separate concurrence noting that on de novo review, she would hold that the Ex Post Facto Clause does not apply to aliens detained at Guantánamo. *See id.* at 33 (Henderson, J., concurring). Judge Rogers concurred in the court's vacatur of Bahlul's material support and solicitation convictions but would also have vacated Bahlul's conspiracy conviction. *See id.* at 34 (Rogers, J., concurring in the judgment in part and dissenting). She would have upheld *Hamdan II*'s statutory interpretation, *see id.* at 35–37, but then found that even if the MCA did apply retroactively, the convictions violated the Ex Post Facto Clause, *id.* at 47. Arguing that for over seventy years the Supreme Court has interpreted "law of war" to mean only the *international* law of war, *id.* at 37, she both disavowed the government's resort to a U.S. common law of war, *id.* at 38, and disputed that inchoate conspiracy was established in such a domestic tradition, *id.* at 43. Judges Brown and Kavanaugh each concurred in the court's judgment but dissented in part, noting that they would review Bahlul's Ex Post Facto Clause challenges under a de novo standard, *id.* at 51 (Brown, J., concurring in the judgment in part and dissenting in part); *id.* at 78 (Kavanaugh, J., concurring in the judgment in part and dissenting in part), and would still uphold his conspiracy conviction. Judges Brown and Kavanaugh also would have decided the other issues on appeal. *See id.* at 73–76; *id.* at 62 (Brown, J., concurring in the judgment in part and dissenting in part).

[49] Because of this standard of review, it is still unclear whether the D.C. Circuit would reach its same conclusions — that "law of war" encompasses the U.S. common law of war, and that conspiracy is a war crime under the U.S. common law of war — on de novo review.

has the potential to undermine efforts to standardize the law of war and poses dangers to American service members abroad. For these two reasons, then, this interpretation should be rejected if it were considered on de novo review.

First, interpreting § 821's reference to the law of war to include both international law and the U.S. common law of war would misconstrue both judicial precedent interpreting this exact phrase and congressional intent. It is well established that conspiracy is not now, and has never been, a war crime under international law.[50] Thus, to suggest that § 821 allocated prosecution of conspiracy to military commissions — in other words, that it considered such an offense to be under the "law of war" — Judge Henderson had to look beyond international law to a new category: the "U.S. common law of war." The resort to this category would upend nearly seventy years of precedent interpreting the term "law of war" as referring to the branch of international law aiming to standardize the conduct of war among nations. The Supreme Court first interpreted the term "law of war" in 1942 in *Ex parte Quirin*,[51] examining the predecessor statute to § 821 — Article 15 of the Articles of War[52] — which used the same relevant language. The *Quirin* Court concluded that Article 15 conferred jurisdiction to try offenses "according to the rules and precepts of the law of nations, and more particularly the law of war."[53] Four years later, the *Yamashita*[54] Court confirmed the law of war's standing as a "branch of international law,"[55] consulting the Hague Conventions and the Geneva Conventions, the two predominant sources of the law of war at that time.[56] With these precedents established when drafting § 821, Congress likely was acutely focused on "law of war" as an international law concept.[57]

---

[50] The government conceded this point. Supplemental Brief for the United States, *supra* note 28, at 3. While Anglo-American criminal law recognizes conspiracy to commit an offense that the conspirators never carry out, in fact, most law-of-war scholars agree that the inchoate form of conspiracy does not exist in international law. Glazier, *supra* note 44, at 297. The London Charter of the International Military Tribunal at Nuremberg criminalized conspiracy to initiate a war of aggression but did not mention conspiracy to commit war crimes. *See id.* at 314. Finally, none of the later international criminal statutes — the four Geneva Conventions, the statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, or the Rome Statute of the International Criminal Court — provide a standalone offense of conspiracy to commit war crimes. *See id.* at 315.

[51] 317 U.S. 1 (1942).

[52] Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 619, 653.

[53] *Quirin*, 317 U.S. at 28.

[54] *In re* Yamashita, 327 U.S. 1 (1946).

[55] *Quirin*, 317 U.S. at 29.

[56] *Yamashita*, 327 U.S. at 14–16.

[57] *Cf. Hamdan I*, 548 U.S. 557, 601–02 (2006) (plurality opinion) (discussing the phrase in international terms); *id.* at 641 (Kennedy, J., concurring in part) (same). Even the Office of Legal Counsel's opinion supporting the Bush Administration's resort to military commissions interpreted § 821's phrase "law of war" to mean the international law of war. Memorandum from Patrick F.

The precedents cited in *Bahlul* do not persuasively suggest a contrary congressional intent that "law of war" may encompass the U.S. common law of war. The D.C. Circuit, and the government, invoked the *Hamdan I* plurality's mention that the "UCMJ conditions the President's use of military commissions on compliance . . . with the American common law of war" as well as on international law.[58] But the *Hamdan I* plurality's reference to "the American common law of war" intended such domestic precedents to be "an additional constraint on, not an alternative basis for," the jurisdiction of military commissions within § 821.[59] Also, even the domestic precedents the government cites as establishing such a "common law" do not advance its argument. These commissions often exercised dual jurisdiction over both law-of-war crimes and criminal offenses under martial law,[60] and so the commissions may not have considered the domestic substantive issues for law-of-war violations. The inconclusive nature of these early common law precedents makes it unlikely that Congress would incorporate them into § 821. Indeed, resort to mostly Civil War precedents as evidence of what the 1956 Congress that enacted § 821 would have understood "law of war" to mean is unpersuasive, given that the modern law of war did not emerge fully until after World War II.[61]

Second, the normative risks of such an interpretation provide further evidence that Congress did not intend to include domestic common law in the term "law of war" in § 821. Recognizing a U.S. common law of war would risk dismantling the notion of the "law of war" as a universally recognized subset of international law.[62] From its earliest conceptions, the development of international law envisioned nations "reciprocally conform[ing] to general rules" as a means to constrain violent state behavior.[63] The United Nations War Crimes Commission in 1949 definitively articulated the nature of a war crime

---

Philbin, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Legality of the Use of Military Commissions to Try Terrorists 5 (Nov. 6, 2001).

58 *Hamdan I*, 548 U.S. at 613.

59 *Al Bahlul*, 767 F.3d at 42 (Rogers, J., concurring in the judgment in part and dissenting); *see also* Peter Margulies, *Defining, Punishing, and Membership in the Community of Nations: Material Support and Conspiracy Charges in Military Commissions*, 36 FORDHAM INT'L L.J. 1, 5 (2013) ("US practice *informs* the development of international law without creating a distinctive body of law that supplants the law of nations.").

60 *See* Glazier, *supra* note 44, at 335–49. Historically, military commissions have possessed jurisdiction in three distinct circumstances: periods of martial law, occupied or regained enemy territory, and violations of the law of war. *Al Bahlul*, 767 F.3d at 34.

61 *See* Jonathan Hafetz, *Diminishing the Value of War Crimes Prosecutions: A View of the Guantánamo Military Commissions from the Perspective of International Criminal Law*, 2 CAMBRIDGE J. INT'L & COMP. L. 800, 819 (2013).

62 Glazier, *supra* note 44, at 299.

63 EMER DE VATTEL, THE LAW OF NATIONS 542 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758).

as "not a crime against the law or criminal code of any individual nation" but "of universal application."[64] That each country could prosecute enemy combatants under its own domestic law of war contravenes "the very reciprocal nature" of the international law of war binding all parties.[65] This would risk the balkanization of international law into various and possibly inconsistent domestic common laws of war,[66] dismantling the international law of war project that has aimed to universalize the conduct of war since at least 1949.

Additionally, Congress would have recognized that allowing prosecutions under a U.S. common law of war would put American servicemembers at risk of prosecution under an indeterminate foreign "common law of war."[67] The "unilateralist impulse" that undergirds the government's theory of a U.S. common law of war is yet "another manifestation of the United States's view that international law should not constrain its ability to wage a global armed conflict against al Qaeda."[68] This approach would pose serious risks for Americans. First, American military prosecutors, judges, and other legal actors could face foreign prosecution "for the war crime of denial of a fair trial" — an offense recognized under Common Article 3 of the 1949 Geneva Conventions and in the Rome Statute — for prosecuting crimes by military commission that are not recognized as war crimes.[69] Second, foreign adversaries could assert their own common law of war to try captured American personnel, with tremendous indeterminacy ex ante about what acts are prohibited.[70]

Therefore, interpreting "law of war" in § 821 to encompass a U.S. common law of war would defy seventy years of Supreme Court precedent and Congressional intent to further the stability and universality of the international law of war.

---

[64] 14 UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 15 (1949).

[65] Jens David Ohlin, *The American Obsession with the Concept of Support*, LIEBERCODE (Oct. 26, 2012, 12:28 PM), http://www.liebercode.org/2012_10_01_archive.html [http://perma.cc/2BFG-7RKL].

[66] Hafetz, *supra* note 61, at 807.

[67] *See* Glazier, *supra* note 44, at 299 ("If the United States can hold foreign personnel criminally accountable for violating 'national' laws of war, other nations can and will assert the same authority." (emphasis omitted)).

[68] Hafetz, *supra* note 61, at 808.

[69] Glazier, *supra* note 44, at 357–58 (noting that the Rome Statute has codified the offense of passing sentences without judgment by a regularly constituted court without affording all regular judicial guarantees — which likely includes ex post facto notice protections).

[70] *Id.* at 358–59. For example, Iran's "2,500 years of Persian history" and China's 4,000 years of military history records dating back to before Sun Tzu's *The Art of War* could be possible sources of these countries' domestic common laws of war. *Id.* at 359.