RECENT CASES

EX POST FACTO CLAUSE — GUANTÁNAMO PROSECUTIONS — D.C. CIRCUIT INTERPRETS MILITARY COMMISSIONS ACT OF 2006 TO BAR RETROACTIVE APPLICATION OF MATERIAL SUPPORT PROHIBITION. — *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012).

Since September 2001, the U.S. government has struggled to deal with captured individuals suspected of involvement in terrorism. The Bush Administration's approach — to hold detainees as unlawful combatants at Guantánamo Bay, Cuba, and prosecute limited numbers in military commissions — engendered intense public debate and judicial scrutiny.[1] However, attempts to prosecute suspected terrorists in military tribunals continue. Recently, in *Hamdan v. United States*[2] (*Hamdan II*), the D.C. Circuit set back efforts to prosecute terrorism suspects for crimes that occurred before 2006. In a unanimous opinion, the court held that the prohibition on material support for terrorism that was passed as part of the Military Commissions Act of 2006[3] (MCA) does not apply retroactively.[4] In doing so, it properly employed ex post facto doctrine to disallow retroactive application of the MCA's material support provision. Though *Hamdan II* could be read as a narrow statement on the correct understanding of the Ex Post Facto Clause, the court's opinion illustrates important separation of powers concerns particular to cases involving the MCA. The presence of such concerns suggests that *Hamdan II* will have significant implications for future detainee prosecutions.

In 1996, Yemeni citizen Salim Hamdan began working for al Qaeda.[5] After attending an al Qaeda training camp in Afghanistan, Hamdan became a driver transporting weapons and supplies for use by terrorist operatives.[6] Hamdan soon encountered Osama bin Laden and became bin Laden's personal driver and bodyguard, a position he held for about five years.[7] Hamdan was aware during this period that al Qaeda targeted Americans for terrorist strikes.[8] Hamdan continued

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[1] *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004).

[2] 696 F.3d 1238 (D.C. Cir. 2012).

[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] *Hamdan II*, 696 F.3d at 1241 (analyzing 10 U.S.C. § 950t(25) (Supp. V 2011); 10 U.S.C. § 950v(b)(25) (2006) (previous codification of same provision)).

[5] *Id.* at 1242.

[6] *Id.*

[7] *See id.* at 1242–43.

[8] *See* United States v. Hamdan, 801 F. Supp. 2d 1247, 1257 (U.S.C.M.C.R. 2011) (en banc).

to work for al Qaeda until November 2001, when he was captured in Afghanistan and turned over to U.S. authorities.[9]

Following his capture, Hamdan was taken to Guantánamo Bay, Cuba, held as an unlawful enemy combatant, and charged before a military commission with one count of conspiracy.[10] Hamdan challenged the legitimacy of his proceedings and in 2006, in *Hamdan v. Rumsfeld*[11] (*Hamdan I*), the Supreme Court found that Hamdan's prosecution violated Article 36 of the Uniform Code of Military Justice and other provisions.[12] Four Justices agreed that 10 U.S.C. § 821, a statute that authorized prosecutions of violations of the "law of war" before 2006, did not authorize Hamdan's prosecution.[13] In response to the Court's ruling in *Hamdan I*, Congress passed the 2006 MCA.[14] In addition to addressing the procedural flaws identified by the *Hamdan I* Court, Congress elaborated on the crimes triable by military commission.[15] While 10 U.S.C. § 821 provides only for prosecutions under the "law of war," without defining that term, the MCA enumerates a number of law-of-war crimes triable by military commission, including conspiracy, terrorism, and material support for terrorism.[16] The statute notes that these crimes are "declarative of existing law," and thus may apply to conduct that occurred before the statute's enactment.[17] Following enactment of the MCA, Hamdan was charged with and convicted of material support for terrorism.[18] Hamdan was credited for time served, transferred to Yemen in 2008, and then released in early 2009.[19]

Despite his release, Hamdan appealed his conviction to the en banc U.S. Court of Military Commission Review (the Commission).[20] In a per curiam opinion, the Commission unanimously affirmed Hamdan's conviction.[21] Rejecting Hamdan's argument that Congress lacked

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9 *Hamdan II*, 696 F.3d at 1243.

10 *Id.* The commission was formed under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C § 1541 note (2006)), as well as under 10 U.S.C. § 821, a longstanding statute that authorizes military prosecutions for violations of the "laws of war." *Hamdan II*, 696 F.3d at 1243.

11 548 U.S. 557 (2006).

12 *Id.* at 561.

13 *Id.* at 559.

14 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

15 *See Hamdan II*, 696 F.3d at 1243–44.

16 *See* 10 U.S.C. § 950v(b) (2006).

17 *Id.* § 950p(b).

18 *Hamdan II*, 696 F.3d at 1244; *see also* 10 U.S.C § 950v(b)(25).

19 *Hamdan II*, 696 F.3d at 1244.

20 *Id.*

21 United States v. Hamdan, 801 F. Supp. 2d 1247, 1254 (U.S.C.M.C.R. 2011) (en banc). Sitting on the Commission were Military Judges Brand, Conn, Hoffman, Sims, Gallagher, Perlak, and Orr.

authority under Article I of the Constitution to criminalize material support for terrorism,[22] the Commission first found that Congress's enumeration of the material support crime fell within its Article I authority to define and punish law-of-war violations.[23] The Commission held that Hamdan's actions were "well-recognized" law-of-war violations when he performed them,[24] meaning that Hamdan's conviction under the MCA did not violate the Constitution's Ex Post Facto Clause because 10 U.S.C. § 821 criminalized law-of-war violations before Hamdan joined al Qaeda.[25]

Hamdan exercised his right to appeal to the D.C. Circuit, and the D.C. Circuit reversed.[26] Judge Kavanaugh wrote for the panel,[27] which found that the MCA does not permit retroactive application of its material support prohibition and that material support was not otherwise criminalized from 1996 to 2001.[28] The court began by noting that *Sibron v. New York*,[29] which held that an individual's completion of a sentence does not moot a direct appeal of the relevant conviction,[30] rendered Hamdan's appeal not moot[31] because Hamdan had directly challenged his material support conviction.[32]

The court also explicitly declined to address whether Congress possesses authority under Article I of the Constitution to define material support as a war crime independent of international legal standards.[33] The court explained that such a determination was unnecessary because of the possible ex post facto concern raised by application of the material support prohibition to Hamdan's pre-2006 conduct.[34] According to the panel, retroactive application of a criminal statute by a

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[22] The Commission rejected the argument that Article I, Section 8, of the U.S. Constitution, which provides that Congress may "define and punish . . . Offenses against the Law of Nations," does not give Congress the power to define law of nations violations without reference to international law. *United States v. Hamdan*, 801 F. Supp. 2d at 1264.

[23] *Id.* at 1269–70.

[24] *Id.* at 1279.

[25] *See* 10 U.S.C. § 821 (2006) ("The provisions of this chapter . . . do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or *by the law of war* may be tried by military commissions . . . ." (emphasis added)).

[26] *Hamdan II*, 696 F.3d at 1241.

[27] Judge Kavanaugh was joined by Judge Sentelle except as to footnote 6 and by Judge Ginsburg except as to footnotes 3, 6, and 8.

[28] *Hamdan II*, 696 F.3d at 1241.

[29] 392 U.S. 40 (1968).

[30] *See id.* at 55–58.

[31] Though neither party in the case raised a mootness issue, the court considered mootness sua sponte because mootness is a jurisdictional issue. *Hamdan II*, 696 F.3d at 1244.

[32] *Id.* at 1244–45.

[33] *Id.* at 1246. Writing for himself only, Judge Kavanaugh explained that he believes Congress does have the power under Article I, Section 8, of the Constitution to define material support unilaterally as a war crime because Congress's war powers under that section are not explicitly limited by international law. *Id.* n.6.

[34] *Id.* at 1246–47.

military commission could raise "serious constitutional issues," given the Ex Post Facto Clause's prohibition on retroactive prosecution.[35] Thus, given the "tight causal link" between Congress's belief that the MCA did not codify new crimes and its belief that the MCA could apply retroactively, the court interpreted the MCA's material support provision to apply to Hamdan only if material support for terrorism "was already prohibited under existing U.S. law as a war crime" when Hamdan was employed by al Qaeda.[36] The question for the court was therefore whether 10 U.S.C. § 821 encompassed material support for terrorism.[37] After finding that the "law of war" referenced in § 821 is the international law of war,[38] the court concluded that the international law of war did not criminalize material support from 1996 to 2001.[39] Thus, the court vacated Hamdan's conviction.[40]

The D.C. Circuit's opinion in *Hamdan II* is a proper interpretation and application of Ex Post Facto Clause jurisprudence. Though the case may be understood narrowly as a remedial decision instructing the Commission on the proper use of nonretroactivity doctrine, the court's logic makes the most sense when understood in the context of the separation of powers and fairness concerns that animate the Ex Post Facto Clause. Read broadly, *Hamdan II* makes a significant statement about the permissibility of retroactive laws that target limited subgroups of individuals, and it may thus have important implications for future Guantánamo prosecutions.

The Ex Post Facto Clause serves multiple purposes: it alleviates culpability concerns by ensuring that individuals are given "fair warning" of the consequences of their actions,[41] and also serves as a restraint on "arbitrary and potentially vindictive" overextensions of legis-

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[35] *Id.* at 1247.

[36] *Id.* at 1247–48.

[37] *See id.* at 1248.

[38] *Id.* at 1248–49.

[39] *Id.* at 1249–53. Though the court noted that international law establishes some forms of terrorism as war crimes, the facts that no international treaties criminalized material support and that no international tribunals had found an individual guilty of material support for terrorism led the court to conclude that the international law of war did not contain a prohibition of material support for terrorism. *See id.* at 1250–51.

[40] *Id.* at 1253. Judge Ginsburg authored a concurring opinion in which he argued that the precedent prohibiting the court from dismissing Hamdan's appeal for mootness was misguided. *Id.* at 1253 (Ginsburg, J., concurring). Though there was a chance that Hamdan's conviction could have caused collateral consequences, that possibility, according to Judge Ginsburg, was very slim because Hamdan was in Yemen and was prohibited from entering the United States. *Id.* at 1255–56. Judge Ginsburg also rejected the argument that Hamdan could be exposed to an enhanced sentence if he were convicted of another crime in another country. *Id.* at 1256. Thus, Judge Ginsburg suggested, the law may have "strayed far" from the kind of situation on which the *Sibron* rule was originally premised. *Id.*

[41] *See* Weaver v. Graham, 450 U.S. 24, 28–29 (1981).

lative power.[42] By limiting Congress's reach to penal decisions with a prospective effect, the clause insulates the legislative and judicial branches and furthers the separation of powers.[43] These impulses have driven the development of the ex post facto test. The Supreme Court stated in 1798 in *Calder v. Bull*[44] that the clause prohibits Congress from making criminal "an action . . . done before the passing of the law, and which was innocent when done,"[45] and indicated in *Collins v. Youngblood*[46] that the clause prohibits legislatures from "retroactively alter[ing] the definition of crimes" where doing so would "disadvantage" the offender.[47] Retroactive application of new standards thus appears improper, even if the conduct at issue were criminalized when performed under another law with different legal standards.[48]

The Commission's treatment of this doctrine was inconsistent. The Commission cited *Collins*[49] and concluded, seemingly within the doctrinal boundaries, that the MCA's material support provision was a "codification of a pre-existing law-of-war violation," thus making retroactive application permissible.[50] For evidence supporting this conclusion, however, the Commission pointed to criminal doctrines in international law similar to material support, but which included more stringent requirements.[51] Concluding that there was no ex post facto

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[42] *Id.* at 29 (citing Malloy v. South Carolina, 237 U.S. 180, 183 (1915)); *see* J. Richard Broughton, *On Straddle Crimes and the Ex Post Facto Clauses*, 18 GEO. MASON L. REV. 719, 751 (2011) ("'[T]he subjecting of men to punishment for things which, when they were done, were breaches of no law' is among 'the favorite and most formidable instruments of tyranny.'" (quoting THE FEDERALIST NO. 84, at 472 (Alexander Hamilton) (George Stade ed., 2006))).

[43] *See Weaver*, 450 U.S. at 29 n.10. *But see* Corey Rayburn Yung, *The Disappearing Ex Post Facto Clause: From Substantive Bulwark to Procedural Nuisance*, 61 SYRACUSE L. REV. 447, 456–58 (2011) (noting that the Supreme Court has traditionally cited separation of powers as a rationale for the Ex Post Facto Clause, but also observing that this rationale has disappeared in recent sex offender cases).

[44] 3 U.S. (3 Dall.) 386 (1798).

[45] *Id.* at 390.

[46] 497 U.S. 37 (1990).

[47] *Id.* at 41, 43; *cf.* Broughton, *supra* note 42, at 746 ("[A] new criminal law is retrospective for ex post facto purposes if the government applies it to a person whose pre-enactment conduct is made the element of that new crime, as this would constitute a new legal consequence of the acts that pre-date the statute." (emphasis omitted)).

[48] *See Weaver*, 450 U.S. at 30 ("[A law] violates the [Ex Post Facto] Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.").

[49] *See* United States v. Hamdan, 801 F. Supp. 2d 1247, 1311 (U.S.C.M.C.R. 2011) (en banc).

[50] *Id.* at 1313.

[51] The international law crime cited by the Commission that comes closest to this standard is likely aiding and abetting liability. However, aiding and abetting in international criminal law requires that the defendant have purposefully (or, perhaps, knowingly) assisted in the commission of the offense in which he was allegedly complicit. *See* Rome Statute of the International Criminal Court art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90; Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT'L HUM. RTS. 304, 310 (2008) (discussing whether the Rome Statute's test is one of knowledge or purpose). Though the

issue, the Commission noted that the clause serves to "prevent punishment of an individual for acts which he or she reasonably believed to be lawful at the time of their commission"[52] and that "[i]t strains credibility to contend that the accused would not recognize the criminal nature of the acts alleged in the indictment."[53]

The D.C. Circuit's rebuke of the Commission could thus, in the first instance, be explained as a narrow application of ex post facto doctrine. Once one concludes that international law does not currently provide for a standard of liability fully analogous to material support, the prohibition on retroactive modification of criminal statutes seems to demand a ban on the retroactive application of the material support crime. Evidence that similar but narrower crimes existed in international law at the time the defendant acted is inapposite if the government did not prove each element of those crimes.[54]

The court's opinion in *Hamdan II* appears more significant, however, when one accounts for the structural values that undergird the Ex Post Facto Clause. By noting that the clause's primary purpose is to prevent punishment of conduct "reasonably believed to be lawful" when committed,[55] the Commission revealed a focus on the first of the clause's motivating factors: culpability. This focus may have led the Commission to ignore the substantive differences between the international law doctrines it cited and material support because Hamdan's conduct most likely met the elements of some international law crime in existence when he acted. But the particular circumstances of Hamdan's case do nothing to mitigate concerns about the impact of

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defendant may not be required to have known of the specific instance of the crime, he must have known or believed that his actions assisted the perpetration of the general type of crime that occurred. *See* Andrea Reggio, *Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for "Trading with the Enemy" of Mankind,* 5 INT'L CRIM. L. REV. 623, 635 (2005) (explaining that aiding and abetting liability in international criminal law requires "knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration *of the crime*" (emphasis added)). By contrast, under the MCA, a defendant is guilty of providing material support to terrorism when he "intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism." 10 U.S.C. § 950t(25)(a) (2006). The material support defendant need not have knowingly aided in the commission of a terrorist *act*; merely assisting a group the defendant knows to have at some point engaged in such acts is sufficient to ground a conviction. *Cf.* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2717 (2010) (interpreting a different, but analogous, material support provision). Thus, certain actions would ground a material support conviction but would not result in international criminal aiding and abetting liability.

52 *United States v. Hamdan*, 801 F. Supp. 2d at 1311 (internal quotation mark omitted).

53 *Id.*

54 *See Hamdan II*, 696 F.3d at 1251–52 ("To be sure, there is a strong argument that aiding and abetting a recognized international-law war crime such as terrorism is itself an international-law war crime. . . . But Hamdan was not charged with aiding and abetting terrorism or some other similar war crime. He was charged with material support for terrorism.").

55 *United States v. Hamdan*, 801 F. Supp. 2d at 1311 (internal quotation mark omitted).

the MCA on judicial power. The danger of encroachment on the judiciary that inures when Congress creates a retroactive criminal law is present regardless of whether the accused was guilty of some other crime. The D.C. Circuit's rejection of the Commission's approach in *Hamdan II* thus illustrates important separation of powers concerns that help limit retroactive lawmaking.[56]

Two factors unique to the MCA make the structural concerns posed by retroactive application of the material support provision particularly significant. First, the practice of codifying preexisting portions of the common law in statute, giving those provisions retroactive effect, and then declaring the statute devoid of ex post facto implications seems problematic from a separation of powers perspective, because retroactive codification in itself usurps an inherently judicial function: to render dispositive interpretations of preexisting laws.[57] By declaring specific criminal prohibitions to have been distilled from international law as it existed in the past, the MCA appears to be an attempt to influence judicial Ex Post Facto Clause decisionmaking on a sensitive issue.[58] The Commission's statement that Congress's nonretroactivity conclusions are not "due absolute deference"[59] (indicating, perhaps, that they are due some deference) suggests that the MCA may already have had such an influence.[60]

Second, Congress appears to have designed the MCA specifically to facilitate convictions of Hamdan and other Guantánamo detainees. The MCA was passed less than a year after Hamdan's high-profile acquittal in the Supreme Court, it was specifically intended to cure the

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[56] Though there is no definitive proof that the court deliberately focused on the separation of powers, the decision does have at least one structural feature that is consistent with such an approach. The court's decision to reinterpret the MCA, which was based on the possibility of "serious constitutional issues," *see Hamdan II*, 696 F.3d at 1247, came before the court's conclusion that international law did not encompass the elements of material support, *id.* at 1248–53. This structure suggests that the court found something constitutionally troubling about the Commission's approach apart from the Commission's analysis of international law.

[57] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *cf.* Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature?: When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 841–42 (2009) (arguing that certain legislative attempts to control the judicial process of statutory interpretation contravene separation of powers principles).

[58] Courts have expressed analogous concerns about congressional attempts to retroactively "clarify" the meaning of statutes. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227 (1995) ("Having achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was." (emphasis omitted)).

[59] *United States v. Hamdan*, 801 F. Supp. 2d at 1279.

[60] Though congressional attempts to provide retroactive guidance on the meaning of laws may not be undesirable in all cases, the fact that international law is not the product of Congress and is extremely politicized may have made congressional influence in this case particularly problematic.

defects the Court identified in that case,[61] and its retroactive provisions were applicable, at most, to a small handful of individuals.[62] The Ex Post Facto Clause's history demonstrates that the clause has evolved to limit Congress's reaching into the past to target specific individuals.[63] Moral culpability issues aside, this sort of targeting has the potential to undermine judicial efficacy and has encountered judicial scrutiny in other contexts.[64] As Justice Powell explained in *INS v. Chadha*,[65] the separation of powers "reflect[s] the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power."[66] Though the MCA was not true trial by legislature, its functional effect is sufficiently similar to make its retroactive provisions a cause for concern.[67]

Given that the D.C. Circuit will hear cases on the permissibility of other retroactive applications of the MCA,[68] the court's analysis in *Hamdan II* will prove significant. In future cases where it is genuinely unclear whether the MCA prohibition at issue previously existed in international law, the structural concerns that *Hamdan II* represents may justify additional applications of the constitutional avoidance principle. Regardless of the case's immediate impact, however, the larger message of *Hamdan II* is clear: congressional authority to create antiterrorism statutes is bounded by the same separation of powers and fairness norms that constrain all legislative actions.

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[61] The House committee report that accompanied the MCA specifically criticized the Supreme Court's decision in *Hamdan I* as "ignor[ing] decades of [the Court's] own precedents." H.R. REP. NO. 109-664, pt. 2, at 4 (2006) (Conf. Rep.).

[62] In October 2006, the month Congress passed the MCA, the United States held 433 individuals as detainees at Guantánamo Bay. *The Guantánamo Docket: A History of the Detainee Population*, N.Y. TIMES, http://projects.nytimes.com/guantanamo (last updated Dec. 11, 2012).

[63] *See* Harold J. Krent, *Should* Bouie *Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 89 (1997) (arguing that the Ex Post Facto Clause serves to "prevent[] legislators from enacting prospective legislation to punish particular individuals for past conduct").

[64] *See, e.g.*, United States v. Brown, 381 U.S. 437, 438, 440 (1965) (finding unconstitutional as a bill of attainder a statute criminalizing service by a Communist Party member in a labor union).

[65] 462 U.S. 919 (1983).

[66] *Id.* at 962 (Powell, J., concurring in the judgment).

[67] The legislative encroachment and targeting evident in *Hamdan II* may also lend support to arguments that legislatures have comparatively poor institutional competence to address retroactive criminality (even when constitutionally permissible), *see* Dan M. Kahan, *Some Realism About Retroactive Criminal Lawmaking*, 3 ROGER WILLIAMS U. L. REV. 95, 115–16 (1997), and that criminal law more generally is structurally vulnerable to separation of powers abuses, *see* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 994–95 (2006).

[68] The D.C. Circuit has already decided one such case. Ali Hamza al Bahlul, whose retroactive conviction under the MCA of conspiracy to commit terrorism was upheld by the Military Commission, *see* United States v. Al Bahlul, 820 F. Supp. 2d 1141 (U.S.C.M.C.R. 2011), appealed to the D.C. Circuit after *Hamdan II*. The court subsequently issued a per curiam order vacating al Bahlul's conviction. *See* Al Bahlul v. United States, No. 11-1324, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013) (per curiam).