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Lawyers Appeal Guantánamo Trial Convictions

by Jacob G. Hornberger

Last Tuesday, a little-known court — the Court of Military Commissions Review — convened to hear appeals in the cases of the only two men sentenced in the military commission trial system established by Congress in 2006, after the first version, conceived by Vice President [Dick Cheney](#) and his close advisors in November 2001, was ruled illegal by the U.S. Supreme Court.

The two men in question — Salim Hamdan and Ali Hamza al-Bahlul — were tried and convicted in 2008, but whereas Hamdan, a driver for Osama bin Laden, had the major charge against him (conspiracy) [dismissed by a military jury](#) in August 2008, and was [sentenced to serve just six months](#) for providing material support to terrorism, al-Bahlul, who made a video promoting al-Qaeda and is regularly described as al-Qaeda’s “media secretary,” was [convicted](#) of conspiracy, solicitation of murder, and providing material support to terrorism, and received a life sentence in November 2008.

Under consideration are two specific questions: firstly, whether providing material support to terrorism is a valid basis for conviction in a war crimes court; and, secondly, whether al-Bahlul’s trial was unfair because he was denied the right to represent himself.

On the first point, lawyers have always maintained that providing material support to terrorism is not a valid war crime. In an email exchange last week, Lt. Col. David Frakt, who represented al-Bahlul before his trial, explained, “It has always been my position that material support to terrorism was a fabricated war crime that was not traditionally triable in a military commission as of the time of Mr. al-Bahlul and Mr. Hamdan’s affiliation with al-Qaeda, but rather was illegally retroactively applied to them several years after the fact.”

As Lt. Col. Frakt also mentioned, the problems with the material-support charges had been advanced by Hamdan’s attorneys in a pre-trial motion to dismiss the charge back in February 2008, when they also attempted to dismiss the conspiracy charge for the same reason. On July 16, the judge in Hamdan’s case, Army Capt. Keith Allred, rejected the motion to dismiss on ex post facto grounds, finding that “conspiracy and material support for terrorism have traditionally been

considered violations of the law of war,” as [Human Rights First](#) explained in a summary of Hamdan’s case.

However, as Lt. Col. Frakt described it, Allred indicated that it was “a very close issue. Although he acknowledged that the crime of material support to terrorism had never been the subject of charges in a military commission before, he reasoned that similar conduct, essentially being part of an armed insurgent group committing war crimes against civilians, had been treated as a war crime in the past, such as during the U.S. Civil War. He argued that Congress was merely providing a new name to conduct that had always been treated as a law of war offense triable by military commission.”

Significantly, Lt. Col. Frakt added, “What Captain Allred ignored is that what Mr. Hamdan was charged with was essentially serving as a personal driver and servant to Osama bin Laden and there was no indication of involvement in any war crimes, against civilians or otherwise.”

Even more significantly, when the Obama administration and Congress revived the Commissions last summer, David Kris, a senior Justice Department official in the National Security Division, testified that the Justice Department had concluded that material support to terrorism was not a traditional war crime and should be removed from the new version of the Military Commissions Act. As Kris explained ([PDF](#)):

While this is a very important offense in our counterterrorism prosecutions in Federal Court ... there are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the rules of war ... our experts believe that there is a significant risk that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense, thereby reversing hard-won convictions and leading to questions about the system’s legitimacy.

As Lt. Col. Frakt explained to me, despite Kris’ concerns, “Congress rejected this sound advice and included material support to terrorism in the revised 2009 MCA, possibly in part because [I advised Congress](#) when I testified that if they removed this crime from statute there would be very few detainees left to prosecute.”

Noticeably, Kris was more enthusiastic about retaining the conspiracy charge, but as I explained in [an article in November](#), “this, too, is fraught with problems. In *Hamdan v. Rumsfeld*, the case in which the Supreme Court shut down the Commissions’ first incarnation, Justice John Paul Stevens, in an opinion in which he was joined by three other justices, made a point of mentioning that ‘conspiracy’ has not traditionally been considered a war crime.”

In Hamdan’s case, a successful appeal on the material support charge would have little practical effect, as he is [already a free man](#) (although Charles Schmitz, who served as his

interpreter during proceedings at Guantánamo, told the [Wall Street Journal](#) that it was “important to him to clear the conviction,” because “In Yemen, they look at him as a criminal. He’s been tainted.”).

To be honest, a successful appeal on the material support charge would mean little to al-Bahlul either, although, it would, of course, fulfill the Justice Department’s own fears about including it in the new legislation, especially as the Obama administration has [already announced](#) its intention of using it against several prisoners currently held at Guantánamo.

It remains to be seen, of course, whether material support and/or conspiracy survive an appeal, but in court last week, lawyers for al-Bahlul pushed both points. As the *Wall Street Journal* described it, Michel Paradis, representing al-Bahlul, argued that the charges on which al-Bahlul was convicted “weren't traditionally considered war crimes under international law, and thus Congress in 2006 couldn't retroactively make them so. International law strongly discourages viewing conspiracy as a war crime. Providing material support for terrorism, while a domestic U.S. crime since the 1990s, has never been considered a war crime.”

Ingeniously, the lawyers also argued that al-Bahlul’s production of propaganda material for al-Qaeda should have been protected by the First Amendment of the U.S. Constitution, guaranteeing freedom of speech. One of his attorneys, Mike Berrigan, [told reporters](#), “Mr. al-Bahlul's conduct in making this documentary — his prosecution for that conduct — was a violation of the U.S. First Amendment. Not that Mr. al-Bahlul had particular First Amendment rights, but the constitutional restrictions on the U.S. government prosecuting someone for speech made the prosecution itself illegal. Mr. al-Bahlul's conduct in making that documentary does not come close to the standard of inciting violence that can be criminalized.”

The prosecution disagreed, of course, and Navy Capt. Edward White, who argued for the government at the appeal, stated, “Our position was that, as an enemy combatant waging war against the United States from abroad, he does not have First Amendment rights. He crossed the line into criminally, soliciting other people — inducing, enticing, encouraging, persuading them — to commit war crimes.”

Beyond all these claims, however, the most disturbing aspect of al-Bahlul’s conviction is the nature of his trial, and what Lt. Col. Frakt described to me as his “best hope” is that the Court of Military Commission Review will recognize that the one-sided trial, in which he refused to mount a defense, was fundamentally unfair — or, as Lt. Col. Frakt put it, the judge’s “denial of his right to self-representation essentially denied him of a fair trial because the judge knew that he would not allow me to represent him.”

This was indeed what happened. Al-Bahlul sought strenuously to represent himself, but although his request was granted by Army Col. Peter Brownback, his first judge in the revived Commissions, Brownback was then [involuntarily retired](#) from the Army, and the new judge, Air Force Col. Ronald Gregory, revoked al-Bahlul's pro se status (his right to represent himself).

As [I explained at the time](#), after Maj. Frakt (as he was at the time) announced that al-Bahlul was boycotting the trial, because he wished to represent himself, and did not wish to be represented by a military lawyer, Frakt then asked to be relieved, noting that he was obliged to respect his client's wishes. When Col. Gregory refused, he declared that he too was unable to participate. "I will be joining Mr. al-Bahlul's boycott of the proceedings," he said, "standing mute at the table." He then refused to answer any further questions from Col. Gregory, even though the judge attempted to argue that he was "obliged to participate," before conceding that it was not in his power to force him to do so. As Lt. Col. Frakt described it to me last week, Col. Gregory's actions "ensured there would be no defense at all in the final military commission trial of the Bush era."

Lt. Col. Frakt also explained that, although appeals are automatic in the Commissions unless waived in writing, the only reason that al-Bahlul failed to waive his right to appeal in writing was because he "refused to accept any papers from his lawyers or the court." As Frakt described it, "Mr. al-Bahlul made it plain to me that he did not wish to appeal any conviction and he categorically refused to meet with his appointed appellate counsel to discuss any possible grounds for appeal."

Lt. Col. Frakt was full of praise for the lawyers attempting to defend al-Bahlul, even though they "were hampered by the fact that I did not preserve any issues for appeal (other than the self-representation issue) because I did not speak during the entire trial." He noted that they "managed to find a way to raise a number of interesting and important issues that strike at the core of the legitimacy of the military commissions," but in the end, what is most noticeable about al-Bahlul's case is how he remains in a position of extraordinary isolation at Guantánamo.

Not only is he imprisoned, alone, to serve out his life sentence, but as Lt. Col. Frakt explained, "it remains a mystery what will happen to Mr. al-Bahlul. Although he is serving a life sentence, [under current U.S. law](#), he can't be transferred out of Guantánamo to a prison on the mainland because detainees can only be transferred to the U.S. to face trial."

Unless he is to stay in Guantánamo, as the prison slowly empties around him, until, perhaps, he is the only prisoner left, it seems, as Lt. Col. Frakt also explained, that "special legislation will be required" to enable him to leave Guantánamo, even if it is just to resume his life sentence elsewhere.

Lost in the system, essentially, Ali Hamza al-Bahlul is another example of the way in which justice at Guantánamo never progressed much beyond an ad hoc system full of holes, and, whatever the outcome of these appeals, it should give the Obama administration some salutary reminders as to why the commissions remain an unsuitable system for any kind of credible trial.

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