[Oral Argument Has Not Been Rescheduled]
No. 11-1324

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALI HAMZA AHMAD SULIMAN AL BAHLUL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR REVIEW FROM THE UNITED STATES COURT
OF MILITARY COMMISSION REVIEW

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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INTRODUCTION AND SUMMARY OF ARGUMENT

On October 25, 2012, this Court entered an order directing the parties to file briefs addressing the effect of the Court's decision in Hamdan v. United States, 696 F.3d 1238 (D.C. Cir. 2012) ("Hamdan II"), on the instant case. This brief sets forth the government's position that Hamdan II requires reversal of Bahlul's convictions by military commission of providing material support for terrorism, conspiracy to commit war crimes, and solicitation to commit war crimes. Because the Court is bound by Hamdan II, the government respectfully submits that it would be appropriate for the court to dispense with holding oral argument and proceed (once supplemental briefing has been completed) to issue its decision. In order to preserve the government's arguments for further review, this brief also sets forth the government's position that the legal rationale of Hamdan II is incorrect and that Bahlul's convictions are consistent with the Constitution and applicable law.

ARGUMENT

I. Hamdan II Requires That Bahlul's Convictions for Material Support, Conspiracy, and Solicitation Be Reversed.

In Hamdan II, the Court construed the Military Commissions Act of 2006, 10 U.S.C. § 948a *et seq*. ("2006 MCA"), "not to authorize *retroactive* prosecution

of crimes that were not prohibited as war crimes triable by military commission under U.S. law at the time the conduct occurred." 696 F.3d at 1241. The Court determined that, for conduct predating the enactment of the 2006 MCA, the relevant statute, 10 U.S.C. § 821 (Article 21 of the Uniform Code of Military Justice), provided that military commissions may try violations of the "law of war," a phrase that the Court found to refer exclusively to the international law of war. 696 F.3d at 1241. Because, in the Court's view, the international law of war did not proscribe material support for terrorism as a war crime at the time of Hamdan's offense, the Court reversed his conviction of that offense. Id.

In this case, Bahlul, like Hamdan, was convicted of providing material support for terrorism for conduct predating the 2006 MCA. While for the reasons explained below, the government disagrees with the Court's reasoning in Hamdan II, that case "is law of the circuit whether or not [it] is correct . . . and binds [this panel] unless and until overturned . . . by Higher Authority." Save Our Cumberland Mountains, Inc. v . Hodel, 826 F.2d 43, 55 (D.C. Cir. 1987) (R. B. Ginsburg, J., concurring) (internal quotation marks omitted), vacated in part, 857 F.2d 1516 (D.C. Cir. 1988) (en banc). This Court is therefore bound by the panel's decision in Hamdan II to reverse Bahlul's conviction for material support for terrorism.

Although the Hamdan II Court did not address whether the inchoate conspiracy and solicitation counts on which Bahlul was also convicted constituted violations of the international law of war, the government acknowledged in its opening brief that neither conspiracy nor solicitation has attained international recognition at this time as an offense under customary international law. See Gov't Br. 50. In view of that acknowledgment, and given the decision in Hamdan II that, for conduct predating the enactment of the 2006 MCA, only violations of the international law of war and pre-existing statutory offenses, such as spying and aiding the enemy, are subject to trial by military commission, this Court must reverse Bahlul's conspiracy and solicitation convictions.

II. The Legal Rationale in Hamdan II Is Incorrect.

In the 2006 MCA, Congress codified offenses that it determined had traditionally been recognized as violations of the law of war that may lawfully be tried by military commissions, and it expressly stated that persons subject to trial under the 2006 MCA may be tried for these offenses for conduct committed before the 2006 MCA was enacted. The conclusion of the Hamdan II panel that Congress did not intend to authorize military commissions to try and punish pre-2006 conduct unless it constituted a clearly-recognized violation of international law cannot be squared with the plain language of the 2006 MCA and Congress's stated

purpose in enacting it. Even assuming it were necessary to look beyond the terms of the 2006 MCA to the terms of Article 21 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 821, the panel also erred in construing Article 21 as limiting the jurisdiction of military commissions to pre-2006 offenses that were clearly recognized as international law war crimes. First, Article 21 does not by its terms restrict the jurisdiction of military commissions, but rather functions as a savings statute to ensure that Congress's extension of court-martial jurisdiction did not deprive military commissions of jurisdiction over offenders or offenses that were by statute or by the law of war triable by military commission. In addition, the context and legislative history of Article 21's predecessor make clear that it was originally enacted to preserve the jurisdiction that U.S. military commissions had traditionally exercised, which clearly included offenses like conspiracy that, while not established as offenses under customary international law, were recognized as war crimes under domestic law and practice. Finally, Congress reaffirmed that construction of Article 21 by expressly enacting a provision to render Article 21 inapplicable to military commissions conducted under the 2006 MCA. For these reasons, the government believes that the rationale of Hamdan II is incorrect and that the military commission plainly had jurisdiction under the

2006 MCA to try and punish Bahlul for conspiracy, solicitation, and providing material support for terrorism.

A. The 2006 MCA

Since the founding of this Nation, the United States has used military commissions to try captured enemy belligerents for offenses against the law of war. See Ex parte Quirin, 317 U.S. 1, 26-27, 42 n.14 (1942). Congress has at times codified specific offenses as violations of the law of war subject to trial by military commission, but U.S. military commissions have in general exercised jurisdiction over violations of the law of war that have been traditionally recognized as such under the "system of common law applied by military tribunals." Id. at 30. In the 2006 MCA, Congress elected to codify a number of offenses that our Nation has traditionally recognized as war crimes triable by military commission. Those offenses include the war crimes for which Bahlul was convicted: conspiracy to commit war crimes (including attacking civilians and terrorism), solicitation of others to commit war crimes, and providing material support for terrorism. 10 U.S.C. § 950v(b)(28) (2006) (conspiracy); id. § 950u (solicitation); id. § 950v(b)(25)(A) (material support for terrorism).

In enacting those offenses, Congress explicitly found that it was *not* creating new crimes but rather codifying offenses that had long been recognized as war

crimes that were traditionally subject to trial by military commission:

> The provisions of [the 2006 MCA] codify offenses that have traditionally been triable by military commissions. [The 2006 MCA] does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.

10 U.S.C. § 950p(a) (2006). Congress also expressly authorized prosecution of offenses codified in the 2006 MCA for conduct committed before its enactment:

> Because the provisions of [the 2006 MCA] (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

Id. § 950p(b); see also id. § 948d(a) (providing that military commissions have jurisdiction over offenses committed "before, on, or after September 11, 2001"). Thus, Congress in the 2006 MCA specifically recognized and ratified this Nation's traditional use of military commissions to try conspiracy, solicitation, and material support for terrorism offenses, and it expressed its view, with unmistakable clarity, that jurisdiction over such offenses based on conduct committed prior to 2006 is appropriate and consistent with ex post facto principles.

Congress reaffirmed that clear purpose in its most recent action in this area. In 2009, Congress amended the MCA, Pub. L. No. 111-84, div. A, tit. XVIII, 123 Stat. 2574, and adopted without change the 2006 MCA's definitions of conspiracy, solicitation, and material support offenses. See 10 U.S.C. § 950t(25), (29), (30)

(2009). Congress also reaffirmed that "[b]ecause the provisions of this subchapter codify offenses that have traditionally been triable under the law of war *or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of the enactment of this subchapter*." 10 U.S.C. § 950p(d) (2009) (emphasis added); see also id. § 948d (authorizing military commission jurisdiction "whether [the] offense was committed before, on, or after September 11, 2001").

B. Hamdan II and Article 21 of the UCMJ

In Hamdan II, the Court considered whether the 2006 MCA authorized Hamdan's military commission to try him for the offense of providing material support for terrorism based on conduct committed before the 2006 MCA's enactment. In addressing that question, the Court recognized that Congress had affirmatively provided for such jurisdiction and that Congress had stated that the 2006 MCA "codified no new crimes and thus posed no ex post facto problem." 696 F.3d at 1247. But, the Court asked, what if Congress were mistaken in that premise, and it had codified a crime, such as material support for terrorism, that was *not* in fact previously recognized as a war crime triable by military commission? Id. The Court held that, in such circumstances, "Congress would *not* have wanted *new* crimes to be applied retroactively," because retroactive

application of such crimes would raise "serious questions of unconstitutionality" under the Ex Post Facto Clause. Id. at 1248. Accordingly, in order to "avoid the prospect of an Ex Post Facto Clause violation," the Court "interpret[ed] the [2006 MCA] so that it does not authorize *retroactive* prosecution for conduct committed before enactment of that Act unless the conduct was already prohibited under existing U.S. law as a war crime triable by military commission." Id.

To determine whether Hamdan's conduct was previously prohibited as a war crime, the Hamdan II court looked to Article 21 of the UCMJ, codified at 10 U.S.C. § 821. Article 21 provides that the extension of court-martial jurisdiction in the UCMJ "do[es] 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." The Hamdan II Court then construed Article 21's reference to "the law of war" as encompassing only offenses that are recognized as war crimes under international law. 696 F.3d at 1248-49. The Hamdan II Court recognized that some forms of terrorism – including the intentional targeting of civilian populations – are well established as international law war crimes, and that "there is a strong argument that aiding and abetting" such conduct would also constitute a violation of the international law of war. Id. at 1249-51. Moreover, in a concurring footnote, Judge Kavanaugh concluded that Congress could

prospectively punish material support for terrorism, because "Congress has long prohibited war crimes beyond those specified by international law." Id. at 1246 n.6. However, the Court concluded that the 2006 MCA did not authorize retroactive jurisdiction over material support for terrorism, because that offense was not recognized as an international law war crime within the meaning of Article 21. Id. at 1249-51.

C. Hamdan II Misconstrued the 2006 MCA and Article 21

In holding that the 2006 MCA does not reach pre-2006 conduct that was not clearly established as an international-law war crime, the Hamdan II Court interpreted the 2006 MCA in a manner directly opposite to its plain text, which, as noted above, explicitly provides jurisdiction over those offenses even when the conduct pre-dates the Act. The reading adopted by Hamdan II also contravenes Congress's stated purpose, which was to provide jurisdiction for pre-2006 conduct that was traditionally triable by military commission. Certainly Congress was well aware in 2006 that among the principal candidates for military commission prosecutions were detainees at Guantanamo Bay, or others detained in the ongoing conflict with al Qaeda and associated forces, whose offenses had occurred before 2006. See, e.g., 152 Cong. Rec. H7936 (daily ed. Sept. 29, 2006) (statement of Rep. Hunter).

The Hamdan II Court adopted its reading of the 2006 MCA in order to avoid what it saw as a serious ex post facto issue. However, as set forth in the government's principal brief, the 2006 MCA's provision of military commission jurisdiction over Bahlul's conduct does not implicate the Ex Post Facto Clause, because military commissions have throughout our Nation's history tried and punished such conduct as war crimes. See Gov't Br. 67-68. As explained below, for instance, there is ample historical support for Congress's conclusion that the offense of conspiracy has been traditionally triable by military commission. See pp. 15-19, infra.

The Hamdan II panel likewise erred in the second step of its analysis – its reliance on Article 21 of the UCMJ. Article 21 provides that "[t]he provisions of [the UCMJ] conferring jurisdiction upon courts-martial 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." 10 U.S.C. § 821 (2000). That language on its face does not limit military commissions' jurisdiction, but rather preserves jurisdiction that the commissions already possessed.

The context of Article 21's enactment further clarifies its function as preserving rather than limiting the preexisting jurisdiction of military commissions.

The predecessor of Article 21 (Article 15 of the Articles of War), which contained materially identical language, was enacted during World War I together with other Articles of War in which Congress extended the jurisdiction of courts-martial to offenders and offenses that had traditionally fallen within the jurisdiction of military commissions. See Madsen v. Kinsella, 343 U.S. 341, 349-55 (1952). The purpose of Article 15 was accordingly to make clear that the Articles of War did not limit or restrict the jurisdiction that military commissions had traditionally exercised. See id. at 354 (noting that Article 15 "preserve[s] . . . traditional jurisdiction [of military commissions] over enemy combatants unimpaired by the Articles" and Congress thereby "gave sanction, as we held in Ex parte Quirin, to any use of the military commission contemplated by the common law of war").

The history and purpose of Article 21 also make clear that its reference to the "law of war" encompasses offenses that were traditionally tried by U.S. military commissions regardless of whether those offenses were clearly-established war crimes under the international law of armed conflict. The main proponent of Article 15, whose testimony the Supreme Court has recognized as authoritative,[1] testified to Congress that the purpose of the article was to preserve and codify the

[1] See Madsen, 343 U.S. at 353; Hamdan v. Rumsfeld, 548 U.S. 557, 617 (2006).

full extent of the jurisdiction that U.S. military commissions had traditionally exercised. See Revision of the Articles of War, Hearing Before the Subcomm. on Military Affairs, appended to S. Rep. No. 64-130, at 40 (1916) (statement of Brigadier General Enoch Crowder, Judge Advocate General of the Army, explaining that the article's purpose was to "save[] to those war courts the jurisdiction they now have"). General Crowder's statement and the authorities he submitted in support demonstrate that the scope of military commissions' jurisdiction over violations of the "law of war" was determined by the offenses that U.S. military commissions had historically recognized; many of the major international conventions, the decisions of international tribunals, and other modern sources of the international law of war were not available to General Crowder and the Congress that enacted the predecessor to Article 21 in 1916. See also William Winthrop, Military Law and Precedents 839 (1886) ("Winthrop") (recognizing that "offences in violation of the laws and usages of war, [consisted of] those principally, *in the experience of our wars*, made the subject of charges and trial") (emphasis added);[2] see also John Fabian Witt, Lincoln's Code: The

[2] General Crowder's authoritative statement on the purpose of Article 21's predecessor relied on Winthrop's treatise to explain the scope of military commission jurisdiction that the article was intended to preserve. See S. Rep. No. 64-130, at 40.

Laws of War in American History 323, 345 (2012) (explaining that the law and practice of the U.S. Civil War-era military commissions served as a key source and catalyst for the subsequent development of the international law of war). Thus, the "law of war" as used in Article 21's predecessor was derived, at least in large part, from traditional American practice rather than exclusively from international conventions and other sources of international law of war relied on by Hamdan II.

To be sure, as the Hamdan II panel observed, the courts and other authorities have often stated that the "law of war," including specifically the reference in Article 21, generally refers to the international law of war. See Hamdan II, 696 F.3d at 1248-49 & n.9. However, the relevant judicial precedents do not establish that international law is the *exclusive* source of the law of war for purposes of the jurisdiction of U.S. military commissions. Indeed, Justice Stevens's plurality opinion in Hamdan v. Rumsfeld referred to the need for military commissions to comply with, *inter alia*, "the *American* common law of war" and used this term as distinct from "the rules and precepts of the law of nations." Hamdan v. Rumsfeld, 548 U.S. 557, 613 (2006) ("Hamdan I") (emphasis added). The proposition that military commission jurisdiction is invariably limited to war crimes recognized under international law is ahistorical, given the many U.S. precedents involving crimes like conspiracy, spying, and aiding the enemy, which have not attained

international recognition as offenses under customary international law. In Quirin, the Court specifically referred to the spy as an offender "against the law of war," 317 U.S. at 31, even though spying has never been understood to constitute a violation of the international law of war, and the Court did not hold that spying was an acceptable offense solely because it had been codified in statute. See Gov't Br. 29-31. Notably, neither the Quirin Court nor the plurality in Hamdan I limited their analysis of the validity of military commission offenses to an examination of international sources, nor did they focus their inquiry on an assessment of customary international law. Rather, they dedicated most of their discussion to the extensive U.S. military commission precedents. See Quirin, 317 U.S. at 31-34, 42 n.14; Hamdan I, 548 U.S. at 603-09; see also Gov't Br. 27-31.

Finally, Congress's recent amendment of Article 21 reinforces the statute's function as preserving, rather than limiting, the jurisdiction that U.S. military commissions have traditionally exercised. As part of the legislation that enacted the 2006 MCA, Congress amended Article 21 to provide that "[t]his section does not apply to a military commission established under [the MCA]." See Pub. L. No. 109-366, § 4(a)(2), 120 Stat. 2631 (2006). This provision was likely a response to the Supreme Court's decision in Hamdan I, in which the plurality referred to Article 21 as defining jurisdictional limitations on military commissions in the

absence of any other express congressional authorization. 548 U.S. at 593. That amendment, which the Hamdan II Court did not address, makes clear that Congress did not intend for Article 21 to be interpreted as imposing limits on the jurisdiction of a military commission, such as Bahlul's, that was established under the 2006 MCA.

For all of these reasons, the Hamdan II Court erred in concluding that Article 21 did not permit jurisdiction over offenses, like the offenses charged here, that have not attained international recognition at this time as violations of customary international law but have been traditionally tried by military commission as violations of the "law of war" within the meaning of that Article.

III. Bahlul's Convictions for Material Support, Conspiracy, and Solicitation Are Consistent with the Constitution and Applicable Law.

The Hamdan II Court did not reach the question whether Congress could, consistent with the Ex Post Facto Clause, try and punish by military commission material support offenses committed prior to 2006, nor did it address that question as to conspiracy or solicitation. However, it is clear, as set forth in the government's principal brief, that military commission jurisdiction over Bahlul's offenses was permissible because such conduct has been tried by this Nation's military commissions since at least the Civil War.

That traditional practice is especially clear regarding conspiracy. Although conspiracy to commit a war crime has not attained international recognition at this time as an offense under customary international law, U.S. military commissions have tried defendants for conspiracy to commit war crimes throughout this Nation's history. Indeed, several of the most prominent examples of military commission prosecutions in American history involved conspiracy charges, including military commission charges against conspirators involved in the assassination of President Lincoln, see Hamdan I, 548 U.S. at 699 (Thomas, J., dissenting); against the Nazi saboteurs in Quirin, see 317 U.S. at 22-23; and against another Nazi saboteur whose convictions were subsequently upheld, see Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956). See also Winthrop at 839 & n.5 (listing conspiracy offenses prosecuted by military commissions); Charles Roscoe Howland, Digest of Opinions of the Judge Advocates General of the Army 1071 (1912) (noting that conspiracy "to violate the laws of war by destroying life or property in aid of the enemy" was an offense against the law of war that was "punished by military commissions" throughout the Civil War); Memorandum of Law from Tom C. Clark, Assistant Att'y Gen., to Major Gen. Myron C. Kramer, Judge Advocate Gen., concerning conspiracies to commit an offense against the laws of war (Mar. 12, 1945) (on file with the National Archives, St. Louis) (filed

with the Court pursuant to Fed. R. App. P. 28(j), see 11-1324 Docket entry (Aug. 24, 2012)) (concluding that "it is well established that a conspiracy to commit an offense against the laws of war is itself an offense cognizable by a commission administering military justice"). Our Nation's long-standing practice establishes that conspiracy is an offense that is properly triable by military commission and that there is no ex post facto violation in the 2006 MCA's codification of that traditionally recognized offense. See generally Hamdan I, 548 U.S. at 697-704 (Thomas, J., dissenting).

The Hamdan II Court rejected the government's reliance on certain Civil War precedents concerning the offense of material support for terrorism, concluding that those precedents, regardless of their implications for the history of military commissions in the United States, fail to establish that material support for terrorism was an international-law war crime. 696 F.3d at 1252. But the Court additionally expressed skepticism about whether those precedents demonstrated that material support for terrorism has been historically subject to trial by military commission in the United States. Id. The latter skepticism cannot reasonably be extended to the conspiracy offense committed by Bahlul. In particular, quoting the plurality decision in Hamdan I, the Hamdan II Court observed that Civil War-era cases were of "limited" precedential value because some Civil War military

commissions functioned, in part, as military government tribunals trying both war crimes and ordinary crimes in a certain territory, rather than as purely law-of-war courts. 696 F.3d at 1252 (citing Hamdan I, 548 U.S. at 596 n.27 (plurality opinion)). Thus, the Hamdan II Court maintained, it was impossible to discern whether a material support offense prosecuted before a military tribunal was tried as a common-law crime subject to the jurisdiction of a martial-law court, or as a war crime falling within the jurisdiction of a military commission.

That contention does not undermine the weight of the precedents establishing that conspiracy has traditionally been triable in U.S. military commissions. First, the World War II-era military commission conspiracy prosecutions in Quirin and Colepaugh were clearly law-of-war rather than martial-law tribunals, because they were held in the United States where the civilian courts were open and functioning normally. The same is true for the Civil War-era conspiracy prosecutions of, for example, G. St. Leger Grenfel (conducted in Cincinnati) and William Murphy (held in St. Louis). See 1 Gov't Supp. Authorities 61, 75. In addition, the nature of the allegations in many of these conspiracy cases makes clear that the defendant was tried for conspiring to violate the law of war rather than a civil offense. See Gov't Br. 41 (discussing, e.g., Captain Henry Wirz, convicted of conspiring, in violation of the law of war, to

impair the lives of prisoners of war; William Murphy, convicted of conspiring, in violation of the law of war, to destroy steamboats; and G. St. Leger Grenfel, convicted of conspiring, in violation of the law of war, to lay waste to and destroy Chicago). Finally, still other conspiracy cases make clear from the face of the caption or the allegations that the charges alleged violations of the law of war. See Winthrop at 842.

Relying on the Hamdan I plurality, Bahlul argues that these precedents are inapplicable because, while he was charged with an "inchoate" conspiracy only, the historical precedents charged conspiracy together with a completed substantive offense. See Pet. Supp. Br. 11; Pet. Br. 19-21; see also Hamdan I, 548 U.S. at 608-11. However, the fact that conspiracy charges were sometimes, but not always, accompanied by allegations of completed offenses does not establish that a completed offense is *required* to sustain the conspiracy charge, and neither Bahlul nor the Hamdan I plurality pointed to any authority establishing such a requirement. We are aware of no principle of law providing that a criminal charge is valid only when coupled with another charge but not when standing alone.

Finally, courts should afford deference to the determination by two Congresses and two Presidents, in the 2006 and 2009 Acts, that conspiracy to commit war crimes is an offense that has been traditionally subjected to military

commission jurisdiction. See, e.g., Rostker v. Goldberg, 453 U.S. 57, 70 (1981) ("judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies . . . is challenged"); see also Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2727 (2010) (courts should defer to inferences drawn by Congress and the President implicating sensitive and weighty national security interests); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (action by President pursuant to act of Congress entitled to judicial deference); Quirin, 317 U.S. at 25 (wartime decisions involving military commissions "are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution"). Moreover, the legislative history makes clear that Congress carefully considered the status of inchoate conspiracy as an offense separately punishable by military commission, and it specifically found, with reference to the competing opinions in Hamdan I, that conspiracy was such an offense. See H.R. Rep. No. 109-664, Pt. 1, at 25 (2005) ("In Hamdan, the Supreme Court left open the question as to whether conspiracy to commit a war crime itself constituted a substantive offense. For the reasons stated in Justice Thomas's opinion, the Committee views conspiracy as a separate offense punishable by military commissions.").

In short, particularly with respect to conspiracy, it is plain that Congress authorized the military commission here to try Bahlul for this offense, and in light of the extensive historical precedents for prosecuting conspiracy in military commissions, it is equally plain that this authorization was consistent with the Constitution and applicable law. But because the Hamdan II Court construes the 2006 MCA and Article 21 to require that an offense have attained the status of an international-law war crime at the time of the charged conduct, regardless of whether the offense has been traditionally triable by military commission in the United States, Hamdan II requires this Court to reverse Bahlul's conviction for conspiracy as well as his convictions for material support for terrorism and solicitation.

CONCLUSION

Because it is bound by Hamdan II, the Court should enter judgment vacating Bahlul's convictions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), and with this Court's Order dated October 25, 2012, because:

this brief contains 22 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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DATED: January 9, 2013

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CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number 11-1324

I hereby certify that I electronically filed the foregoing Supplemental Brief for the United States with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on January 9, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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