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Kevin's most recent posts (here and here) continue to demonstrate his seriousness and salutary concern for defendants' rights; the same is true for Steve. However, Kevin and Steve's posts don't undermine Former Government Officials and Military Lawyers' amicus brief asking the *en banc* D.C. Circuit to uphold the military commission conviction of former bin Laden aide Ali Hamza al Bahlul.

Kevin and Steve and I disagree about the definition of "charges" in military commissions and transnational tribunals. Kevin and Steve take a categorical approach, viewing the label attached to the charge as a threshold issue. If the charge is murder as a crime against humanity in the course of an armed conflict (an undisputed war crime), the prosecution can then advance a theory of responsibility based on Joint Criminal Enterprise (JCE), with some latitude in pleading under cases like the ICTY's *Prosecutor v. Kvočka*. However, if the charge is conspiracy, the prosecution is fatally flawed, since conspiracy as an inchoate offense is not a war crime.

In contrast, the jurisprudence of the Define and Punish Clause, which authorizes Congress to "define and punish . . . Offenses against the Law of Nations," permits a functional approach to charges in military commissions. (See my analysis, pages 76-87.) The Framers were wary of the formalism of the categorical turn. Madison, for example, commented in Federalist No. 37 on the difficulty of "delineating the several objects and limits of different codes of laws… [including] common law… [and] maritime law." Those "perfectly accurate… delineations," Madison chided, might be found in science, but not in law's "course of practice." In *Ex parte Quirin*, the Court echoed Madison, warning against hamstringing Congress with an unduly "meticulous" demarcation of the law of nations' "ultimate boundaries." The functional approach hedges against this risk.

Under a functional approach, a charge such as conspiracy can be tried in a U.S. tribunal if its application in a given case tracks the *elements* of a form of responsibility that can be adjudicated under international law. While agreement alone would be insufficient under this functional test, intentional participation in a common plan that results in a completed war crime (such as the murder of civilians) would pass muster. In that case, the tribunal is adjudicating conduct that constitutes a violation of international law. On this functional view, any combination of formal charges and listed overt acts is appropriate if it provides adequate notice to a defendant that his conduct matches the elements of a form of responsibility for a war crime.

Justice Stevens' plurality opinion in *Hamdan I* on conspiracy is entirely consistent with this approach. Justice Stevens, responding to the government's argument in that case that military commissions had jurisdiction to try the inchoate offense of conspiracy, noted the importance of "the completion of an offense" in explaining the Court's upholding the military commission convictions of the Nazi saboteurs in *Ex Parte Quirin*. Other examples of conspiracy from U.S. tribunals, including the trial of the Lincoln conspirators, also dovetail with the functional approach, as does the *Justice (Alstoetter)* case at Nuremberg cited by the ICTY in *Brdanin*. In the Nuremberg *Justice* case, the tribunal rejected conspiracy as an inchoate offense, but stated, albeit in dicta, that jurisdiction would be appropriate for allegations of "participation in the formulation and execution of plans to commit war crimes . . . which actually involved the commission of such crimes."

Taking a functional view of al Bahlul case, it's not enough to look merely at the charge sheet, which lists conspiracy, material support, and solicitation. It's also necessary to look at the list of overt acts in the charging document. In al Bahlul's case, a number of overt acts, including the *bayat* administered by the defendant to Atta and al Jarrah, were linked to the completed war crimes of the 9/11 attacks.

From the start of the trial, the prosecution treated the overt acts related to 9/11 as separate charges. The prosecution's opening statement began with a reference to al Bahlul's letter to Ramzi bin al Shibh describing the defendant's gratitude to God for the opportunity to play a "simple and indirect role" in the 9/11 attacks. Later in the opening statement, the prosecution weaved together al Bahlul's rooming with Atta and al Jarrah, his giving them the *bayat*, and his role in preparation of their martyr wills. The defendant, who had earlier made statements to the court acknowledging his role in the *bayat* and in conduct related to the martyr wills, did not object. (In a recent post, David Frakt, who was assigned as al Bahlul's defense counsel, says that, *contra amici*'s brief, al Bahlul was not representing himself at this stage of the proceedings, but was merely making "spontaneous comments" to the court. However, David said at paragraph 8 in an earlier request for clemency for al Bahlul that the defendant was clearly "acting as his own counsel" when he addressed the court.)

After the opening statement, the prosecution followed up with testimony from FBI agent Ali Soufan on interviews in which the defendant made identical acknowledgments of his role. The defense did not cross-examine Agent Soufan. In other words, the defendant's tactics during the trial reveal that he was intimately familiar with both the 9/11-related charges and the evidence supporting them, all of which stemmed from his own letters and interviews with the FBI. Although the judge erroneously instructed the members of the commission that a conspiracy charge in a law of war commission doesn't require a completed act (my answer to Steve's Question Number 1), the members of the commission cured this error with their specific finding that al Bahlul had administered the *bayat* to Atta and al Jarrah. This finding completed the steps that the functional approach requires.

Kevin derides the list of overt acts as "oblique" references to completed war crimes. Steve also insists that determining the charge in a military commission requires that we look at the charge sheet in isolation, without the context (and notice to the defendant) offered by the list of overt acts in the charging document. However, neither Kevin nor Steve explains why U.S. military commissions must comply with the categorical approach. (Steve's Question Number 2 is based on an incomplete assumption because it does not consider the totality of the charging document, including the list of overt acts.)

Moving on to Kevin and Steve's other arguments: Kevin also disagrees with *amici*'s assessment of the actual notice provided to al Bahlul. However, he provides no evidence from the record to support his view. Instead, he asserts that a rational defendant with notice would not act this way. But, as discussed in my last post, rationality entails matching goals with means. Al Bahlul's goals entailed celebration of Al Qaeda's impact and his own role as bin Laden's former aide. His statements to the court served that purpose, including his avowal at page 167 of the transcript that, "What I did and I will do… is to kill Americans." That statement is not evidence on the charges' merits, but it buttresses my account of al Bahlul's motivations at trial and the notice he received.

Kevin and Steve are also on shaky ground with their claim that the government's dropping of the term "enterprise" from the charges undercuts *amici*'s argument. Kevin and Steve are correct that the government dropped the generic charge that al Bahlul "join[ed] al Qaeda, an enterprise of persons who shared a common criminal purpose" and that the judge so instructed the members of the commission. However, Kevin and Steve are off-base on the import of these steps.

The government dropped the language after a judge in Salim Hamdan's case (see June 1, 2008 ruling AE211) rejected the enterprise concept from the Racketeering Influenced and Corrupt Organizations Act (RICO), *not* from JCE. The ruling stemmed from defense counsel's concern that the government would cut corners in proving the elements of conspiracy (including the overt act requirement) by showing merely that a defendant joined an enterprise such as Al Qaeda. This is clear in the defense motion to exclude enterprise liability in the Canadian Omar Khadr's case, where the defense notes at Exhibit H (p. 4 n. 2) that the RICO "enterprise" concept was "simply unknown to common law." Dropping the language had everything to do with fear of RICO, the new federal law enforcement juggernaut. The judges in these cases didn't even mention JCE.

Amici rely, not on the generic "enterprise" charge, but on the specific overt acted listed in the charging document: Al Bahlul's giving the *bayat* to Atta and al Jarrah. That conduct, which Kevin concedes would constitute participation in a JCE, was specifically found by the members of the commission.

Kevin's remaining points are even more readily countered. While Kevin says that the Military Commissions Act of 2006 (MCA) provides no basis for charging conspiracy as a form of responsibility for a completed war crime, multiple bases for such charges appear in the statute. For example, 10 U.S.C. 950q provides for aiding and abetting liability, which the ICTY in *Prosecutor v. Milutinovic* relied on in part to find that Article 7(1) of the ICTY statute implicitly authorized JCE. Section 948d provided for "jurisdiction to try any offense made punishable by this chapter or the law of war." Moreover, the MCA's own conspiracy charge, section 950v(28), contemplates charging a common plan that results in a completed war crime, since it authorizes prosecutors to seek the death penalty "if death results to one or more of the victims" of the conspiracy. Section (b) of 10 U.S.C. section 881, the UCMJ's provision on conspiracy, contains the same wording. It would be odd indeed if Congress provided greater prosecutorial leeway in courts martial for members of the U.S. armed forces than it did in military commissions for suspected terrorists. (That's my answer to Steve's Question Number 3.)

Finally, there's the matter of Justice Stevens' footnote 32 in *Hamdan I*, where Kevin's argument is really not with me, but with Justice Stevens. Stevens, in the course of critiquing Justice Thomas's argument about alternative charges that would have supported jurisdiction (such as aiding the enemy) cites several examples in explaining that those charges were also not triable in military commissions. Kevin may feel that the examples are just idle embellishment, but Stevens was never fond of rhetorical filigree. These examples evidently mattered to Justice Stevens, even if they happen to undercut Kevin's argument.

Although Kevin contends that Stevens' examples in footnote 32 were dicta, Justice Kennedy in *Hamdan I* did Kevin one better. Justice Kennedy stated in his concurrence that Justice Stevens' entire plurality opinion on conspiracy was dicta, and declined to join it. Kennedy was right that the principal focus in *Hamdan I* was the separation of powers, which the Court viewed as threatened by President Bush's unilateral establishment of military commissions.

Building on this separation of powers theme, Justice Kennedy suggested that in a future commissions case the Court would be more likely to defer to Congress. In a nod to Justice Harlan, Justice Kennedy expressed the view that, "Congress, not the Court, is the branch in the better position to undertake the 'sensitive task of establishing a principle not inconsistent with the national interest or international justice.'" Indeed, Justice Stevens' plurality opinion on conspiracy expressly reserved questions on the jurisdiction of military commissions established pursuant to Congress's authority to "define and punish… Offenses against the Law of Nations." In the MCA, Congress authorized the commission that convicted al Bahlul.

The functional approach preserves the separation of powers, because it extends some (although not unlimited) deference to Congress's exercise of power under the Define and Punish Clause. Upholding al Bahlul's conviction is consistent with that measure of deference.

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