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The *Al Bahlul* Argument: Article III, Conspiracy, and Precepts of International Law

By Peter Margulies    Thursday, October 23, 2014, 9:33 AM

Some may wish that *Ex Parte Quirin*, the Supreme Court's case upholding the military commission convictions of Nazi saboteurs would recede into history. However, as Steve has noted, the oral argument in the D.C. Circuit Wednesday in *Al Bahlul v. United States* suggested that *Quirin* is very much alive. The D.C. Circuit decided in an *en banc* decision in July that the Ex Post Facto Clause did not bar the conviction for inchoate conspiracy of Ali Hamza al Bahlul, a former bin Laden aide whose acts the D.C. Circuit found "directly relate" to the 9/11 attacks. Wednesday's argument centered on whether commission jurisdiction over al Bahlul's case violated Article III of the Constitution. In typically thoughtful questioning, Judge David Tatel asked whether military commission jurisdiction in al Bahlul's case was consistent with "strong dicta" in *Quirin* that ties commission jurisdiction to the "rules and precepts of the law of nations" (p. 28). The best answer is that this passage and others in *Quirin*, when read in context, favor the government's view that charges that are "cognizable" in commissions (again quoting *Quirin*) include two categories of charges: 1) those expressly authorized by international law (such as the murder of civilians), and, 2) those domestic law charges related to armed conflict that international law permits states to try in commissions.

The opinion in *Quirin* by Chief Justice Harlan Fiske Stone referred to the term "precepts" interchangeably with the term, "usage." Merriam-Webster defines a "precept" as a "general rule of action" – an established practice. Merriam-Webster's definition of usage echoes its definition of precept: a usage is a "firmly established and generally accepted practice or procedure." Just as Chief Justice Stone referred on p. 28 to the "precepts of the law of nations" as a guide, he referred to "usage" in a similar fashion at footnote 9 of his opinion. That note asserts that "the law and usage of nations" supported military commission jurisdiction over British Major John Andre's spying during the Revolutionary War. Spying is not an international war crime, although international custom has long permitted states to designate military commissions as the forum for adjudicating charges of wartime espionage. Precepts of the law of nations, backed up by the state practice that informs customary international law, thus include the two categories of charges outlined above: 1) international war crimes, and, 2) violations of domestic law such as wartime espionage that states have adjudicated in military commissions. This more flexible conception of the "law and usage of nations" pervades Chief Justice Stone's opinion. *Quirin*'s footnote 15 cited a piece by U.S. military law historian Edmund Morgan. Morgan's piece (p. 108) in turn cited a resolution passed by the Continental Congress in 1776 that authorized military tribunals to try suspected spies according to the "law and usage of nations." William Winthrop, the preeminent U.S. law of war scholar whose work was also cited in *Quirin*, cited both spying and trading with the enemy as acts that could be tried by military commissions pursuant to "the laws and usages of war." Importantly, trading with the enemy, like spying, is not an international war crime. However, as explained in the amicus brief Jim Schoettler and I filed for scholars and former JAGs and national security officials, Winthrop clearly viewed adjudication of spying by military commissions as consistent with the "laws and usages of war." This course of practice demonstrates that military commission adjudication of domestic law charges related to belligerency in armed conflict is, in Chief Justice Stone's words, "cognizable" in military commissions. In *Quirin*, Chief Justice Stone gave short shrift to the Nazi saboteurs' Article III arguments. The Chief Justice cited the pre-constitutional pedigree of military commissions in finding that military commissions on the conduct of belligerents in an armed conflict are not even "trials" within the meaning of Article III. The Court's landmark decision in *Ex Parte Milligan* dovetails with *Quirin*. *Milligan* vacated a commission conviction because it found that Lambdin Milligan, a longtime resident of Indiana, was located far from the locus of hostilities in the Civil War and was not a participant in that bloody conflict. The same cannot be said for al Bahlul, who, as the *en banc* D.C. Circuit observed, was found to have committed overt acts that "directly relate" to the 9/11 attacks. Indeed, that finding supplies an independent basis for commission jurisdiction in al Bahlul's case. As Judge Janice Rogers Brown noted in her concurring opinion in the *en banc* decision, James Madison suggested in Federalist No. 42 that Congress was entitled to deference in defining and providing for the punishment of violations of the law of nations. Congress's authorization of military commissions to adjudicate charges that "directly relate" to the 9/11 attacks is surely worthy of that deference.

Finally, the Supreme Court's decision in *Hamdan v. Rumsfeld* also supports Congress's power to designate military commissions as a forum for adjudication of conduct by belligerents during an armed conflict. Nothing in Justice Stevens' opinion suggests that Article III would bar commission proceedings that Congress could authorize under Article I, at least when the Ex Post Facto Clause was not in play (as it isn't in al Bahlul after July's *en banc* decision). Justice Stevens' plurality opinion on conspiracy in *Hamdan* expressly reserved questions of Congress's power. Indeed, Justice Stevens' central theme in *Hamdan* was the protection of Congress's power from executive encroachment. Justice Kennedy, who did not join Stevens' plurality opinion on conspiracy, wrote a concurrence in *Hamdan* that highlighted the centrality of Congress's role. He wrote that "Congress may choose to provide further guidance" on crimes triable in commissions. And Kennedy observed 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.'" Congress accepted Kennedy's invitation when it enacted the Military Commissions Act of 2006. Justice Kennedy's invitation would have been an empty gesture if he believed Congress's power was narrowly circumscribed by Article III. Al Bahlul argued Wednesday for just such a rigid reading. As Justice Kennedy suggested in *Hamdan* and the precepts of nations confirm, deference to Congress's judgment is the better course.
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