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Peter Margulies
Roger Williams University School of Law

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In *Al-Bahlul,* the *en banc* D.C. Circuit resolved some quite important issues regarding military commissions, but declined to address other no less important ones. Among other things, the full court opted to remand the question of Congress's Article I power to make inchoate conspiracy an offense triable by commission. When a three-judge panel once more takes up the Guantanamo detainee's appeal, Judge Janice Rogers Brown's subtle and incisive concurring opinion—which discusses that very issue at length—should be on the front burner. Unlike the majority, Judge Brown chose to evaluate an argument raised by al-Bahlul, regarding Congress's Article I power to "define and punish… Offences against the Law of Nations." (Full disclosure: Judge Brown cites my paper, which informed the amicus brief Jim Schoettler and I filed for national security law profs and former officials and military lawyers.) In evaluating al-Bahlul's conviction for conspiracy, Judge Brown makes a cogent argument that a congressional determination regarding an offense's status is worthy of deference, because the Framers devised the Define and Punish Clause to give Congress the opportunity to "interpret and define international law in a more flexible way that serves the country's self-interest, but still remains compatible with international norms." Both domestic and international law, Judge Brown writes, support providing Congress with a measure of deference. Judge Brown notes that one should read the Define and Punish Clause in tandem with other provisions of the Constitution that exhibit wariness about foreign influence. The Foreign Gifts Clause was drafted to minimize that risk, which the Framers feared in part because of extravagant gifts to Ben Franklin by the King of France. Hamilton, in Federalist No. 66, defended the Treaty Clause on similar grounds, arguing that the requirement of a 2/3 vote in the Senate would preclude domination by a cabal of legislators serving as "mercenary instruments of foreign corruption." As Judge Brown wisely observes, it would be incongruous to regard the Framers as precluding Congress from avoiding this risk of foreign influence as it defined offenses against the law of nations. Congress's role is especially important because of what Judge Brown calls the "protean quality" of international law. In Federalist No. 37, Madison stressed the difficulty in "delineating the several objects and limits of different codes of laws." That challenge is nowhere more apparent than in international law, where some scholars sense faint glimmers of an emerging rule at breakfast and proclaim a peremptory norm at lunch. A body like Congress, that is both deliberative and representative (or so the Framers hoped), is surely the appropriate forum for deciding how to define and punish violations of international law. Congress's status as the voice of the people situates it well to reconcile fealty to international law norms with basic concerns of U.S. self-interest. The political branches, acting together, traditionally have been given great deference in matters touching on foreign affairs. Courts, in contrast, are not entrusted with such constitutional responsibilities. Deference to the legislature is the most prudent path for courts in this context.

As Judge Brown points out, Justice Story acknowledged the importance of deference to Congress in *United States v. Smith* (1820). Congress, Justice Story opined, was the most appropriate branch to decide on the manner of defining and punishing piracy on the high seas. Judge Brown echoes Justice Story's insight, asserting that the "range and fluidity of international law, the distinctive needs of each nation-state, and dangers of faction to a system that relies on myriad sources… of nation-state opinion and practice" counsel granting Congress a "zone of deference" in exercising its power under the Define and Punish Clause. Cases like *United States v. Arjona* (1887) likewise illustrate this tendency, as Judge Brown explains. In *Arjona*, the Supreme Court upheld a federal statute prohibiting international counterfeiting based on the Define and Punish Clause. No clear international norm barred counterfeiting. However, the Court reasoned that Congress had acted because counterfeiters, like pirates, are global free riders whose greed threatens to undermine the global public good of "wise and equitable commercial laws." In exercising its constitutional authority within this zone of deference, Judge Brown asserts, Congress could designate inchoate conspiracy as a charge triable in military commissions. That charge, in al-Bahlul's case, clearly has a nexus with acknowledged law of war offenses, such as the murder of civilians. As at least two of the opinions in the case note, members of the military commission specifically found that al-Bahlul played a role in events that contributed to the 9/11 attack. Moreover, al-Bahlul did so with the express purpose of murdering U.S. civilians. Evidence for that proposition included a letter by al Bahlul that he acknowledged at trial, and FBI interviews that he never disavowed. Whatever worries some see in prosecuting inchoate conspiracy in law of war courts, those worries are not present here. A narrower view of Congress's power would impose what Judge Brown aptly describes as a "one-sided rigidity" that ill serves the Framers' intent. International law does not require a rigid view of Congress's power to define offenses. Because international law depends on the good will of states, the principle of complementarity affords states a measure of deference. (In cases like *Handyside v. United Kingdom*, the European Court of Human Rights, no mindless acolyte of state sovereignty, calls this a "margin of appreciation.") Deference under international law should also extend, one can argue, to reasonable decisions by states in coping with the challenge of transnational terrorism. As Judge Brown concedes, Congress's power has limits under both domestic and international law. Some offenses clearly have no nexus with international law violations. But in this 9/11-related case, conspiracy to murder civilians surely qualifies. When there are colorable arguments for Congress's approach to military commission jurisdiction, judicial deference is the wisest course. Judge Brown's unpacking of the rationale for deference is sound guidance for future proceedings in this long-running case.

Topics: Terrorism Trials & Investigations, Terrorism Trials: Military Commissions

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Peter Margulies is a professor at Roger Williams University School of Law, where he teaches Immigration Law, National Security Law and Professional Responsibility. He is the author of Law's Detour: Justice Displaced in the Bush Administration (New York: NYU Press, 2010).