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Newsroom: Margulies Cited on Military Commissions 11-04-2016

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Newsroom

November 4, 2016

Margulies Cited on Military Commissions

Professor Peter Margulies' scholarship and advocacy were recently cited by the en banc D.C. Circuit in a cutting-edge decision on military commissions.

By Professor Peter S. Margulies



My scholarship and advocacy were recently cited by the *en banc* D.C. Circuit in an important decision on military commissions, *Bahlul v. United States*, 2016 U.S. App. Lexis 18852 (Oct. 20, 2016) (upholding the conspiracy conviction of a former aide to Osama bin Laden who played a supporting role in preparations for 9/11); see decision [here](#). The full court voted 6-3 to uphold the conviction; my work played a significant part in the decision.

Judge Patricia Millett and Judge Robert Wilkins, recent additions to the court, issued concurrences citing my work, which argued that Congress was entitled to a measure of discretion in establishing military commissions to address plots by Al Qaeda operatives subsequently captured abroad by U.S. forces. See *Bahlul*, 2016 U.S. App. Lexis 18852, at 96 (Millett, J. concurring) (citing my piece, *Defining, Punishing, and Membership in the Community of Nations: Charging Material Support and Conspiracy in Military Commissions*, 36 *Fordham Int'l L.J.* 1 (2013), available [here](#)); *id.* at 117, 125 (Wilkins, J., concurring) (citing *amicus curiae* brief in which I served as co-counsel for Former Government Officials, Former Military Lawyers, and Scholars of National Security Law, including Philip Zelikow, former Executive Director of the 9/11 Commission and Counselor to the U.S. Secretary of State). The government's victory hinged on the support of at least one of these two D.C. Circuit judges.

Moreover, two other D.C. Circuit judges have cited my work in the course of this important case. In the latest *en banc* decision, Judge Karen LeCraft Henderson joined another opinion upholding Bahlul's conviction. Judge Henderson also filed a concurrence, *id.* at 4-5, that incorporated her earlier *dissent* to

the panel decision that the full court just vacated. In that earlier dissent, Judge Henderson cited my Fordham International Law Journal piece. See *Bahlul v. United States*, 792 F.3d 1, 44, 47 (2015). Finally, in an earlier *en banc* decision rejecting *another* challenge (this one claiming a violation of the Constitution's Ex Post Facto Clause) to Bahlul's conviction, Judge Janice Rogers Brown cited my piece in her concurrence. See *Bahlul v. United States*, 767 F.3d 1, 59, 62 (2014).

All told, I've been co-counsel on three *amicus* briefs in this case, and written three articles and two book chapters about military commissions, including the recent treatise published by Aspen, *National Security Law: Principles and Policy* (Aspen; co-authored with Geoff Corn, Jimmy Gurule, and Eric Jensen). I've also posted regularly about the case and debated other national scholars on the influential Lawfare and Just Security blogs; see my analysis of the new D.C. Circuit *en banc* decision [here](#). The case may end up in the U.S. Supreme Court; I feel privileged to have played a role in the development of the law in this important area and look forward to future opportunities to contribute to the law's evolution.