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7-16-2014

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Recommended Citation

Peter Margulies, Al Bahlul and Article III: A Reply to Marty and Steve, Lawfare (July 16, 2014, 4:00 PM), <https://www.lawfareblog.com/al-bahlul-and-article-iii-reply-marty-and-steve>

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Al Bahlul and Article III: A Reply to Marty and Steve

By Peter Margulies Wednesday, July 16, 2014, 4:00 PM

Marty and Steve's post on *al Bahlul* (and Steve's post here) is right that the D.C. Circuit's decision should not be read as a green light for inchoate conspiracy charges in military commissions. However, Marty and Steve go off course in magnifying the modest issues remanded to the panel in *al Bahlul*, particularly the impact of Article III on military commissions. In the context of this case, neither of these issues is as complex as the *Ex Post Facto* Clause question that the en banc D.C. Circuit decided.

First, a point of clear agreement between Marty, Steve, and me: Nothing in the decision opens the floodgates on inchoate conspiracy charges for pre-Military Commissions Act (MCA) conduct. The limited holding in the case, which upholds the conspiracy charge in *al Bahlul*'s case only because it did not constitute "plain error," is hardly a ringing endorsement.

After this common ground, however, Marty and Steve go astray with an unjustifiably broad view of Article III restrictions on military commissions. Marty and Steve are of course right that Article III imposes constraints. However, their argument goes far beyond the leading precedents on this question, *Ex Parte Milligan* and *Ex Parte Quirin*.

Marty and Steve's sweeping Article III argument, which owes much to Steve's important article on military justice, categorizes military commissions as an "exception" to Article III's requirement that independent federal courts conduct criminal trials governed by federal law. In *Ex Parte Quirin*, Chief Justice Stone explained that military commissions aren't an "exception" to Article III. Rather (p. 39), they simply "are not courts in the sense of the Judiciary Article." Military commissions, which the Framers were clearly familiar with because of General Washington's use of a military commission to try British Maj. John Andre during the Revolutionary War, are a necessary incident of war. A state conducting an armed conflict with another party must have a means to hold its adversaries accountable for violations of the law of armed conflict. The military commission serves that purpose; it's not a court in the Article III sense, and couldn't be, given what Chief Justice Stone described as its usual functioning under "conditions precluding resort to such procedures."

Article III limits on commissions stem from the test the Court adopted in *Milligan* and interpreted in *Quirin*: to avoid impairing the right to a jury trial under Article III (and the right to a grand jury under the Fifth Amendment), the Constitution only permits commissions when, 1) courts are not open, or, 2) the defendant is a belligerent in an armed conflict. The *Milligan* Court found that Lambdin Milligan was not a belligerent, despite his attempted subversion of the lawful government of Indiana during the Civil War. In contrast, the *Quirin* Court found that the defendants in that case were belligerents who had disembarked on the East Coast of the U.S. during World War II on orders of the Nazi High Command and shed their uniforms to enable acts of sabotage.

When courts are not open, military commissions function as a source of law and order, as they did during war-torn Missouri during the Civil War. Nothing in *Milligan* questioned the legality of the Missouri commissions. Indeed, the *al Bahlul* majority unduly discounts the commissions' lawful role. The majority opinion (p. 46) reports that one commission convicted a defendant, Henry Willing, for the vague transgression of being a "bad and dangerous man." The majority doesn't share the main charges against Willing, whom members of the commission found had conspired successfully to destroy portions of a railroad used by Union troops. Without a commission to hold him accountable, Willing would have continued his work with impunity.

Quirin explains that while the dysfunction of civilian courts is one basis for the convening of military commissions, it is not the only one. Even when courts are open, *Quirin* held, military commissions are still appropriate for the trial of belligerents in the conflict, such as the Nazi saboteurs convicted in that case. A finding that a defendant is a belligerent is a sufficient assurance that the convening of the commission is not subject to Article III's requirements.

Al Bahlul was clearly a belligerent in the noninternational armed conflict between the U.S. and Al Qaeda. Evidence at his military commission trial includes a letter *al Bahlul* wrote acknowledging his "role" in the 9/11 attacks, and his interviews to the same effect with FBI agent Ali Soufan (whose excellent work Marty and Steve don't acknowledge, relegating Soufan to the ranks of unnamed "Guantanamo interrogators").

While Marty and Steve don't directly address the question of Congress's power to convene military commissions under Article I, the best answer is that courts should provide Congress with a measure of deference, as Judge Janice Rogers Brown explained in her concurrence (see my post). That deference is not unlimited. At the very least, inchoate conspiracy charges should entail some nexus to an acknowledged war crime, such as the murder of civilians. Congress surely had the power to establish a commission to try *al Bahlul*'s conduct, which entailed intentional participation in a common plan resulting in a completed war crime (the 9/11 attacks).

In sum, Marty and Steve are right about future cases. However, they exaggerate the difficulty of issues facing the panel that will hear remaining issues in *al Bahlul*'s appeal. Reading *Milligan* and *Quirin* together should ease the panel's task.

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