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## And the Congress Shall Have Power To...: The Implications of the D.C. Circuit Court's Per Curiam Decision in *Bahlul v. United States*

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AND THE CONGRESS SHALL HAVE POWER TO . . . : THE  
IMPLICATIONS OF THE  
D.C. CIRCUIT COURT'S PER CURIAM DECISION IN *BAHLUL V.*  
*UNITED STATES*

*Clarke D. Cotton*\*

I. INTRODUCTION

Today, Amagansett, New York is an attractive East Hampton neighborhood.<sup>1</sup> A get-away for the rich and powerful, there are typically more vacationers than residents in the town at any given time.<sup>2</sup> Among the many mansions that populate Amagansett is a historic Coast Guard station that sits just off Atlantic Avenue beach.<sup>3</sup> In 1966 the station was moved to a private residence to protect and preserve its features.<sup>4</sup> In 2007, the station was moved back to its original spot off Atlantic Avenue beach and, now, is protected as a historical landmark.<sup>5</sup> This is the station that Coast Guardsman John C. Cullen sprinted to in 1942 to warn of a most extraordinary finding: a group of Nazis had landed on American soil with explosives in hand, they were here to do our country harm.<sup>6</sup>

Thirty-five miles outside of Berlin, Germany, laid a camp in which eight Nazi soldiers were trained in the use of explosives, fuses, and detonators.<sup>7</sup> These men received their instruction from Lt. Walter Kappe and focused on destroying railroads, factories, and other strategic U.S. military and infrastructure targets.<sup>8</sup> The eight soldiers were divided into two groups. The first was led by Edward John Kerling, and included Werner Thiel, Hermann Neubauer, and Herbert Hans Haupt.<sup>9</sup> Kerling's

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1. John Rather, *If You're Thinking of Living in Amagansett, L.I.: A Down to Earth Hamptons Alternative*, N.Y. TIMES (June 30, 1996), <http://www.nytimes.com/1996/06/30/realestate/if-you-re-thinking-living-amagansett-li-down-earth-hamptons-alternative.html>.

2. *Id.*

3. *Amagansett Life Saving Station (1902) East Hampton, New York*, U.S. LIFE-SAVING SERVICE HERITAGE ASSOCIATION, <http://uslife-savingservice.org/station/endangered-stations/amagansett-life-saving-station-1902-east-hampton-ny/>.

4. *Id.*

5. *Id.*

6. Richard Goldstein, *John Cullen, Coast Guardsman Who Detected Spies, Dies at 90*, N.Y. TIMES (Sept. 2, 2011), <http://www.nytimes.com/2011/09/03/nyregion/john-cullen-coast-guardsman-who-detected-spies-dies-at-90.html>.

7. LOUIS FISHER, CONG. RESEARCH SERV., RL31340, *MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 1* (2002).

8. *Id.* at 1.

9. *Id.* at 5.

group headed for the coast of Florida, and they arrived near Jacksonville without incident on June 16, 1942.<sup>10</sup> The second group was led by George John Dasch, and included Earnest Peter Burger, Heinrich Harm Heinck, and Richard Quirin.<sup>11</sup> Their group headed for New York City, and they arrived on the beaches of Amagansett on June 12, 1942, in full uniform and with explosives in tow.<sup>12</sup>

The night of June 12 was particularly foggy when Coastguardsman Cullen began his beach patrol.<sup>13</sup> Cullen, then twenty-one, had joined the Coast Guard a few weeks after the Japanese attack on Pearl Harbor.<sup>14</sup> He was assigned to one of the least glamorous tasks a Coastguardsman, or any U.S. serviceman, could be assigned: a “sand pounder.”<sup>15</sup> Essentially, a sand pounder was responsible for walking up and down the beach – pounding sand – and looking for signs of enemy submarines or planes.<sup>16</sup> The job was boring and lonely, and sand pounders did not even carry weapons.<sup>17</sup>

Not long after his patrol began, Cullen happened upon Dasch’s group digging in the sand.<sup>18</sup> Dasch, whose English was quite good, explained that he and his friends were fishermen who had run aground.<sup>19</sup> However, one of the other men, dragging a large bag, shouted something in German. Seeing Cullen’s suspicion, Dasch abandoned his fisherman story and asked Cullen if he had parents who would grieve his death.<sup>20</sup> “I wouldn’t want to have to kill you,” said Dasch.<sup>21</sup>

Instead, Dasch, perhaps considering the difficulties that murdering a service member would cause, offered Cullen \$300, asking, “Why don’t you forget the whole thing?”<sup>22</sup> Cullen quickly agreed, accepting the money, which he later counted to be only \$260, and retreated back into the fog.<sup>23</sup> However, once he was out of sight, Cullen sprinted back to the Coast Guard station to inform his superiors of his discovery.<sup>24</sup> Cullen

10. *Id.* at 5.

11. *Id.* at 5.

12. *Id.* at 5.

13. Aileen Jacobson, *Nazi Saboteurs in the Amagansett Sands*, N.Y. TIMES (Sept. 12, 2014), [https://www.nytimes.com/2014/09/14/nyregion/june-13-1942-saboteurs-land-in-amagansett-on-view-in-east-hampton.html?\\_r=0](https://www.nytimes.com/2014/09/14/nyregion/june-13-1942-saboteurs-land-in-amagansett-on-view-in-east-hampton.html?_r=0).

14. Goldstein, *supra* note 6.

15. *Id.*

16. *Id.*

17. *Id.*

18. Fisher, *supra* note 7, at 5; Jacobson, *supra* note 13.

19. Goldstein, *supra* note 6.

20. *Id.*

21. *Id.*

22. *Id.*

23. Fisher, *supra* note 7, at 5.

24. Jacobson, *supra* note 13.

and the Coastguardsmen recovered the buried explosives and contacted the FBI station in New York City, who then launched a massive manhunt.<sup>25</sup>

The manhunt was short lived, however. On the night of June 14, Dasch decided to turn himself in to the FBI.<sup>26</sup> Dasch called the New York headquarters, informed the desk agent that he was a Nazi, and told of his plans.<sup>27</sup> For reasons that remain unclear, the desk agent did not appear to take these claims seriously.<sup>28</sup> Dasch offered to travel to Washington D.C. and turn himself into FBI Headquarters.<sup>29</sup> The FBI agent made a note of the phone call but never sent the memo to D.C. or asked Dasch to turn himself in in the New York office. It appeared that the agent was happy to take Dasch at his word, which luckily, Dasch kept.<sup>30</sup>

As Dasch traveled to D.C., Kerling's group arrived in Jacksonville, unbeknownst to the FBI. From there, the four Nazis traveled to Cincinnati, Ohio, staying a few days before splitting up.<sup>31</sup> Two of the men traveled to Chicago while the other two went to New York.<sup>32</sup>

Dasch arrived in D.C. on June 20, 1942, and turned himself in to authorities.<sup>33</sup> Burger, who at the time knew of Dasch's plans, waited in his hotel room and was arrested without incident.<sup>34</sup> With the help of Dasch and Burger, the FBI located and arrested the other six Nazis and, by June 27, all eight saboteurs were in custody.<sup>35</sup>

Originally, the Nazis were to be tried in federal court, but Attorney General Francis Biddle quickly discovered a problem: there were almost no charges that could be brought against the Nazis.<sup>36</sup> Of course, they could be charged with sabotage, which carried a maximum 30-year sentence, but they had not actually committed any acts of sabotage.<sup>37</sup> Biddle, believing sabotage would not hold up at trial, limited the charges to conspiracy, which carried a two-year sentence and a fine.<sup>38</sup> Additionally, he might have been able to charge the men with a

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25. *Id.*

26. Fisher, *supra* note 7, at 2.

27. *Id.*

28. Jacobson, *supra* note 13.

29. Fisher, *supra* note 7, at 2.

30. *Id.*

31. *Id.*

32. *Id.* at 5.

33. Jacobson, *supra* note 13.

34. Fisher, *supra* note 7, at 2.

35. *Id.* at 3.

36. *Id.* at 4.

37. *Id.*

38. *Id.*

violation of immigration laws.<sup>39</sup>

As such, President Roosevelt commissioned a military tribunal to try the eight Nazis.<sup>40</sup> The military tribunal allowed the Government to seek the death penalty. Additionally, the military tribunal could be held in secret, which was another win for the government. FBI Director J. Edgar Hoover used the media to create the false impression that the FBI used their superior detective skills to apprehend the Nazis.<sup>41</sup> In federal court, the public would quickly learn of Coastguardsmen Cullen's luck, the New York office's incompetence, and Dasch's aid in apprehending the Nazis.<sup>42</sup> In military tribunal, the proceedings would be in secret, allowing the FBI to control the narrative.

At the military trial, all eight Nazis were found guilty.<sup>43</sup> The two defectors were sentenced to prison and hard labor, while the remaining six were sentenced to death by electrocution, which was carried out on August 8, 1942.<sup>44</sup> Eight days prior to the executions, the Supreme Court issued a hasty *per curiam* decision ruling that the Military Commission was constitutional.<sup>45</sup> Two and a half months after the executions, the Supreme Court supplemented their ruling in a long and confusing decision.<sup>46</sup>

This decision—*Ex Parte Quirin*—opened the door to numerous questions about the power of the President, the reach of Congress, the constitutionality of military tribunals, the application of international law, and the very definition of war itself. *Quirin*, a long and rambling decision, left the door to interpretation wide open. It is through this door that Ali Hamza Ahmad Suliman al Bahlul wished to have his conviction overturned.

The following Casenote addresses the Constitutional issues raised by *Bahlul* following his conviction and sentencing by a military commission. Part II provides background on the creation of military commissions, on the defendant, Bahlul, and on the procedural posture of Bahlul's case. Part III addresses Bahlul's challenge of the military tribunals and the specific arguments presented by Bahlul and the Government. Part IV provides a summary of the two concurrences and the dissent in the D.C. Circuit Court's *per curiam* opinion released in October 2016. Part V, the Discussion section, addresses a hypothetical

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39. *Id.*

40. *Id.* at 5.

41. *Id.* at 3.

42. *Id.* at 3.

43. Jacobson, *supra* note 13.

44. *See generally* *Ex Parte Quirin*, 317 U.S. 1 (1942).

45. *Id.*

46. *Id.*

posed by the dissent, proposes a new test for examining these types of cases, and applies this new test to the dissent's hypothetical.

## II. BACKGROUND

This section addresses the history leading up to Bahlul's challenge, including the actions of President George W. Bush and the United States Congress. Additionally, this section provides a brief history of Bahlul and the procedural posture of his challenges of the military tribunals.

### *A. Congress, the President, and the War on Terror*

Following the September 11, 2001, terrorist attacks, President George W. Bush exercised broad authority to detain enemy combatants in the name of national security.<sup>47</sup> President Bush's decisions led to a significant political divide, with his opponents claiming the President's actions were unconstitutional.<sup>48</sup> Chief among the issues raised was the power of the President, and later the power of Congress, to create military tribunals to try suspected terrorists of war crimes.<sup>49</sup>

President Bush issued an Executive Order on November 13, 2001, that allowed military tribunals to try non-American citizens accused of participating in or conducting terrorist acts.<sup>50</sup> The President's authority to commission military tribunals has long been a contentious and an uncertain area of constitutional law.<sup>51</sup> The use of military tribunals has been traced back to both the Civil War and World War II.<sup>52</sup> During the Civil War, military tribunals were used by President Lincoln to effectively and efficiently try Confederate soldiers.<sup>53</sup> However, there was no constitutional challenge raised during the Civil War. Conversely, during World War II, this very issue was raised and litigated in *Ex Parte Quirin*, the case involving the Nazi saboteurs.

As noted above, following the capture of the saboteurs, President Roosevelt commissioned a Military Tribunal to try the men.<sup>54</sup> They were charged with the following crimes:

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47. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 394 (5th ed. 2015).

48. *Id.*

49. *Id.*

50. *Id.* at 400.

51. *Id.* at 401.

52. *Ali Hamza Ahmed Suliman Al Bahlul (Bahlul III) v. United States* 840 F.3d 757, 759 (D.C. Cir. 2016).

53. *Id.*

54. Chemerinsky, *supra* note 47, at 401.

- I. Violation of the law of war.
- II. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.
- III. Violation of Article 82, defining the offense of spying.
- IV. Conspiracy to commit the offenses alleged in charges [I, II, and III].<sup>55</sup>

Procedurally, the Supreme Court issued a short per curiam opinion, affirming the power and jurisdiction of the military tribunals.<sup>56</sup> The men were tried and convicted, and six were executed.<sup>57</sup> Two and a half months after the executions, the Supreme Court finally issued its full opinion. In the decision, the Court stated, “[b]y universal agreement and practice the law of war draws a distinction between...lawful and unlawful combatants.”<sup>58</sup> In defining this distinction, the Supreme Court ruled that lawful combatants should be treated as prisoners of war, entitled to the full protections of a prisoner of war, while unlawful combatants were “offenders against the law of war subject to trial and punishment by military tribunals.”<sup>59</sup> Of special interest was the Court’s decision not to define or decide the outer bounds of a military tribunal’s jurisdiction.<sup>60</sup> Instead, they seemed satisfied with the ruling that lawful combatants were entitled to the laws of war while unlawful combatants could be tried by military tribunal.

This obviously raises the difficult question of just how far the *Quirin* decision should reach. The question is left open as to whether *Quirin* is binding precedent or unique because, at the time, America was actually involved in a war declared by Congress.

The issue of *Quirin* came to life again in *Hamdan v. Rumsfeld*.<sup>61</sup> In November of 2001, Salim Ahmed Handan, of Yemen, was captured in Afghanistan and later transferred to Guantanamo Bay.<sup>62</sup> After a year in detention, Hamdan was tried by a military commission for “conspiracy to commit offenses connected with the attacks of September 11, 2001.”<sup>63</sup> Hamdan subsequently petitioned for a writ of habeas corpus, and the Supreme Court granted certiorari.<sup>64</sup>

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55. *Hamdan v. Rumsfeld*, 548 U.S. 557, 605 (2006).

56. Chemerinsky, *supra* note 47, at 410.

57. *Id.* at 401.

58. *Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942).

59. *Id.* at 31; Chemerinsky, *supra* note 47, at 401.

60. Chemerinsky, *supra* note 47, at 401.

61. *Hamdan v. Rumsfeld*, 548 U.S. 557, 604 (2006).

62. *Id.* at 566.

63. *Id.*

64. *Id.* at 567.

In a 5-3 decision, Justice Stevens' majority opinion found that "the military tribunals were not authorized by act of Congress and that they violated the Uniform code of Military Justice and the Geneva Conventions."<sup>65</sup> Specifically, Common Article 3 of the Geneva Conventions requires that the accused be tried in a "regularly constituted court."<sup>66</sup> As such, President Bush's courts did not satisfy Common Article 3, and the conviction was vacated.<sup>67</sup> For Hamdan to be properly tried, his hearing must occur before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples"<sup>68</sup>

In response to the Court's decision, Congress enacted the Military Commissions Act of 2006 ("MCA"), which "amended the statutory procedures governing military commission to cure the flaws identified in *Hamdan*."<sup>69</sup> Specifically, the Military Commissions Act enumerated thirty war crimes triable by military commissions.<sup>70</sup> Moreover, it conferred jurisdiction on military commissions to try "any offense made punishable by this chapter or the law of war when committed by an alien *unlawful enemy combatant* before, on, or after September 11, 2001."<sup>71</sup>

### B. *The Defendant, al Bahlul*

Ali Hamza Ahmad Suliman al Bahlul is a native of Yemen.<sup>72</sup> At some point in the late 1990s, Bahlul traveled to Afghanistan to join al Qaeda.<sup>73</sup> While in Afghanistan, Bahlul trained with al Qaeda, eventually pledged a *bayat* (an oath of loyalty) to Osama bin Laden, and was assigned to work in the al Qaeda media and propaganda department.<sup>74</sup> Following the October 12, 2000, attack on the U.S.S. *Cole*, Bahlul created a video glorifying the attack to use as a recruitment tool.<sup>75</sup> The video called for a jihad against America and blamed the West for Muslim problems in the East.<sup>76</sup> The video was considered a successful recruitment tool and has been translated into several languages in an

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65. Chemerinsky, *supra* note 47, at 402.

66. *Hamdan*, 548 U.S. at 631-32.

67. *Id.*

68. *Id.*

69. *Bahlul v. United States (Bahlul I)*, 767 F.3d 1, 6 (D.C. Cir. 2015).

70. *Id.*

71. *Id.* at 6-7.

72. *Id.* at 5.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 6.



attempt to expand al Qaeda recruitment.<sup>77</sup>

Given the success of the video, Bahlul was promoted and became Bin Laden's personal assistant and secretary of public relations.<sup>78</sup> In this capacity, Bahlul arranged for the *bayat* and "martyr wills" of Mohamed Atta and Ziad al Jarrah, two of the 9/11 hijackers.<sup>79</sup> Bahlul proudly proclaimed that he volunteered to participate in the 9/11 attacks himself, but was turned down by bin Laden because of his importance to the al Qaeda organization.<sup>80</sup>

Prior to the 9/11 attacks, Bahlul and bin Laden fled to a remote location in Afghanistan to await the results of their planned attack.<sup>81</sup> In the weeks following 9/11, Bahlul again fled, this time to Pakistan where he was captured in December 2001 and turned over to U.S. Military forces.<sup>82</sup> Bahlul was transferred to Guantanamo Bay, Cuba, where he was held as an enemy combatant pursuant to the 2001 Authorization for Use of Military Force.<sup>83</sup> Bahlul was eventually charged with three crimes under the 2006 Military Commissions Act: (1) conspiracy to commit war crimes, (2) providing material support for terrorism, and (3) solicitation of others to commit war crimes.<sup>84</sup> Specifically, "the conspiracy and solicitation charges allege seven object crimes proscribed by the 2006 MCA: murder of protected persons, attacking civilians, attacking civilian objects, murder in violation of the law of war, destruction of property in violation of the law of war, terrorism, and providing material support for terrorism."<sup>85</sup>

### C. Procedural Posture

The path to Bahlul's conviction is long and convoluted. But a summary of the procedural posture is appropriate. Bahlul was originally charged under President Bush's military tribunals. However, Bahlul's prosecution was stayed, awaiting a decision from the Supreme Court in *Hamdan v. Rumsfeld*.

Following the Supreme Court's decision in *Hamdan* and Congress' enactment of the MCA, Bahlul's charges were amended, and he

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77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 7.

85. See generally Samantha Sliney, *U.S. v. Al Bahlul: Where It's Been and Where It's Going*, Harvard Law School National Security Journal (March 22, 2016) (discussing the proceedings leading up to the decision of October 2016).

appeared before a military commission.<sup>86</sup> A military commission convicted Bahlul of the three crimes listed above and sentenced him to life in prison.<sup>87</sup> His conviction was reviewed by the United States Court of Military Commission Review (“CMCR”) and the conviction was upheld.<sup>88</sup>

Following the decision of the Military Commission Review, Bahlul appealed to the D.C. Circuit Court (“*Bahlul I*”).<sup>89</sup> In their first decision, the D.C. Circuit Court vacated Bahlul’s conviction based upon *Hamdan*.<sup>90</sup> The government was granted a rehearing *en banc* and the court then affirmed Bahlul’s conspiracy conviction, vacating the other convictions, and remanding the remaining decision (“*Bahlul II*”).<sup>91</sup>

On remand in *Bahlul II*, Bahlul’s conspiracy conviction was once again vacated with the court holding that “conviction of Bahlul for inchoate conspiracy by law of war military commission violated separation of powers enshrined in Article III.”<sup>92</sup> The Government once again requested a hearing *en banc* and ultimately vacated the decision that vacated the conspiracy charge and scheduled another hearing (“*Bahlul III*”).<sup>93</sup>

### III. BAHULUL’S CHALLENGE

After vacating the June 2015 decision, the *Bahlul III* court requested that the sides address two questions: the proper standard of review and “whether the Define and Punish Clause of the Article I of the Constitution gives Congress power to define as an offense against the law of nations, triable before a law-of-war military commission, a conspiracy to commit an offense against the law of nations, to wit, a conspiracy to commit war crimes; and whether the exercise of such power transgresses Article III of the Constitution.”<sup>94</sup>

Of importance to this decision are the Define and Punish Clause, the Declare War Clause, and the Necessary and Proper Clause. The Define and Punish Clause reads, “[The Congress shall have the Power] . . . To

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86. *Id.*

87. *Bahlul v. United States (Bahlul I)*, 767 F.3d 1, 8 (D.C. Cir. 2015).

88. *Id.*

89. Sliney, *supra* note 85.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Bahlul v. United States (Bahlul II)*, No. 11-1324, 2015 U.S. App. LEXIS 16967, at \*1 (D.C. Cir. Sept. 25, 2015); While the D.C. Circuit Court did propose two specific questions, the first question remains outside the scope of this article. All of the Judges except for one, Judge Millet, agreed that the standard was *de novo*.

define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations.”<sup>95</sup> The Declare War Clause reads, “[The Congress shall have the Power] . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”<sup>96</sup> Finally, the Necessary and Proper Clause reads, “[The Congress shall have the Power] . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>97</sup>

All parties to the litigation agreed, the United States established military commissions in three wartime situations: (1) to operate as general courts in areas under martial law; (2) as general courts in the areas that the military temporarily occupies; and (3) to punish enemy belligerents who commit offenses against the laws of war during an armed conflict.<sup>98</sup> Additionally, all parties agreed that Bahlul’s trial occurred under the third type of military commission.<sup>99</sup> However, their disagreement occurred in the scope of that military commission’s jurisdiction.

#### A. *The Government’s Argument*

The Government argued that international laws of war did not act as a constraint upon their authority to charge and convict prisoners of war.<sup>100</sup> In support of this position, the Government argued that it was within Congress’s authority to “authorize military commissions to try enemy belligerents for violations of the international laws of war as well as any other offenses Congress *defines* as violations of the ‘laws of war.’”<sup>101</sup> Essentially, the Government’s argument was that military commissions had the power to try international law of war offenses *and* Congress had the power to create separate and distinct causes of action for military commissions.

In the alternative, the Government argued that a military commission might try an enemy belligerent for international law of war offenses, as well as “any offenses punishable under a ‘U.S. common law of war.’”<sup>102</sup>

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95. U.S. CONST. art. I, §8, cl. 10.

96. U.S. CONST. art. I, § 8, cl. 11.

97. U.S. CONST. art. I, § 8, cl. 18.

98. *Ali Hamza Ahmed Suliman Al Bahlul (Bahlul III) v. United States*, 840 F.3d 757,759 (D.C. Cir. 2016)

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

Though this assertion, the Government contended that military commissions had the power to try offenses listed in international laws of war and offenses that have been historically recognized as triable by military commissions, for which conspiracy would qualify. Specifically, the Government pointed to a case that was a main contention of this litigation: *Ex Parte Quirin* as well as some other historical analysis.<sup>103</sup>

### *B. Bahlul's Argument*

Bahlul argued that the military commissions were only able to try offenses against the international laws of war.<sup>104</sup> The challenged conviction—conspiracy—was not listed as an international law of war offense. In support of this argument, Bahlul relied heavily on the *Hamdan* decision.

Additionally, Bahlul argued that acts created under the Define and Punish Clause were limited by international law.<sup>105</sup> Specifically, Bahlul argued that “law of nations” was synonymous “international law” and, therefore, international law acted as a constraint upon the Define and Punish Clause.<sup>106</sup>

## III. BAHLUL III

### *A. Kavanagh Concurrence*

The first concurrence, joined by Judges Henderson, Brown, Griffith, and Kavanagh would have upheld the conspiracy conviction as an offense triable by the military commission. In reaching this decision, the Kavanagh concurrence relied on historical standards: Congress twice passed the Military Commission Act, and both Presidents Bush and Obama signed the Military Commission Acts into law.<sup>107</sup>

First, this concurrence addressed Bahlul’s argument that his conviction violated Articles I and III of the Constitution in that the military commissions could only try offenses written under international law.<sup>108</sup> The concurrence began by calling this argument “extraordinary” because it “would incorporate international law into the U.S. Constitution as a judicially enforceable constrain on Congress and the

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103. *Id.*

104. *Id.*

105. *Id.* at 761.

106. *Id.* at 761.

107. *Id.* at 774.

108. *Id.* at 760.

President.”<sup>109</sup> Essentially, the Kavanagh concurrence characterized Bahlul’s argument as attempting to enforce international law, that is not necessarily agreed upon through a treaty, on American military tribunals.<sup>110</sup>

Kavanagh addressed the Article I issue first. Bahlul conceded that Congress does have the power to establish military commissions, however, he argued that these powers were limited only to offenses defined by international laws of war.<sup>111</sup> Kavanagh pointed to five sources of law to support Congress’ authority to create military commissions and to define the offenses that they may try: (1) the text and original understanding of Article I, (2) the overall structure of the Constitution, (3) landmark Supreme Court precedent, (4) longstanding federal statutes, and (5) deeply rooted U.S. military commission practice.<sup>112</sup>

In regard to the text and original understanding of Article I, Kavanagh asserted that the Define and Punish Clause, the Declare War Clause, and the Necessary and Proper Clause all worked together to give Congress the authority it needed.<sup>113</sup> As noted above, the Define and Punish Clause gives Congress the power to “define and punish . . . Offenses against the Law of Nations.”<sup>114</sup> Bahlul argued that “law of nations” was synonymous with “international law.”<sup>115</sup> However, Kavanagh did not find this argument persuasive, stating “the premise of Bahlul’s Article I argument is flawed” because Article I authority is not found exclusively in the Define and Punish Clause.<sup>116</sup>

Rather, Kavanagh found that the Declare War Clause “is understood by universal agreement and practice to encompass all of the traditional incidents of war – including the power to kill, capture and detain enemy combatants, and most relevant here, the power to try unlawful enemy combatants by military commission for unlawful war crimes.”<sup>117</sup> Because there is sufficient power found within the Declare War Clause, Kavanagh did not reach the issue of the scope of the Define and Punish Clause.<sup>118</sup>

Second, Kavanagh addressed the structure and scope of the

109. *Id.* at 759.

110. *Id.*

111. *Id.* at 760.

112. *Id.* at 760.

113. *Id.* at 161.

114. *Bahlul v. United States (Bahlul II)*, No. 11-1324, 2015 U.S. App. LEXIS 16967, at \*1 (D.C. Cir. Sept. 25, 2015).

115. *Bahlul III*, 840 F.3d at 761.

116. *Id.*

117. *Id.*

118. *Id.*

Constitution itself. He stated, “[t]he Framers assigned the national government – in particular, Congress and the President – the authority – to make wartime decisions on behalf of the United States.”<sup>119</sup> Kavanaugh continued, “it would be a historical anomaly to conclude that ‘We the People of the United States’ gave foreign or international bodies the power to constrain U.S. war-making authority in that way.”<sup>120</sup>

Turning now to the fourth reason, longstanding federal statutes, Kavanaugh emphasized that “[b]eginning in 1776, the Continental Congress codified the offense of spying – a non-international-law of war offense – as a crime triable by military tribunal . . . [I]kewise in September 1776, Congress authorized trial by military tribunal for another non-international-law offense: aiding the enemy.”<sup>121</sup>

The third and fifth points, however, are where contention between the Kavanaugh concurrence and the joint dissent arose. In regards to Supreme Court precedent, the Kavanaugh concurrence cited primarily to *Ex Parte Quirin*.<sup>122</sup> Specifically, the Kavanaugh concurrence pointed to the fact that the Nazi saboteurs were tried and convicted of spying, which was not and has never been an international law of war offense.<sup>123</sup> However, the Kavanaugh concurrence then focused on what the *Quirin* court did not say, rather than what they did say.<sup>124</sup> Specifically, they pointed out that *Quirin* “did not say that military commissions are constitutionally permitted only for international law of war offenses. Nor did any later Supreme Court case hold that military commissions are constitutionally permitted only for international law of war offenses. One would have expected the Court at some point to say as much if the Court actually thought as much.”<sup>125</sup> Essentially, the Kavanaugh concurrence held that because the *Quirin* Court did not specifically state that international law was a constraint upon military commissions, it must not be.

### B. Wilkins Concurrence

Circuit Judge Wilkins wrote separately with a rather novel theory of this case. Essentially, Judge Wilkins found that Bahlul was not actually convicted of inchoate conspiracy but was, in fact, “convicted of an offense tantamount to substantive war crimes under a *Pinkerton* theory

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119. *Id.* at 762.

120. *Id.*

121. *Id.* at 765.

122. *Id.* at 763.

123. *Id.*

124. *Id.*

125. *Id.* at 763-64.

of liability.”<sup>126</sup> Wilkins found that international law recognized and applied a *Pinkerton* theory of liability with which Bahlul’s conspiracy comports. In fact, Judge Wilkins stated that if the separation of powers issue was presented in this case, he would be inclined to side with the dissent; however, he does not find a separation of powers issue at all.<sup>127</sup>

First, Judge Wilkins defined inchoate conspiracy as “the darling of the modern prosecutor’s nursery” and that at its essence, conspiracy was “an agreement to commit an unlawful act.”<sup>128</sup> The agreement itself satisfies the *actus reas*, and it is not necessary that the conspiracy actually succeed for the conviction to succeed.<sup>129</sup> Moreover, many jurisdictions require “an overt act in furtherance of the conspiracy but the overt act itself does not have to be unlawful.”<sup>130</sup> As a stand-alone crime against the United States, conspiracy requires, “an agreement by two or more persons to commit an offense. The defendant must deliberately join the conspiracy with knowledge of this purpose. And one of the conspiracy members must, at some point during its existence, perform an overt act to further or advance the purpose of the agreement.”<sup>131</sup>

In the alternative, under *Pinkerton* liability, a member to a conspiracy can be held liable for reasonable foreseeable crimes committed by others that are a part of the conspiracy.<sup>132</sup> Under “a *Pinkerton* theory, a defendant’s responsibility to the underlying offense generally requires that the substantive offense be reasonably foreseeable and committed in furtherance of the conspiracy’s objectives, all while the defendant was a member of the conspiracy.”<sup>133</sup> Essentially, the Wilkin’s concurrence would likely agree that inchoate conspiracy is far too broad to be tried by a military commission. However, Bahlul’s conviction much more closely resembled a *Pinkerton* conspiracy charge which has been recognized in international law.<sup>134</sup>

First, Judge Wilkins pointed out that the MCA’s version of conspiracy very well may not reach the level of inchoate conspiracy. Judge Wilkins stated, “the statute specifically references victims, containing two sentencing variations depending on whether anybody dies as a result of the conspiracy . . . In other words, by conditioning punishment on either death or other harm befalling another person, the

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126. *Id.* at 798.

127. *Id.* at 800.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 801.

132. *Id.*

133. *Id.*

134. *Id.*

MCA's version of conspiracy contemplates the completion of a substantive offense."<sup>135</sup> The major distinction between inchoate conspiracy and a *Pinkerton* theory of liability is that inchoate conspiracy is achieved "even though the substantive offense is not successfully consummated."<sup>136</sup> Notably, there is a substantive offense completed in this case: the September 11, 2001 terrorist attacks.<sup>137</sup>

Inchoate conspiracy jury instructions normally state that "the acts of co-conspirators can be considered proof of the conspiracy charge against the defendant."<sup>138</sup> However, this instruction or any similar instruction was not given in Bahlul's military tribunal.<sup>139</sup> In fact, the conspiracy instruction that was given in Bahlul's trial required that the commission find that Bahlul "knowingly committed at least one of the following overt acts for the purpose of bringing about one of the objects of the agreement."<sup>140</sup> Judge Wilkins continued by explaining that Bahlul was on trial for ten specific findings regarding his own individual actions, not merely his membership in Al Qaeda.<sup>141</sup>

Judge Wilkins opined, and Bahlul conceded, that the *Pinkerton* theory of liability did not violate the Constitution and that it was a recognized theory of vicarious liability in international law.<sup>142</sup> In international law, this is called Joint Criminal Enterprise (JCE), and it occurs when there is a "common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of the common purpose."<sup>143</sup> In fact, international tribunals have compared Joint Criminal Enterprise to the *Pinkerton* theory of conspiracy.<sup>144</sup> Specifically, one court stated, "[t]he standard itself for JCE III stems from the *Pinkerton v. United States* doctrine . . . . Indeed, even the language in *Tadic* is borrowed, from *Pinkerton*."<sup>145</sup>

Therefore, Judge Wilkins's theory of the case was that Bahlul's conviction must stand because he was convicted under a *Pinkerton* theory of conspiracy. Since this particular type of conspiracy is recognized in international law, there is no restraint on the conviction. It is important to note, however, that Judge Wilkins stated that he would

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135. *Id.*

136. *Id.*

137. *Id.* at 802.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 803.

143. *Id.*

144. *Id.*

145. *Id.* at 803-04.



have likely agreed with the dissent if Bahlul was in fact convicted of inchoate conspiracy.

### C. *The Joint Dissent*

The joint dissent is divided into four parts. First, the joint dissent concurred in the *de novo* review of Bahlul's case.<sup>146</sup> Second, it addressed why the government's argument fell short.<sup>147</sup> Third, it addressed and countered particular arguments of the three concurrences.<sup>148</sup> And fourth, the joint dissent addressed potential consequences of finding for the government.<sup>149</sup>

Beginning with Part II of the opinion, the dissent addressed the Congressional ability to create limited exceptions to Article III courts, including the creation of military commissions.<sup>150</sup> The dissent recognized three instances in which military commissions may be established: (1) to operate as general courts during martial law; (2) to operate as courts in areas in which the military currently occupies; and (3) to "punish enemy belligerents who commit offenses against the laws of war during an armed conflict."<sup>151</sup> The basis of the dissents argument is that the Congress' creation of stand-alone offenses, including conspiracy, was unconstitutional under Article III.<sup>152</sup>

Quickly summarized, the dissent's position is that there are limited exceptions to Article III courts. One of those exceptions is for trying enemy belligerents who commit offenses against the laws of war but, under *Quirin*, this exception should be read narrowly to include only international law of war offenses.<sup>153</sup> Since conspiracy is not an international law of war offense, Congress's enactment of the offense is an unconstitutional infringement upon Article III.<sup>154</sup>

In its interpretation of *Quirin*, the dissent asserted the Supreme Court found that "law of war" referred to "branch of international law," and, therefore, the *Quirin* decision was based upon the Nazis' violation of international law of war offenses.<sup>155</sup> Therefore, the question in *Quirin* for the Supreme Court was whether or not the Nazis had "been charged

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146. *Id.* at 805.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 809.

151. *Id.* at 810.

152. *Id.*

153. *See generally, id.* at Part II.

154. *Id.*

155. *Id.* at 811.

with a violation of the international rules governing armed conflicts.”<sup>156</sup> The dissent argued that the Court’s question was limited to this, and that the Supreme Court had decided that the actions of the Nazis constituted a violation of international law. Specifically, the dissent provided:

Stating that the term “law of war” refers to a “branch of *international law*” the Court proceeded to consider whether the defendants had been charged with a violation of the international rules governing armed conflicts. [The Court] ultimately concluded that [the Nazis] had been, expressing its belief that passing behind enemy lines in civilian dress with the purpose of committing hostile acts was then an offense under international law.<sup>157</sup>

To further support this theory, the joint dissent cited *In re Yamashita* and *Johnson v. Eisentrager*. Both *Yamashita* and *Eisentrager* cited *Quirin* and in these decisions, the Supreme Court looked to international law to determine whether the charges violated the “law of war” or rather, “international law.” Specifically, *Yamashita* affirmed *Quirin*’s “governing principles.”<sup>158</sup> Because the joint dissent determined that *Quirin* allowed only a limited exception to Article III courts, i.e., the exception in international law, and because conspiracy is not an international law of war offense, the conviction cannot stand.

Moreover, the dissent did not find persuasive the Government’s argument that because conspiracy was not an international law of war offense at the time *Quirin* was decided, *Quirin* stands for the principle that Congress can enact defenses outside of international law.<sup>159</sup> The dissent found that the *Quirin* court must have believed, albeit mistakenly, that conspiracy was an international law of war offense.

Next, the dissent addressed the government’s argument that “Article III must be construed in light of Congress’s Article I powers and that those powers enable Congress to go beyond international law in determining the offenses triable by military commission.”<sup>160</sup> Essentially, the Government argued that *Quirin* and its progeny demonstrate that Congress derives its power to create military commission from the war powers.<sup>161</sup> Therefore, the Government argued that Congress must also derive its power to list the offenses from the

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156. *Id.*

157. *Id.*

158. While if *Yamashita* certainly reaffirms *Quirin*, the issue in this case, and in this Casenote is: what are *Quirin*’s “governing principles”? Essentially, this argument could be used in support of either argument, depending on what one believes the governing principles are.

159. *Bahlul III*, 840 F.3d at 823.

160. *Id.* at 818.

161. *Id.*

War Powers Clause.<sup>162</sup>

In contrast, the dissent opined that *Quirin* and its progeny only established Congress's ability create military commissions. The jurisdiction which those commissions may exercise, however, is still limited by international law.

Additionally, the dissent employed what is essentially a slippery slope argument, that if the conspiracy charge were allowed then there is no telling what else could be allowed next.<sup>163</sup> The dissent pointed out that the Kavanaugh concurrence would only allow for two constitutional constraints upon military commissions: "(1) that the individuals are 'enemy belligerents' who (2) engaged in proscribed conduct 'in the context of and associated with hostilities.'" <sup>164</sup> The dissent continued:

Critically, the government's suggestion that the defendant's status as an enemy belligerent in the context of hostilities suffices to subject him to trial by military commission ignores the Supreme Court's focus on the offenses triable to law-of-war military commissions, in addition to the status of the offenders. Thus, the Court has focused on "the question whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged." In *Quirin*, the Court "assume[d] that there are acts" that could not be tried by military commission "because they are of the class of offenses constitutionally triable only by a jury."<sup>165</sup>

Thus, the dissent is concerned that focusing on the status of the offender, rather than the offense itself leads to ambiguities concerning how these cases will be handled in the future.

## V. DISCUSSION

Ultimately, the *Bahlul* per curiam encompassed four opinions, of which only the dissent decided the original issue regarding whether the Define and Punish Clause gives Congress the power to grant jurisdiction to military tribunals to hear the conspiracy charges, which the dissent answered in the negative. Both the Kavanaugh concurrence and the joint dissent took hard-line positions, with little room for compromise. Kavanaugh was concerned that overturning the conviction would

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162. *Id.*

163. *Id.* at 835.

164. *Id.*

165. *Id.* at 835-36.

constrict Congress, and therefore the people Congress represents, to the mandates of international law. In Kavanagh's view, the court does not even need to reach the extent of the Define and Punish Clause, because the Declare War Clause and the Necessary and Proper Clause are enough to provide Congress with the requisite authority.

In the alternative, Judge Rodgers's dissent focused on the liberty and due process issues that would arise by finding for the government. The joint dissent posed the following hypothetical:

Suppose, for instance, that the FBI launches an investigation into three lawful permanent residents who have lived in the United States since early childhood. Searching an apartment in Virginia that the three share, it discovers pipe bombs, al Qaeda propaganda, and a map of the Washington, D.C., metro system. The government arrests the three and wishes to prosecute them for conspiracy to kill innocent civilians. Under the government's view of things, the Constitution would pose no bar to transferring the individuals into military custody and prosecuting them before a military commission.<sup>166</sup>

Thus, if the analysis is limited to Kavanagh and Rodgers, the choices are rather stark and positional. Either we abdicate our Congressional decision-making powers to international law or we open ourselves to a world in which Congress has nearly unfettered power to try anyone as an enemy belligerent as long as they can be tied to the War on Terror.

However, the choices need not be so grim. The possibility exists to satisfy the interests of the Government in utilizing Military Commissions while also guarding against the overreach that the dissent fears. First, the Discussion Section of this Casenote addresses the scope of the Define and Punish Clause. Next, this section addresses the dissent's hypothetical, as if that hypothetical were to be decided under Kavanagh's concurrence. Third, the Discussion Section will propose a new test for analyzing these issues. Finally, the Discussion section analyzes the dissent's hypothetical once again; however, this time it will be analyzed under the proposed test.

#### *A. The Scope of the Define and Punish Clause*

The Military Commissions Act derives its authority from the Define and Punish Clause. The Define and Punish Clause has not been specifically addressed by the Supreme Court. Lower courts have found

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<sup>166</sup>. *Id.* at 836-37.

that international law acts as a constraint upon the Define and Punish Clause because the act of “defining” implies that the charge must already have been created.<sup>167</sup> Thus, in their opinions, Congress can only “define” laws that are already a part of the “law of nations” or, in their opinion, “international law.”

These courts do have a point: the power to define does not constitute the power to create. By its very definition, to define something is to provide a “statement of exact meaning” of something that is already in existence.<sup>168</sup> In this, the lower courts are correct: Congress does not have the power to “create” offenses, only to define offenses and the appropriate punishments.

However, where the courts are incorrect is in their interpretation of “Law of Nations.” If there is any international constraint upon Congress, it should only be on what they are restricted from doing. For example, if the United States entered into a treaty by which it was agreed that a conspiracy charge would violate international law of war principles, then Congress may be restricted. As the Kavanagh concurrence points out, it would be a historical anomaly to allow international law to act as a constraint upon the Congress and the President in making war-time decisions.

Indeed, it would be rather ironic for the American People to fight the Revolutionary War, in large part because of a lack of representation from a far-off government, only to later concede to those governments the extent of power military commissions.

If Congress can only “define” international laws, Congress could simply give every international law of war offense a definition so broad as to allow it to force anyone into a Military Tribunal. Additionally, at the time of the ratification of the Constitution, America was a small country with limited power in the international community, it is unlikely that the Framers intended to restrict Congress for years to come, based upon the decisions of the international community.

### *B. The Dissent’s Hypothetical Under the Kavanagh Concurrence*

The Kavanagh concurrence is so broad that any person could be forced into a military tribunal so long as they are: (1) an enemy belligerent and (2) they are engaged in proscribed conduct “in the context of and associated with hostilities.” In fact, the Government admitted as much during oral arguments. Under this interpretation, the dissent has a strong argument that a non-citizen resident could be forced

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<sup>167</sup> *Id.* at 819-20.

<sup>168</sup> *Define*, MERRIAM-WEBSTER DICTIONARY (2016).

into a military commission.

Historically, non-citizen residents are afforded protections under the Constitution.<sup>169</sup> However, the broad interpretation of the Kavanaugh concurrence would appear to limit those rights. Utilizing the dissent's hypothetical, the three non-citizen lawful residents could be dragged into a military commission by only this minimum standard. The fact that the men were apparently involved with al Qaeda could fit them into the broad definition of "enemy belligerent." Moreover, the evidence of pipe bombs and a map of Washington D.C. shows an "association with" hostilities.

*C. The Courts should employ a new test for analyzing these charges.*

The issues raised by the scope of the jurisdiction of the Military Commissions Act forces us to rethink how we should go about answering these tough questions. The War on Terror is far from over and it is impossible to predict future conflicts. Therefore, we must either accept the overarching power of military commissions or constrain them within the confines of international law. However, there may be another way. This section proposes a new test for analyzing both the charges and the people brought before military tribunals. The goal of this test is to respect the precedent of *Quirin* and its progeny; to allow Congress to create charges for military commissions with only limited restrictions from international law; and to ensure protection from violations of due process as feared by the dissent. This new test consists of four parts, each of which is addressed below.

1. Is the charge brought by the military tribunal based upon an Act of Congress? If so, is the particular charge listed in the Act?

Step One in this analysis is a simple cursory question that addresses the problem raised in *Hamdan*. Essentially, this step asks whether Congress has enacted a statute that would allow for the charges to be brought. If there is no statute, any conviction should be vacated and an analysis similar to the Supreme Court's in *Hamdan* should begin.

However, if there is an act of Congress, this step is not asking whether that Act is constitutional in and of itself. As with any Act of Congress, it might satisfy one test, but then be found unconstitutional under another. Additionally, this test asks whether or not the particular charge is enumerated in the Act. While this may seem obvious, it simply reinforces the fact that Congress must speak and do so with specificity.

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169. See generally *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

Under no circumstances should a military commission be authorized to create its own charges or act in complete independence of Congress. The parameters of the law and charges should be clearly defined. If there is an identifiable statute, and the charge in question is enumerated therein, the analysis should proceed to Step Two.

2. Is there a Constitutional Constraint upon the Charge, Conviction, or Jurisdiction?

The second step of this analysis is meant to address the concerns of the dissent; specifically, the concern was about placing non-citizen residents or possibly even American citizens before a military tribunal if they pledge loyalty to a terrorist organization. The concern about dragging an American citizen into a military court has been addressed and resolved by the Supreme Court.<sup>170</sup> It is well settled that American citizens, captured here or abroad, must be afforded due process of law.<sup>171</sup>

However, the dissent raises an interesting question concerning non-citizen residents. Under Kavanaugh's broad interpretation of Congressional power, it is quite possible that a non-citizen resident could be forced into military court if they were determined to be an enemy belligerent. However, adding a due process analysis resolves this issue. It has long been settled that non-residents living in the United States are afforded Constitutional rights and due process protections.<sup>172</sup>

By adding this additional due process consideration, citizens and non-citizen residents are distinguished and protected. If there is a constitutional constraint, the analysis should stop and the conviction vacated. If there is no constitutional constraint, the analysis continues to Step Three.

3. Is this particular charge or offense enumerated in international law of war or was the charge treated as an international law of war offense?

The third step of this analysis follows the reasoning of Judge Wilkins's concurrence. Although a specific offense may not be listed as an international law of war offense, it may very well fall within a broader definition of similar international law.

As cited by the Kavanaugh concurrence, the Supreme Court case *United States v. Arjona*, looked to international law for guidance, but did

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170. See generally *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

171. See generally *Boumediene v. Bush*, 553 U.S. 723 (2008).

172. *Wong Kim Ark*, 169 U.S. at 665.

not treat it as binding.<sup>173</sup> Therefore, the courts should look for guidance from international law, but should not treat it as a means of binding Congress's hands. A charge that can be found in international law serves to strengthen the government's argument, but it is not dispositive. If a similar charge is found in international law, the analysis should stop and the conviction should be upheld. However, if there is not similar charge, the analysis continues to Step Four.

#### 4. Does International Law act as a constraint upon the charge?

The final step of this analysis requires the court to look to international law for specific restraints upon the charge or conviction, if any exist. It is important to note that this analysis does not look to international law for *permission*, but rather for a *restraint*. In other words, courts should analyze whether there is a treaty or international agreement that would prevent the charge or conviction.

For example, if the Geneva Conventions or other lawfully enacted treaties provide for a specific prohibition on the charge, Congress should be prevented from creating it. Hypothetically, if the United States entered into a treaty with another country wherein conspiracy was strictly prohibited as a military court offense, the statute or charge should be struck down or vacated.

#### *D. The Dissent's Hypothetical Under the New Test*

Returning now to the hypothetical proposed by the dissent, this new test will allow Congress and the military commission to exercise its power without infringing upon due process. As quoted above, this hypothetical involves three non-citizen residents who are arrested with pipe bombs, al Qaeda propaganda, and a map of Washington D.C. Assume that they are placed under the authority of a military tribunal, tried, and convicted. They appeal their decision to the military commission board, and their convictions are upheld. At this point they exercise their right under the MCA to appeal the D.C. Circuit Court.

First, the court should determine whether or not there is an Act of Congress under which the defendants were charged. In this case, that would be the Military Commissions Act. As a part of this analysis, the court should also inquire whether the defendants were charged with a charge enumerated in the Act. Presumably they would be charged with conspiracy. Assuming the charge is enumerated in the Act, the analysis would advance to the next step.

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173. See generally *United States v. Arjona*, 120 U.S. 479 (1887).



Second, the court should ask whether there is a constitutional constraint upon charging these particular defendants. In this case, the defendants would argue—and the court should give great weight—the fact that they are non-citizen residents and are therefore protected by the Constitution and deserving of a trial by jury in an Article III court. However, this must be a heavy facts-and-circumstances analysis. If, for example, the non-citizen residents defected to a Middle Eastern country controlled by a terrorist organization for a period of time, received training, and then reentered the United States illegally, they may very well have forfeited their right to be heard in an Article III court. Alternatively, if they traveled to a Middle Eastern country for a short period before returning as a legal non-resident, they should still receive protection from the constitution and access to an Article III court.

Recall the issue in *Quirin*, where eight Nazis entered the country illegally intending to do harm. In that instance, the Nazis were not legally allowed in the country and therefore did not avail themselves of the protections of an Article III court. Now imagine that the Nazis were legal non-residents who left America, received training in Germany, and then returned to America as legal non-residents. This case is somewhat more difficult, but the Nazis ultimately should still be afforded the right to be heard in an Article III court. The decision in this part of the analysis rests upon the defendants' status at the time of the offense. If they were a legal non-resident at that time, they are afforded greater due process. However, if they were not a legal resident at the time of the offense, and they meet the criteria of being an enemy belligerent, the Government has the power to move the defendants into a military commission.

Third, the court should ask if the charge can be found in international law. Here, the court should utilize a Wilkins analysis. If the defendants were charged with conspiracy and the burden of proof met by the government meets a *Pinkerton* theory of liability, the court should uphold the charge. Overall, the court should give deference to Congress and their ability to create charges and convict enemy belligerents. If the charge, or a similar charge, is not found in international law, Congress should not be totally restricted from creating the charge. However, the burden on the Government should be higher at this juncture.

This is the great novelty of Judge Wilkins's opinion. Judge Wilkins, rather than taking the defendant at his word, chose to fully analyze the actual charge leveled against the defendant and the standard for applying it. Given the limited facts of the dissent's hypothetical, it appears the Government would not win on a charge of *Pinkerton* conspiracy. For *Pinkerton* conspiracy, there must be a completed act; here there is no completed act. Bahlul committed multiple acts in furtherance of the

conspiracy, to include traveling to Afghanistan to join al Qaeda, joining al Qaeda, pledging loyalty to al Qaeda, leading others to pledge loyalty to al Qaeda, acting as bin Laden's personal secretary, preparing propaganda for al Qaeda, etc.<sup>174</sup>

So assuming the actions of the three conspirators do not meet the definition of *Pinkerton* conspiracy, an inchoate conspiracy is not recognized by international law. This should not end the analysis. While it is certainly advantageous to find a similar law in the international community, it should not constrain Congress. However, if there is no similar charge in international law, the burden on the Government should be higher, especially in regards to the due process analysis and step four. Ultimately, the only constraint upon Congress should be what they cannot do, not what they can do.

Finally, the court should look for any constraints by international law that would prevent the charge, conviction, or sentence. Specifically, the court should look to the Geneva and Hague Conventions to determine if international law prevents the charge. So long as there is no clearly defined prevention of the charge, Congress should have the power, under the Define and Punish Clause, to enumerate and enact the charges so long as due process is satisfied. In the dissent's hypothetical, we do not know the specific charges levied against the defendants. Assuming that there is not international restriction, however, the charges should be upheld.

Under the dissent's hypothetical, the convictions would potentially be overturned after Step Two. If they were determined to have constitutional protections, the analysis should stop. However, this test would also allow Congress to retain its autonomy and utilize military commissions for the trial of enemy belligerents.

## VI. CONCLUSION

If it did nothing else, the *Bahlul* per curiam showed the contentious nature of the issue of the military commissions. If we limit ourselves to the concurrences and the dissent in the *Bahlul* per curiam, the options appear relatively bleak.

The truth of the matter is that military commissions have been used since the Civil War and the chances that Congress will move away from their use is slim at best. There is a chance that *Bahlul* will be heard by the Supreme Court in the next year. Should it be heard by the Supreme Court, we can only hope that the remaining questions about the Define and Punish Clause, the constraints of international law, and the true

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174. Ali Hamza Ahmed Suliman Al Bahlul ("*Bahlul III*") v. United States 840 F.3d 757, 777 (D.C. Cir. 2016).

meaning of *Quirin* will finally be decided.