

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 - - - - - X
4 ALI HAMZA AHMAD SULIMAN AL :
BAHLUL, :
5 Petitioner, :
6 v. : No. 11-1324
7 UNITED STATES OF AMERICA, :
8 Respondent. :
9 - - - - - X

10
11 Wednesday, October 22, 2014
12 Washington, D.C.

13 The above-entitled matter came on for oral
14 argument pursuant to notice.

15 BEFORE:

16 CIRCUIT JUDGES HENDERSON, ROGERS, AND TATEL

17 APPEARANCES:

18 ON BEHALF OF THE PETITIONER:

19 MICHEL PARADIS, ESQ.

20 ON BEHALF OF THE RESPONDENT:

21 JOHN DE PUE, ESQ.
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C O N T E N T S

ORAL ARGUMENT OF:

PAGE

Michel Paradis, Esq.
On Behalf of the Petitioner

3; 23

John De Pue, Esq.
On Behalf of the Respondent

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P R O C E E D I N G S

THE CLERK: Case number 11-1324, Ali Hamza Ahmad Suliman al Bahlul, Petitioner v. United States of America. Mr. Paradis for the Petitioner; Mr. De Pue for the Respondent.

(Discussion off the record.)

JUDGE HENDERSON: All right, Mr. Paradis.

ORAL ARGUMENT OF MICHEL PARADIS, ESQ.

ON BEHALF OF THE PETITIONER

MR. PARADIS: Thank you, Judge Henderson. Good morning, Judge Henderson, Judge Tatel, Judge Rogers, and may it please the Court. I'd like to make two principle points this morning, the first is that the Constitution puts two necessary conditions on the subject matter jurisdiction of law of war, military commissions. The charge must in fact be an offense under the law of war, that branch of international law governing hostilities, and the charge must not be of a crime that entailed a jury trial right at common law.

Conspiracy, the stand alone crime of entering into a tortious or criminal agreement, fails both conditions. The Government concedes that it is not a war crime, at least as that term is ordinarily understood, and conspiracy is a paradigm example of a crime, indeed an infamous crime, that entails the full deliberation of a jury trial under the

1 Constitution.

2 Now, the Government asks for a new rule, and under
3 that rule the invocation of the war powers answers any
4 limits that Article 1, Article 3, or really any other part
5 of the Constitution might put on its ability to bring
6 domestic crimes into special trial chambers run by the
7 Department of Defense.

8 JUDGE TATEL: Can I ask you to just step back for
9 a minute. Your brief, you treat the article on an Article 3
10 arguments in separate sections.

11 MR. PARADIS: Yes, Your Honor.

12 JUDGE TATEL: Do you think they're separate
13 arguments?

14 MR. PARADIS: Yes, Your Honor.

15 JUDGE TATEL: Can you prevail on -- in other
16 words, can we deal with Article 3 without getting into
17 Article 1 and vice-versa?

18 MR. PARADIS: Yes. Yes, you can, they are --

19 JUDGE TATEL: How?

20 MR. PARADIS: Sorry.

21 JUDGE TATEL: Go ahead, tell me how you can do
22 that.

23 MR. PARADIS: Yes, they're both necessary
24 conditions, the Supreme Court lays that out pretty clearly
25 in *Ex parte Quirin*, we would point the Court specifically to

1 page 29 where the Court says, and I'm paraphrasing a little
2 bit, that there may be offenses under international law that
3 are recognized abroad that are not triable by military
4 commission here either because we don't recognize it as a
5 violation of international law, or because it is of the
6 class of offense that is only triable by jury.

7 JUDGE TATEL: Right. Here's why I ask my
8 question, so in response to your Article 3 argument one of
9 the Government's responses is well, Congress' authority to
10 create conditions and establish their jurisdiction comes not
11 from the, not just the define and punish laws, but the
12 congressional war authority in Article 1. And so, we have
13 to deal with that argument, don't we? In response to your
14 Article 3 argument they say the Article 1 power, war making
15 powers are not limited in that way.

16 MR. PARADIS: Well, I think the --

17 JUDGE TATEL: So, doesn't that just bring us right
18 into Article 1 even if we're considering Article 3?

19 MR. PARADIS: No, and I would point to -- I would
20 give you, this Court an example --

21 JUDGE TATEL: Yes.

22 MR. PARADIS: -- that I think would answer
23 potentially the Article 1 question, but would under no
24 circumstances be triable in a military commission in this
25 country, and that's the crime of treason. Treason is

1 inherently tied up in the war powers, there are arguments
2 that certain types of treason are recognized as offenses
3 under international law, yet treason is not triable, is only
4 triable, in fact, in an Article 3 court, and the precedents
5 on that go back to the Civil War, including some of the
6 military commissions the Government has cited at least in
7 earlier phases in this litigation. General Halleck in
8 Missouri threw out convictions for treason on the ground
9 that treason itself, treason proper, is only triable by a
10 court, by a court of law. So, yes, they are independent
11 conditions, and that's what the Supreme Court held in
12 *Quirin*, and in fact, in setting that out, *Quirin* relied
13 specifically on *Ex parte Milligan*, that was the Court's
14 analysis in *Ex parte Milligan*, they said this fact that the
15 offenses are only triable by a jury is precisely why we had
16 to vacate in *Ex parte Milligan* but not vacate here. And I
17 think it's important for this Court to just keep in mind
18 that when the Supreme Court said that *Ex parte Milligan* is a
19 conspiracy case, that is the first charge, that was the
20 primary charge against Milligan, and so when the Supreme
21 Court in *Quirin* is holding up *Milligan* as the paradigm case
22 of a crime triable only by jury they were looking to a
23 conspiracy case.

24 JUDGE TATEL: I thought your point about treason
25 was interesting. Suppose -- which leads me to wonder,

1 suppose because of the war on terror and the developments in
2 the world suppose eventually the international community
3 recognizes conspiracy as a international law of war
4 violation of law, and it's recognized as such by the
5 international community, would Congress then be able to have
6 military commission try conspiracy claims, or would you
7 still have an Article 3 problem?

8 MR. PARADIS: Under *Quirin* you'd still have the
9 Article 3 problem, again, the precise problem with
10 conspiracy that *Ex parte Quirin* points out. And I would
11 point out, too, the second case the Supreme Court relied on
12 in *Quirin* for, again, the parameters, the bounds of Article
13 3 is *Callan v. Wilson*, which is a D.C. case, and dealing
14 with the D.C. Police court, and is also a conspiracy case,
15 and there the question was whether or not conspiring to
16 commit a petty offense, petty offenses being triable outside
17 the ordinary jury requirements like spying and aiding the
18 enemy, that a conspiracy to commit one of those offenses
19 does trigger the Article 3 entitlements to trial by jury and
20 a federal judge, and that in part is because of the nature
21 of proving a conspiracy. In an ordinary crime, particularly
22 in a war crime, there's no doubt that a crime occurred, and
23 typically the providing the corpus delicti is the
24 Government's simplest task in an ordinary criminal
25 prosecution, and then the rest of the trial is whether or

1 not this individual perpetrated that crime. Whereas, in a
2 conspiracy the vast majority of the evidence the Government
3 is going to put forward is proving that a crime even
4 happened, and it's all through circumstantial evidence, it's
5 all through implication, and sort of understanding what was
6 the intent of the various actors at the given time whether
7 or not that intent was specific, a number of questions that
8 are both delicate in the evidentiary demands that we put on
9 them, and that are things that federal courts do every day,
10 and that military commissions are really quite inappropriate
11 for primarily because the rules of evidence are so much more
12 lax than ordinary courts are, again, primarily because in a
13 war crimes context there's no question there's a crime it's
14 just proving this individual was tied to this crime.

15 JUDGE TATEL: You're not taking the position, are
16 you, that *Quirin* holds that the law of wars is related to
17 the international law?

18 MR. PARADIS: We are.

19 JUDGE TATEL: You think it holds that?

20 MR. PARADIS: Yes.

21 JUDGE TATEL: Because --

22 MR. PARADIS: Sorry.

23 JUDGE TATEL: Well, go ahead. Well, let me just
24 ask you --

25 MR. PARADIS: Yes.

1 JUDGE TATEL: -- how can you make that argument
2 given the fact that *Quirin* says we hold only that exception
3 one was sufficient to invoke the constitutional jurisdiction
4 of the Commission, and that was a clear violation of the law
5 of war, it didn't require an resort to domestic law at all.
6 That's the holding of *Quirin*, isn't it?

7 MR. PARADIS: Yes, they hold that the first
8 charge --

9 JUDGE TATEL: Right.

10 MR. PARADIS: -- perfidious sabotage, was an
11 offense under the law of war under international law.

12 JUDGE TATEL: Right. And *Quirin* didn't have to
13 explore at all whether there was something beyond the
14 international law of war, correct?

15 MR. PARADIS: The --

16 JUDGE TATEL: Like an American, it didn't have to
17 consider that.

18 MR. PARADIS: Well, they certainly didn't consider
19 it. I don't --

20 JUDGE TATEL: Right, that's why I'm asking you
21 what the holding of the case is from our perspective.

22 MR. PARADIS: Well, the holding of the Court was
23 to say that the law of war is a branch of international law,
24 and we look to that branch of international law in order
25 to --

1 JUDGE TATEL: My point is it didn't take the next
2 step and say it's limited to the international law of war,
3 it didn't have to resolve the issue before it.

4 MR. PARADIS: It didn't have to, but no one until
5 this case ever suggested that there was anything other than
6 the international law of war.

7 JUDGE TATEL: Well, doesn't that make the point
8 even stronger than that it could not have resolved this
9 issue if it wasn't raised then?

10 MR. PARADIS: Well, if it did not resolve that
11 issue the Government bears an enormous burden of
12 demonstrating that literally every authority on the law of
13 war from this country, from abroad, from anywhere else is
14 wrong to treat it as a branch of international law. And I
15 would point specifically to the Government's own manual and,
16 not manual, excuse me, directive on detainee treatment which
17 was promulgated after we submitted our briefing, but we do
18 quote it in our reply brief, which says the law of war is
19 and only is the international law governing the conduct of
20 hostilities, detention, operations, et cetera, and with no
21 mention of some other branch of international law. And I
22 think if the Government is going to make this argument --

23 JUDGE TATEL: Okay. You're going beyond *Quirin* at
24 this point. I was just asking about --

25 MR. PARADIS: Oh, sure. Yes.

1 JUDGE TATEL: -- *Quirin*. So, do you want to say
2 anything about the Government's argument about *Hamdan*, and
3 that is that, that what did they say, they said at least, I
4 think they said seven Justices said that we should look to
5 the American common law of war in *Hamdan*.

6 MR. PARADIS: That's simply not correct.

7 JUDGE TATEL: I thought you would say that, but
8 why?

9 MR. PARADIS: Well, I would first cite to
10 Justice --

11 JUDGE TATEL: My question was why.

12 MR. PARADIS: -- Thomas' opinion and say that the
13 one question on which there was unanimity in *Hamdan*, the one
14 question, was that the law of war is international law, and
15 Justice Thomas says quite explicitly that we do not, the law
16 of war is not domestic law, we look to the law and the
17 practices of civilized nations, of which the United States
18 is a part. And so, when the United States, when *Quirin* or
19 *Hamdan* or any other case looks to domestic practice they're
20 looking to domestic practice implementing international law,
21 just like Justice Thomas said, and when Justice Stevens
22 refers to the American common law of war he's talking about
23 procedural law, he's talking about the constraints that
24 statutes and the Constitution may put on how we conduct war,
25 not on, not some separate body of substantive law that we

1 can resurrect and send to military commissions. And so,
2 again, the Government is embracing a truly radical position
3 in attempting to redefine the law of war in a way that not
4 only is unprecedented, not only that they have no authority
5 to support, but that is contrary to the basic purposes and
6 logic of the law of war being those minimal rules, those
7 basic rules that all nations, all actors in an armed
8 conflict must share and must respect. And if there's an
9 American common law of war it's easy to say that there's
10 going to be a Russian common law of war, there's going to be
11 a Syrian common law of war, and the very purpose of the law
12 of war setting minimal standards for humanity is going to be
13 thwarted by that, and --

14 JUDGE TATEL: And then what's your reaction to the
15 Government's argument that if we agree with you we'll be
16 casting constitutional doubt on some of the most important
17 military commission decisions in U.S. history, including the
18 Lincoln, the trial of Lincoln assassins.

19 MR. PARADIS: If anyone is casting doubt on the
20 most important military commissions in history it is the
21 Government, in fact, the Government's entire case depends on
22 this Court effectively overturning *Quirin* on one of two
23 points, this Court, either the Supreme Court was wrong to
24 say that spying is a violation of the international laws of
25 war, or the Court was wrong to say that the international

1 laws of war govern the subject matter jurisdiction of a law
2 of war military commission. And --

3 JUDGE TATEL: Well, you're only right on the
4 second point if that's in fact what *Quirin* held, going back
5 to our earlier discussion.

6 MR. PARADIS: I'm sorry, I didn't understand
7 your --

8 JUDGE TATEL: I said your second point is correct
9 only if you're right that *Quirin* in fact held that military
10 commissions are limited to violations of international law,
11 right?

12 MR. PARADIS: Yes, of course.

13 JUDGE TATEL: Yes. right.

14 MR. PARADIS: And, but --

15 JUDGE TATEL: But what about my question about the
16 Lincoln, the commission that tried the Lincoln assassins,
17 they make a big, they make a very persistent argument in
18 their briefs that, you know, if we agree with you then that
19 will be suggesting that that entire process was
20 unconstitutional.

21 MR. PARADIS: Not in the least, I think, is our
22 simple --

23 JUDGE TATEL: Right.

24 MR. PARADIS: -- answer.

25 JUDGE TATEL: Yes.

1 MR. PARADIS: And that's because the Lincoln
2 conspirators, as they called them, whereas the Lincoln
3 assassins as they were called at the time were not tried for
4 conspiracy either as a standalone offense, or as an, even as
5 a co-defense, they were tried for assassinating the
6 President, there was one charge against them, it was
7 assassination. They were alleged to have conspired and
8 aided and abetted, and been an accessory to, and pretty much
9 every other theory of liability that could get them to be
10 liable for the assassination, but none of them were charged
11 with conspiracy as a standalone offense. And what makes
12 that the most obvious is, well, there are two points, one is
13 when the Attorney General reviewed the case he doesn't
14 mention the word conspiracy, he says you have asked me to
15 review whether it was lawful to try the assassins of Abraham
16 Lincoln with the offense of assassinating the President; but
17 I think the second and the more compelling reason is that
18 this is an anachronistic view of the law of conspiracy, the
19 law, conspiracy in the 1860s was a misdemeanor, it was a
20 misdemeanor that carried a maximum sentence of two years,
21 and it could not be in fact charged where they completed a
22 crime because of doctrines of merger, and so any crime that
23 was, anyone who was charged with a substantive conspiracy
24 offense and a completed felony was actually just charged
25 with a completed felony, and there was even authority saying

1 that trying to charge both in the same document would render
2 the indictment itself defective. And so, no one, no one
3 would have thought in the nineteenth century that the
4 conspirators are charged with the offense of conspiracy, and
5 I think that's also proven out by, and we point this out in
6 our brief, John Surratt, the last assassin who escaped
7 military commission prosecution he was ultimately tried in a
8 federal court a few years later, the same language is in his
9 indictment, and that's important because that indictment was
10 issued before there was a federal conspiracy statute. And
11 so, no one at the time would have viewed that as a
12 standalone conspiracy offense if only because it would have
13 been absurdly lenient. And so, if anyone is casting doubt
14 on any precedent, again, it is the Government who is
15 anachronistically applying modern legal concepts, modern
16 thought about spying and conspiracy retroactively to a pre-
17 modern times, and ultimately if this case is going to turn
18 on anachronism we lose, but if this case is going to turn on
19 what the law is, what the law is today, what the Supreme
20 Court has clearly held, and what has been reaffirmed in case
21 after case, be it *Yamashita*, *Eisentrager* or *Hamdan* then we
22 prevail, and the Government knows that, and that is why it
23 is attempting to look at history through a lens darkly, and
24 to confuse the issues in this Court that they have
25 stipulated that the offense here is not a violation of law

1 of war, and there is Supreme Court precedent including
2 *Quirin* holding that conspiracy is an offense that is only
3 triable by jury under Article 3.

4 JUDGE TATEL: Okay. Just, I just want to pursue
5 this one question about *Quirin*. Suppose we don't agree with
6 you that *Quirin* holds, that it's limited to the
7 international law of war, suppose we don't agree with you
8 about that, then what?

9 MR. PARADIS: Well, then the Government still
10 loses on the second prong, even if the -- either because
11 Congress has a broad swath of discretion under the define
12 and punish clause, or because there is just a class of
13 offenses that can be tried in a military commission,
14 irrespective of whether they are violations of under
15 international law, you still have the massive Article 3
16 problem which the Government never overcomes, because that
17 is a separate condition. *Quirin* --

18 JUDGE TATEL: So, is that your -- so then might --
19 then that brings me to a sort of I think maybe the final
20 question for you, which is that back to my original question
21 about the fact that you argue Article 1 and 3 in separate
22 sections of your brief, which do you think, it sounds to me
23 like you think from what your to my last question, that you
24 think the more powerful argument from Bahlul's perspective
25 is Article 3, is that right?

1 MR. PARADIS: I don't know if I would say it's
2 more powerful, but I think it's certainly an argument the
3 Government has never even sought to overcome. I think
4 the -- and I would say this -- I'm sorry, Your Honor.

5 JUDGE TATEL: Well, which would you, if you were
6 writing the opinion in this case which would you start with?

7 MR. PARADIS: I would start with Article 3, and
8 here's --

9 JUDGE TATEL: And does it make a -- and the
10 subsidiary question to that is does your Article 1 and
11 Article 3 issues leak a difference in terms of our standard
12 of review?

13 MR. PARADIS: I think if there is any difference,
14 we don't think there is a difference, but if there were to
15 be any difference --

16 JUDGE TATEL: Yes, what's the difference?

17 MR. PARADIS: -- Article 3 obviously has the
18 highest and most de novo standard of review possible, both
19 because there was no waiver, express waiver of the jury
20 trial right, and most importantly, that's a question that
21 goes right to the Court's independent duty to ensure that
22 the Executive Branch is not essentially sidelining the
23 courts in the prosecution of the trial of all, or in the
24 trial of all crimes, that's a core judicial function, and be
25 it *Stern v. Marshall*, be it *Northern Pipeline*, but it *Ex*

1 *parte Quirin*, the courts must have an independent duty to
2 protect their turf, so to speak, and to protect the sanctity
3 of judicial trial. This is a core separation of power
4 problem, and if Congress and the political branches can send
5 conspiracy that sort of, our typical common law organized
6 crime offense, if they can sign such a domestic offense as
7 conspiracy to a military commission there are no limits, and
8 that is ultimately something that is fundamentally dangerous
9 to the basic structure of our government, and having an
10 independent judiciary.

11 I see that my time has expired. I did have one
12 other point, but if Your Honors --

13 JUDGE HENDERSON: Go ahead.

14 JUDGE TATEL: Go ahead.

15 MR. PARADIS: The second major point I would like
16 to make is, and this is tied to the Government's invocation
17 of the war powers more broadly, is that this Court is being
18 asked, the D.C. Circuit Court of Appeals is being asked to
19 embrace the segregation of the justice system for the first
20 time in U.S. history, and this Court has been given no
21 rational, let alone compelling reason to embrace that
22 segregation.

23 JUDGE TATEL: Well, didn't *Quirin* do that?

24 MR. PARADIS: I'm sorry?

25 JUDGE TATEL: Didn't *Quirin* do that? Isn't that

1 what *Quirin* did?

2 MR. PARADIS: Not at all, there were two citizens
3 who were tried in *Ex parte Quirin* --

4 JUDGE TATEL: Yes.

5 MR. PARADIS: -- and the Supreme Court squarely
6 held in I think it's around page 45 that citizenship does
7 not matter when it comes to the jurisdiction of the military
8 commission, and they were relying on an unbroken line of
9 precedent, unbroken until today of subjecting our own
10 people, our own citizens, to those to whom our legislature
11 is politically accountable to the same laws, procedures, and
12 rules that everyone else is. And if there is any other
13 attack that could be had on the American justice system it
14 is this one, on the basic bedrock principle, the organizing
15 principle of our entire justice system, which is equal
16 justice under law, and if this Court looks at the
17 legislative history there is no doubt that Congress
18 understood that they were abrogating that, and moreover,
19 they were explicit that if two individuals were arrested at
20 the same time for committing the same offense, no other
21 distinction between them, the one with the U.S. passport
22 would be sent to a federal court, the one without one would
23 be sent to Guantanamo for a deliberately and meticulously
24 inferior criminal justice process. And so, unlike *Ex parte*
25 *Quirin*, unlike any court system, military or civilian in our

1 nation's history --

2 JUDGE TATEL: So, but what do you do with our
3 decision in *Kiyemba*?

4 MR. PARADIS: I'm sorry, I didn't hear you.

5 JUDGE TATEL: What do you do with our, with this
6 Court's *Kiyemba* decision, which says the Fifth Amendment
7 doesn't apply?

8 MR. PARADIS: Well, this Court's decision, that's
9 a civil case, this is a criminal case, and more specifically
10 *Wong Wing v. United States* squarely answers the question at
11 issue here. *Wong Wing*, the Chinese Exclusion Act was the
12 only time in U.S. history when Congress attempted to
13 segregate the justice system, and it directed illegal aliens
14 for trial for violating the immigration laws to
15 commissioners is what they called them. And in *Wong Wing*
16 the Supreme Court said that relying on *Yick Wo v. Tompkins*,
17 so this is an equal protection case, said that the Fifth
18 Amendment does not allow the federal government to
19 discriminate on any basis, of any videas (phonetic sp.)
20 basis when it challenges something as fundamental as equal
21 justice under law and the right to a jury trial. And that,
22 it's difficult --

23 JUDGE TATEL: And what's their standard -- I hate
24 to be technical about this, but --

25 MR. PARADIS: No, no.

1 JUDGE TATEL: -- what is our standard of review on
2 that issue?

3 MR. PARADIS: On this issue it's clearly de novo,
4 and that's because of all the issues raised today, *Bahlul*
5 did raise this issue, he raised it squarely, he raised it in
6 writing, and the only reason we don't have his written
7 objection on this issue is because the Government lost it.
8 We know that the objection was made primarily from a
9 fragment of transcript that was entered into the record in
10 place of his written objections, but objection seven, it's
11 on page 114 of our Appendix, he squarely objects to the
12 military commissions on the ground that they discriminate
13 against, they discriminate on the basis of nationality,
14 that's his language. And this transcript, particularly the
15 transcript from Arabic is very difficult to read, the
16 translation quality is very uneven, but that point is clear,
17 he raised this issue, he raised it in his first military
18 commission, and he raised it again, attempted to raise it
19 again, and so if nothing else this issue is raised by the
20 accused and subject to de novo review. And I would simply
21 say even if that was not satisfactory, personal jurisdiction
22 is a question that in military tribunals is always subject
23 to de novo review, it's just a --

24 JUDGE TATEL: So, your answer to *Kiyemba* is that
25 that was a habeas case?

1 MR. PARADIS: That's correct. It was a civil
2 action where an individual is asserting a right against the
3 Government positively.

4 JUDGE TATEL: But doesn't the case hold that the
5 due process clause does not apply to Guantanamo?

6 MR. PARADIS: The due process clause does not
7 apply, again, to a habeas petition, or to habeas proceedings
8 in Guantanamo, I think it's a pretty radical thing to say,
9 and I, candidly, I don't think this Court could say that the
10 due process clause does not apply in a criminal prosecution
11 because that would, again, run headlong into *Wong Wing*,
12 which holds that the Fifth Amendment applies to any
13 prosecution of any individual who is brought into the
14 jurisdiction of the United States. *Wong Wing* could not be
15 clear about that, and again, was dealing not even like the
16 war powers with the immigration powers, an area where the
17 political branch's power is at their effigy, and still the
18 Supreme Court said that when you go from the necessary
19 conditions, the need, excuse me, when you go from the need
20 to detain and to implement the immigration laws and to
21 protect our borders the courts will generally defer, and
22 there very well may not be a significant due process right
23 in that question, but when Congress goes that extra step
24 here and invades the judicial power and says we are going to
25 now punish these individuals for infamous crimes, then the

1 judicial power clicks in and the authority of the courts
2 becomes paramount over the political authority that the
3 other branches may have. And I would just say, this law is
4 extraordinary, we didn't have, we've never segregated the
5 justice system.

6 JUDGE ROGERS: No.

7 MR. PARADIS: We didn't do it during *Jim Crow*, we
8 didn't do it when we interned the Japanese, we didn't even
9 do it during slavery, and so the Government is asking this
10 Court with, after offering it no reason, no rational basis,
11 let alone a compelling justification to say that justice
12 here is separate and unequal. And I, the D.C. Circuit Court
13 of Appeals should not embrace for the first time in our
14 history unequal justice under law because that in the
15 American context is a contradiction in terms, if we are
16 going to apply the law, if we're going to apply the
17 Constitution it must be applied equally, and justice must be
18 blind. If there are no further questions on that I would --

19 JUDGE HENDERSON: All right. We'll give you a
20 couple of minutes to respond.

21 MR. PARADIS: Thank you, Your Honor.

22 JUDGE HENDERSON: Mr. De Pue.

23 ORAL ARGUMENT OF JOHN DE PUE, ESQ.

24 ON BEHALF OF THE RESPONDENT

25 MR. DE PUE: Good morning, Your Honors, and may it

1 please the Court, John De Pue for the United States.

2 JUDGE ROGERS: Just to finish up on this issue
3 that we were just talking about, does the Government address
4 *Wong Wing*?

5 MR. DE PUE: No, we have not, Your Honor.

6 JUDGE ROGERS: Yes. All right.

7 MR. DE PUE: Mr. Bahlul's argument --

8 JUDGE TATEL: So, what is your response to what
9 Counsel just said about his equal protection argument?

10 MR. DE PUE: First, at the outset I would point
11 out the fact that Petitioner is simply incorrect in holding
12 that this is a unique or novel proposition.

13 Contemporaneously with the enactment of the Bill of Rights,
14 the Congress enacted the military, the Articles of War --

15 JUDGE TATEL: Well, before you say it, do you
16 agree with him that *Kiyemba* is not binding on this issue?

17 MR. DE PUE: *Kiyemba* addressed the context of the
18 civil litigation.

19 JUDGE TATEL: Right.

20 MR. DE PUE: *Kiyemba* has never directly extended
21 the question, or addressed the question whether the equal
22 protection clause --

23 JUDGE TATEL: Right.

24 MR. DE PUE: -- applies --

25 JUDGE TATEL: Okay.

1 MR. DE PUE: -- in the criminal --
2 JUDGE TATEL: So, we're not down --
3 MR. DE PUE: -- context --
4 JUDGE TATEL: That's an open issue here.
5 MR. DE PUE: Yes, I believe --
6 JUDGE TATEL: Okay. Fine.
7 MR. DE PUE: -- it is an open issue, Your Honor,
8 but I don't think we need to address it to reach this point
9 simply because as a historical matter since the adoption of
10 the Articles of War of 1806 Congress has distinguished
11 between aliens and citizens with respect to their
12 amenability to a trial by a military commission. Congress
13 has historically viewed aliens and citizens particularly
14 during a time of an armed conflict differently, and Congress
15 had a rational basis for doing so here, after all, the
16 military commission's Act of 1906 was enacted in the context
17 of the attack of 9/11, it was enacted in contemplation of
18 the fact that most of the individuals who will be rounded up
19 and subject to a military proceedings would be aliens, and
20 it was adopted in the context of concern that in the basis
21 of recent legal events there may be a basis for
22 distinguishing in the panoply of procedural safeguards
23 between citizens and aliens, it was suggested in the *Verdugo*
24 case, it was suggested in this Court in the *Al-Bihani* case,
25 so the Court acted rationally in making this decision. But

1 what I think is important to understand is that the Military
2 Commissions Act and the procedural safeguards that it
3 provides are almost as robust as those that apply to
4 American soldiers who are subject to trial by court-martial,
5 the only relevant distinctions, different hearsay rule, and
6 the inability to invoke *Miranda* safeguards have absolutely
7 no bearing in this case because Petitioner got up on the
8 stand, admitted that he committed all the acts that he was
9 charged with judicially, and then went on to boast about the
10 fact that he was proud about the fact that he had been
11 involved in 9/11. So, I think there's plenty of rational
12 basis here, and even if there weren't, the Petitioner was
13 not prejudiced as a result of the proceedings that were
14 heard.

15 But Petitioner's argument founders on his mistaken
16 reasoning that the define and punish clause constitutes the
17 exclusive basis for reaching offenses, and confining them as
18 violations of a law of war, and subjecting the individuals
19 who are the subjects to trial by a military commission.

20 JUDGE ROGERS: On that last point --

21 MR. DE PUE: Yes, Your Honor.

22 JUDGE ROGERS: -- in your brief at page 50 are you
23 conceding that the Article 3 issue is non-forfeitable?

24 MR. DE PUE: Your Honor, I think there are two
25 components to the Article 3 argument, first part is the

1 Defendant's right to a jury trial.

2 JUDGE ROGERS: I'm really focusing on the second
3 part.

4 MR. DE PUE: The second part is a structural
5 argument, and we do not believe that that is forfeitable
6 because it relates --

7 JUDGE ROGERS: All right.

8 MR. DE PUE: -- to the Court's authority to
9 adjudicate cases.

10 JUDGE ROGERS: And you acknowledge he is raising
11 it?

12 MR. DE PUE: I do not acknowledge that he was
13 raising it. We don't read the record in the same way he
14 did.

15 JUDGE ROGERS: Well, your brief says --

16 MR. DE PUE: Yes.

17 JUDGE ROGERS: -- to the extent Bahlul --

18 MR. DE PUE: Yes.

19 JUDGE ROGERS: -- raises --

20 MR. DE PUE: Yes.

21 JUDGE ROGERS: -- such a structural --

22 MR. DE PUE: We're not -- I'll concede --

23 JUDGE ROGERS: All right.

24 MR. DE PUE: -- for purposes of this --

25 JUDGE ROGERS: I just want to be clear what the

1 Government's position is on this.

2 MR. DE PUE: -- that he raised it. But I think
3 that with respect to the equal protection, the structural
4 component it is not a waiveable or forfeitable claim.

5 JUDGE TATEL: But you agree the Article 3 is not
6 forfeited, is that what you're saying?

7 MR. DE PUE: No, I don't -- I'm sorry, I do not --

8 JUDGE TATEL: I thought that's what you said --

9 MR. DE PUE: Yes, I do --

10 JUDGE TATEL: -- in response to Judge Rogers. You
11 didn't say --

12 MR. DE PUE: I do not agree that the Article 3 has
13 been forfeited, we don't read the record that way.

14 JUDGE TATEL: No, I'm asking you whether, I
15 thought in response to your question you said you agree that
16 it could not be forfeited, that it was structural.

17 MR. DE PUE: Yes.

18 JUDGE TATEL: You agree with that?

19 MR. DE PUE: The structural component of that
20 argument is forfeitable, and it's really kind of irrelevant
21 whether the jury trial right is forfeitable because you have
22 to reach it because it's a forfeitable matter under this
23 Court's recent decision in *Kuretski v. Commissioner*. I
24 think where Petitioner --

25 JUDGE TATEL: What do you do about the cases that

1 he's --

2 JUDGE ROGERS: Can we just clarify --

3 JUDGE TATEL: I'm sorry, you go ahead. Yes.

4 JUDGE ROGERS: -- the Government's position here,
5 because I've heard two different --

6 MR. DE PUE: Okay.

7 JUDGE ROGERS: -- answers. Are you saying that
8 the personal individual right to a jury trial is a right
9 that is forfeitable?

10 MR. DE PUE: Yes.

11 JUDGE ROGERS: Are you also saying that the
12 structural Article 3 claim is forfeitable?

13 MR. DE PUE: I am saying that argument is not
14 forfeitable.

15 JUDGE ROGERS: Yes. Thank you.

16 MR. DE PUE: That goes to this Court's authority,
17 and for --

18 JUDGE TATEL: And so what are the consequences of
19 that for our standard of review? Let's assume we take up
20 the Article 3 argument first, you agree then that we're de
21 novo?

22 MR. DE PUE: With respect to the structural
23 argument, that's de novo; with respect to the right to a
24 jury trial --

25 JUDGE TATEL: Well, how can you separate them?

1 MR. DE PUE: I don't believe you can
2 pragmatically.

3 JUDGE TATEL: You can't. Right. So --

4 MR. DE PUE: As a practical matter I don't believe
5 you can separate.

6 JUDGE TATEL: Okay. So, then on that issue we're
7 looking at this de novo --

8 MR. DE PUE: Yes.

9 JUDGE TATEL: -- correct?

10 MR. DE PUE: Yes.

11 JUDGE TATEL: Okay. Great.

12 MR. DE PUE: And let's proceed with that issue.

13 JUDGE TATEL: Okay. That's good. All right.

14 MR. DE PUE: I think the answer to that is that,
15 the answer to both parts of that question is the manner in
16 which Petitioner characterizes the conspiracy, he says that
17 it encroaches on this Court's Article 3 authority because
18 it's nothing more than a run of the mill common law
19 conspiracy of the type that this, that the Article 3 courts
20 typically adjudicate under Title 18. Nothing could be
21 further from the truth. The conspiracy alleged in this case
22 is a conspiracy to commit the most quintessential and
23 obvious violations of the law of war that there are, murder
24 of civilians, attacking civilian targets, committing acts of
25 terrorism as a mode of warfare.

1 JUDGE ROGERS: What about the inchoate conspiracy,
2 and the acts, the overt acts that were charged?

3 MR. DE PUE: There were 10 overt acts alleged, all
4 were found to have been proven by the Government, or by the
5 finder of fact.

6 JUDGE ROGERS: Except one. He was found not
7 guilty.

8 MR. DE PUE: Except one that involved wearing a
9 grenade belt.

10 JUDGE ROGERS: And that was the only law of war
11 offense.

12 MR. DE PUE: No, it was not the only law of war
13 offense, all of the others --

14 JUDGE ROGERS: Of the overt acts which were
15 traveling, which were training, what else was a law of war
16 offense of the overt acts?

17 MR. DE PUE: Assisting and participating in the
18 attacks, in preparation of the acts of terrorism, making the
19 film, training others, and inducing others to commit
20 violations of the law of war.

21 JUDGE ROGERS: I don't think that's the way the
22 charge reads, but in any event, proceed with your argument.

23 MR. DE PUE: Well --

24 JUDGE TATEL: So, are you now -- let me just
25 follow up. So --

1 JUDGE ROGERS: Yes.

2 JUDGE TATEL: -- is it the Government's position
3 that you don't need to, that you don't need to argue that
4 the jurisdiction of the military commission is not limited
5 by international law, that is, you know, it was your
6 argument that we should look to the domestic common law of
7 war, you don't need that argument? Is that what you were
8 just saying?

9 MR. DE PUE: Of course we need --

10 JUDGE TATEL: I thought you said that the
11 conspiracy charge here was in fact --

12 MR. DE PUE: Well --

13 JUDGE TATEL: -- a violation of international law
14 of war. I thought your briefs --

15 MR. DE PUE: -- no, Your Honor, I'm saying --

16 JUDGE TATEL: -- conceded that it wasn't.

17 MR. DE PUE: -- I'm saying that the overt acts
18 that were -- that the target offenses charged in the
19 conspiracy --

20 JUDGE TATEL: Okay.

21 MR. DE PUE: -- were plain violations of the law
22 of war.

23 JUDGE TATEL: Okay. But the inchoate conspiracy
24 charge, an uncompleted conspiracy is not a violation of the
25 law of war, right?

1 MR. DE PUE: That's correct, Your Honor, and we
2 have acknowledged that before, but the question --

3 JUDGE TATEL: Okay. And so, for us, for this
4 Court to agree with the Government we have to go beyond the
5 international law, correct?

6 MR. DE PUE: That's correct, Your Honor.

7 JUDGE TATEL: Okay. And that brings us to *Quirin*.

8 MR. DE PUE: It brings us first to the
9 proposition --

10 JUDGE TATEL: Yes.

11 MR. DE PUE: -- that is the courts have recognized
12 repeatedly that the define and punish clause does not
13 constitute the exclusive basis on which Congress is
14 empowered to allege offenses as war crimes cognizable by
15 military commission.

16 JUDGE TATEL: And so, let's assume you're right
17 about that, is there any limiting principle?

18 MR. DE PUE: Yes, absolutely.

19 JUDGE TATEL: What is it?

20 MR. DE PUE: Absolutely, Your Honor. I think the
21 limiting principles are contained in the *Quirin* case, in the
22 *Quirin* decision, so the distinctive nature of the offense
23 and the offender, the offender must be an unlawful enemy, an
24 enemy belligerent.

25 JUDGE TATEL: Right.

1 MR. DE PUE: If --

2 JUDGE TATEL: But that's not the -- you think
3 that's what *Quirin* is about?

4 MR. DE PUE: The --

5 JUDGE TATEL: I thought *Quirin* used that language
6 simply to describe who had committed the violations of the
7 law.

8 MR. DE PUE: That's right, but I think it's a
9 legitimate limiting principle. Who's the offender? An
10 enemy belligerent. What's the nature of the offense? The
11 nature of the offense is a scheme to commit an offense
12 related to the commission, to the armed conflict, which is
13 what distinguishes this from the cases that Petitioner
14 cited.

15 JUDGE TATEL: And what's your best authority for
16 the proposition that the define and punish clause is not,
17 doesn't limited Congress' authority here? Is it *Quirin*?
18 What's the best authority you have for that?

19 MR. DE PUE: First --

20 JUDGE TATEL: Because I'm not sure *Quirin*, I mean,
21 as I read *Quirin* --

22 MR. DE PUE: Yes.

23 JUDGE TATEL: -- you know, *Quirin* is definitely
24 not the clearest opinion, but --

25 MR. DE PUE: No, it's not.

1 JUDGE TATEL: -- when *Quirin* is talking about
2 Congress' power to establish the condition you're totally
3 right, it's talking about Congress' authority, its war
4 powers under Article 1. But wherever the opinion is talking
5 about the jurisdiction of the commission Congress creates it
6 seems to talk about the define the punish clause.

7 MR. DE PUE: *Quirin* begins its discussion by --

8 JUDGE TATEL: Right.

9 MR. DE PUE: -- acknowledging the fact that the
10 constitutional war powers rest --

11 JUDGE TATEL: That's what I just said.

12 MR. DE PUE: Yes.

13 JUDGE TATEL: You're totally right about that.
14 But when you get into the body of *Quirin* and it's talking
15 about the jurisdiction of the commission, it's talking
16 about, here, I'll give you an example, it says, okay, it
17 says, here's an example, after it says Congress has the
18 authority, as you just pointed out properly, to create these
19 commissions under its war power it then says, here, Congress
20 has thus exercised its authority to define and punish
21 offenses against the law of nations by sanctioning within
22 constitutional limitations the jurisdiction of the military
23 commissions. So, when it gets into the jurisdictional
24 questions, the actual authority, I read this as saying that
25 they're looking at the defining punish, is that not right?

1 MR. DE PUE: The way I read *Quirin* is to --

2 JUDGE TATEL: Yes.

3 MR. DE PUE: -- acknowledge the fact that the
4 define and punish clause recognizes the authority of the
5 domestic courts to reach offenses such as spying that are
6 not themselves violations of international law. The big
7 problem that we have to confront with *Quirin* is that the
8 offense --

9 JUDGE TATEL: Here, let me just read you the
10 quote, again. Let's stick with the language of *Quirin*.
11 Congress exercised its authority to define and punish
12 offenses against the law of nations by sanctioning within
13 constitutional limitations the, quote, I'm still in the
14 quote, jurisdiction of military commissions to try persons
15 for offenses, et cetera, et cetera. It's talking about
16 jurisdictional, and it's talking about the define and punish
17 clause. So, that's why I asked what's your, is there
18 another case that we should look at if we're not convinced
19 that *Quirin* resolves this what other case is there? It says
20 that the jurisdictional questions here are not limited by
21 the define and punish clause.

22 MR. DE PUE: I believe that *Quirin* is the source to --

23 JUDGE TATEL: Okay.

24 MR. DE PUE: -- which you would ordinarily look.

25 JUDGE TATEL: Okay. Right.

1 MR. DE PUE: But I would also say with respect to
2 the *Quirin* decision. And it recognized that spying was not
3 a violation of international law, and the only way you can
4 recognize, you can reconcile the passage that you have read
5 with respect to the language in *Quirin* that recognizes that
6 spying is not a violation --

7 JUDGE TATEL: But wait, I don't mean to interrupt
8 you, but *Quirin* expressly says that spying was a violation
9 of the international law of war.

10 MR. DE PUE: No, I don't agree with you in that
11 respect, Your Honor.

12 JUDGE TATEL: You don't agree with me or *Quirin*?

13 MR. DE PUE: Pardon?

14 JUDGE TATEL: You don't agree with *Quirin* or me?

15 MR. DE PUE: I don't agree that *Quirin* said only
16 that spying was a violation of international law.

17 JUDGE TATEL: No, no, I didn't say that. *Quirin*
18 seems to say, *Quirin* operates on the assumption that spying
19 was a violation of the international law, didn't it?

20 MR. DE PUE: I don't believe that it did. No,
21 Your Honor. I don't --

22 JUDGE TATEL: Quote, the spy who secretly and
23 without a uniform crosses the borders seeking to gather
24 military intelligence, and communicate it to the enemy is a
25 familiar example of a belligerent who is deemed an offender

1 against the law of war. And then in footnote nine it
2 describes this 17, what is it, 1787 trial of a British, what
3 was he?

4 MR. DE PUE: That was Major John Andre.

5 JUDGE TATEL: Yes, and --

6 JUDGE ROGERS: Right.

7 JUDGE TATEL: -- before, it was before a Board
8 that General Washington had set up, and it says, here's what
9 the Board said, the Board found -- and I'm just reading from
10 *Quirin*, the Board found that he was a, quote, a spy from the
11 enemy, and that agreeably to the law --

12 MR. DE PUE: Yes.

13 JUDGE TATEL: -- and usage of nations he ought to
14 suffer death. That's saying that this was a violation, and
15 they may have been wrong about that, right? But *Quirin*
16 seems to me to say, to rest on the proposition that spying
17 is a violation of the international law of war.

18 MR. DE PUE: I believe that when you begin with a
19 quote that you have just excerpted with me it begins by
20 saying that our nation has always recognized the fact that
21 these individuals are subject to trial by military
22 commissions as violators of the law of war. And as you have
23 also pointed out that the sole authority that the *Quirin*
24 court relied upon for that proposition were domestic
25 precedents starting with the trial of Major Andre back in

1 1780 --

2 JUDGE TATEL: Right.

3 MR. DE PUE: -- was, the offense of spying was not
4 then --

5 JUDGE TATEL: No, but I only cited it to you for
6 the proposition that that General Washington created Board
7 viewed spying as a violation of international law.

8 MR. DE PUE: No.

9 JUDGE TATEL: No?

10 MR. DE PUE: I would say that he viewed spying as
11 an offense that the international law permits a nation to
12 punish, not specifically that it was itself an international
13 crime, as Judge Kavanaugh pointed out in his concurring
14 opinion before the en banc court, spying has never been
15 viewed as a violation of international law, spying is a
16 crime that the international authorities recognized that a
17 sovereign may punish, but not that it itself is a violation
18 of international law, and I do not read *Quirin* to go beyond
19 that.

20 JUDGE ROGERS: So, let me be very clear about
21 this, I know you cite Judge Kavanaugh's opinion, and you
22 cite Winthrop, but *Quirin* is focused on Winthrop and
23 describes the charge before it as spying in terms of the law
24 of war, and in those days at least it was clear to the
25 Supreme Court what that phrase meant.

1 MR. DE PUE: I believe it was clear to everyone
2 that the way the phrase law of war was typically used even
3 then is Colonel Winthrop explain embraced not only our
4 nation's own law of war, but as supplemented by our long-
5 standing traditions and practices, and one of those
6 supplementations, of course, was to treat spying as a war
7 crime subject to trial by military commission. So, the law
8 of war, the phrase law of war to those people back then
9 embraced something broader than international war crimes, it
10 embraced offenses that were permitted by our nation, or the
11 practice of our nation to reach those offenses.

12 JUDGE TATEL: Tell us once again, what's your best
13 sentence in *Quirin* that says that? Tell me the best one
14 you've got in *Quirin* that says that.

15 MR. DE PUE: The sentence in *Quirin* beginning with
16 the facts that the international law made cognizable by
17 military commission --

18 JUDGE TATEL: Right.

19 MR. DE PUE: -- the offense of spying, it didn't
20 say it was a violation of international law, it said that it
21 was cognizable, or that the international law permitted a
22 sovereign that caught the spy to punish him.

23 JUDGE ROGERS: So, in this instance where
24 international law in that same vein has not permitted
25 inchoate conspiracy, what happens to your analysis?

1 MR. DE PUE: I would say that the same reasoning
2 applies as Professor Oppenheim explained in his treatise,
3 there are quite a number of offenses, spying simply being
4 one of them, that although they are not violations of
5 international law themselves, the international law
6 community permits to be reached, and to be made cognizable
7 by a nations tribunal in the interests of self-protection.

8 JUDGE ROGERS: And so, I was assuming the, I
9 wasn't challenging your assertion, I was merely asking you
10 what effect on your assertion is the fact that the
11 international community has not made cognizable, and has not
12 permitted inchoate conspiracy to be charged?

13 MR. DE PUE: The international community has yet
14 to recognize the offense of inchoate conspiracy as an
15 international war crime.

16 JUDGE ROGERS: Well, it's pretty clear in
17 *Nuremberg* --

18 MR. DE PUE: Yes.

19 JUDGE ROGERS: -- that the judges were not going
20 that way, and that many nations did not recognize
21 conspiracy, and that the military commissions were looking
22 for personal responsibility.

23 MR. DE PUE: But surely if we can reach the
24 offense of spying by a military commission, it not being a
25 violation of international law --

1 JUDGE ROGERS: But you just told me it was
2 cognizable.

3 MR. DE PUE: Yes, it's cognizable.

4 JUDGE ROGERS: And I'm asking you if the offense
5 is not cognizable, if it's not permissible under
6 international law then what happens?

7 MR. DE PUE: I don't think it matters a bit. I
8 think that --

9 JUDGE ROGERS: That's what I thought, you have
10 to --

11 MR. DE PUE: Yes.

12 JUDGE ROGERS: -- say that, don't you?

13 MR. DE PUE: I think the general principle is that
14 as Professor Oppenheim points out in his treatise that
15 nations can punish offenses as war crimes that are not
16 violations of international law when those offenses have a
17 palpable effect, when the offenses are committed by an enemy
18 belligerent and they have a palpable effect on the integrity
19 of the particular nation. And if you read Professor
20 Oppenheim, conspiracy is clearly within the class that would
21 be permitted to be reached, that the international law would
22 permit to reach, but --

23 JUDGE TATEL: Isn't this the issue that the
24 Supreme Court split on in *Hamdan*?

25 MR. DE PUE: In *Hamdan* --

1 JUDGE TATEL: Isn't it the issue that the Justices
2 who debated this issue split on?

3 MR. DE PUE: They split on the fact, they split on
4 the question whether conspiracy was a violation of our
5 domestic law of war. What I think is pertinent about *Hamdan*
6 is the fact that both Justice Stevens, who wrote the
7 plurality opinion, and Justice Thomas, who wrote the
8 dissent, had to consider not only whether the offense of
9 conspiracy was a violation of international law, but also
10 whether it was a violation of our own domestic law of war --

11 JUDGE TATEL: Well, but I think as I read *Hamdan*
12 the issue that the Court decided the case on was whether or
13 not the military commissions then violated procedural
14 provisions of --

15 MR. DE PUE: Article 21.

16 JUDGE TATEL: -- the Uniform Code of Military
17 Justice, right?

18 MR. DE PUE: Yes, Your Honor.

19 JUDGE TATEL: So, when the Court was talking about
20 domestic law it was looking at domestic law, namely the
21 Uniform Code of Military Justice, as a limitation on the
22 creation of military commissions. I didn't read it as
23 saying you could expand the power of a military commission
24 by resumer to domestic law, that question I don't think was
25 even before the Court, or at least it wasn't decided on that

1 basis, right?

2 MR. DE PUE: No, it wasn't.

3 JUDGE TATEL: Do you agree with me about what the
4 holding of *Hamdan* was?

5 MR. DE PUE: Of course, there is no holding in
6 *Hamdan* with respect to the offense of conspiracy.

7 JUDGE TATEL: Correct, and nor -- but I was just
8 responding to your question about the seven Justices' use of
9 the word domestic, and in terms of the holding of the case
10 the use of domestic law there was referring to procedural
11 limitations imposed by the Uniform Code of Military Justice,
12 and so would I be wrong in reading *Hamdan* as saying that
13 military commissions are limited by both international law
14 and domestic law, it doesn't hold that military commissions'
15 jurisdictions can be expanded by a domestic common law?

16 MR. DE PUE: I think you'll read it in this way,
17 they had to look at Article 21, as you say, to determine
18 whether this was a cognizable offense. Article 21 they read
19 broadly enough to embrace not simply violations of
20 international law, which is consistent with the legislative
21 history of Article 21.

22 JUDGE TATEL: I'm sorry, what?

23 MR. DE PUE: Pardon?

24 JUDGE TATEL: Would you just say what you said,
25 again? Just --

1 MR. DE PUE: They had to reach, the legislative
2 history of Article 21 and the language --

3 JUDGE TATEL: Yes.

4 MR. DE PUE: -- of Article 21 makes it quite
5 apparent that what the draft resort Congress was intending
6 to do was to embrace two classes of violations of the law of
7 war, international law, and as the Judge Advocate General at
8 the time testified, violations of our own domestic
9 practices, so that when the plurality considered whether the
10 status of conspiracy it had to look to both categories, so
11 in looking to that second category where the judges, where
12 the Justices were in disarray is to the extent to which our
13 domestic practices permitted us to reach conspiracy. But
14 what is important about *Quirin* is that they all considered
15 it essentially to not only international law, but upon our
16 domestic practices, as well, which is precisely the same
17 thing that the en banc court did in this case, relying upon
18 that language in *Hamdan*, they looked to domestic practices
19 in determining whether or not the *ex post facto* clause --

20 JUDGE TATEL: Well, but we were operating under
21 plain error there.

22 MR. DE PUE: Yes, you were.

23 JUDGE TATEL: Okay. And --

24 MR. DE PUE: But you --

25 JUDGE TATEL: -- it's a completely different

1 ballgame.

2 MR. DE PUE: But you still found it necessary.

3 JUDGE TATEL: No, we didn't, we said that issue is
4 unresolved, in fact, the en banc court said this question
5 wasn't resolved by the Supreme Court, but because you could
6 make an argument that there was a domestic law it wasn't
7 plain error. Isn't that what we said?

8 MR. DE PUE: Yes, you certainly did --

9 JUDGE TATEL: Right.

10 MR. DE PUE: -- you certainly did, Your Honor, but
11 the --

12 JUDGE TATEL: Right. So --

13 MR. DE PUE: -- but the point remains that the
14 Court did have to look to both sources.

15 JUDGE TATEL: But only for purposes of plain error
16 review.

17 MR. DE PUE: Yes, that's correct.

18 JUDGE TATEL: Yes. Right.

19 JUDGE HENDERSON: Do you have any more questions,
20 Judge Tatal?

21 JUDGE TATEL: Yes, just one more.

22 JUDGE HENDERSON: All right.

23 JUDGE TATEL: Let's go back to *Quirin* for a
24 minute.

25 MR. DE PUE: Okay.

1 JUDGE TATEL: So, I just want to ask you, here,
2 let me just find this. Okay. Okay. So, let me just ask
3 you this question about *Quirin* and its impact on this Court,
4 on this non-en banc court, also non-Supreme Court. So, I
5 agree with you that *Quirin* does not hold that, I agree with
6 the Government that *Quirin* does not hold, at least I think I
7 do, that military commissions are limited to the
8 international law of war, that wasn't the issue before the
9 Court, but it's full of language that seems to suggest that
10 it does. Every time it talks about the issue it talks about
11 the law of war in terms of the international law, it does it
12 again and again throughout the opinion, so given that, and
13 given that this issue I don't read *Hamdan* as having resolved
14 the issue, and given what the Supreme Court has said about
15 narrowing any limits to Article 3 to the narrowest possible
16 scope, how can, give me your best argument for how this
17 panel can rule that, can hold that the military commission's
18 jurisdiction is determined by both international law and the
19 domestic law of war, do you see my point?

20 MR. DE PUE: Yes, I do.

21 JUDGE TATEL: Let me ask you a question about this
22 appeals court, given the language of *Quirin*, and the failure
23 of the Supreme Court to resolve this issue, and its language
24 about Article 3.

25 MR. DE PUE: Well, the first thing that I would

1 point --

2 JUDGE TATEL: What's your best argument that we
3 can adopt that approach.

4 MR. DE PUE: Well, the first thing that I would
5 point about --

6 JUDGE TATEL: Yes.

7 MR. DE PUE: -- *Quirin*, and the language upon
8 which you're relying is the way that the *Quirin* court uses
9 the phrase law of war, once again, I would invite the
10 Court's attention to page --

11 JUDGE TATEL: Yes.

12 MR. DE PUE: -- to footnote 10 at page 32.

13 JUDGE TATEL: Well, you're fighting my question
14 now, right? I mean, I know, I read your brief, so I know
15 your argument about this, but suppose I don't agree with you
16 that that's the way you read *Quirin*, that I read this as
17 sentences like, well, there's lots of language in there
18 that, here, I mean, the Congress has thus exercised its
19 authority to define and punish offenses, we were talking
20 about this sentence, whereby sanctioning, to try persons for
21 offenses which according to the rules and precepts of the
22 law of nations, and more particularly the law of war, are
23 cognizable, and it says that again and again, and so if I
24 read that as sort of strong dicta from the Supreme Court
25 that the law of war is the international law of war, I agree

1 it doesn't hold that, and given that the Supreme Court
2 couldn't resolve that question what do we do? What does
3 this Court do? How do we go with your argument?

4 MR. DE PUE: I would first point out as I did
5 earlier that the phrase I think cognizable is quite
6 important in that context.

7 JUDGE TATEL: Yes.

8 MR. DE PUE: Whether not necessarily violations of
9 international law, but they can be -- but there's nothing
10 wrong with reaching them under international, that there's
11 nothing wrong with reaching them under international law.
12 The principle of *Quirin*, it seems to me, is that if the
13 offense at issue, they're spying, even though it's not a
14 violation of international law, if that offense is committed
15 by an enemy belligerent during and in relation to an armed
16 conflict with the United States and it has a palpable effect
17 on the nature of that conflict the Government's war powers
18 permit it to reach that crime.

19 JUDGE TATEL: So, do I have to agree -- so,
20 suppose I don't agree with that (indiscernible) of *Quirin*
21 can you still prevail?

22 MR. DE PUE: I think we can, Your Honor, by simply
23 saying --

24 JUDGE TATEL: That's why I was asking what your
25 best argument is.

1 MR. DE PUE: Yes, you simply could, Your Honor,
2 by --

3 JUDGE TATEL: Which is what?

4 MR. DE PUE: -- saying that we're not really sure
5 what *Quirin* holds --

6 JUDGE TATEL: Okay.

7 MR. DE PUE: -- in this regard, we believe,
8 however, that Congress' war powers are broad enough to
9 permit us to reach this offense.

10 JUDGE TATEL: Even though the Supreme Court
11 couldn't resolve that question?

12 MR. DE PUE: Even though the -- well, yes, even
13 though the Supreme Court didn't clearly resolve that
14 question I believe that you can reach it based upon the
15 reasoning of the fact that we have traditionally repeatedly
16 made offenses cognizable by military commission that are not
17 themselves violations of international law.

18 JUDGE TATEL: So, we have one group of Justices
19 who says, who agree with you, and another group who don't,
20 and we have *Quirin*, and the Court has told us again and
21 again we're supposed to leave it to the Court to clean up
22 its precedent, but you want us to do that.

23 MR. DE PUE: Well, I would suggest that under the
24 hypothetical that you have given me the Supreme Court hasn't
25 clearly ruled on it, it can be read either way, and that you

1 can read it in such a manner as it gives the Government
2 authorization, or permits the Government --

3 JUDGE TATEL: I see.

4 MR. DE PUE: -- to reach offenses that are not
5 themselves violations of international law when those
6 offenses are committed by enemy belligerents during and in
7 time of an armed conflict, and that that power resides not
8 in the define and punish clause, but in the amalgam of
9 Congress' constitutional war powers.

10 JUDGE TATEL: I just have a factual question, this
11 goes beyond the record, but what percentage of Guantanamo
12 detainees are subject only to conspiracy charges, do you
13 know offhand? I mean --

14 MR. DE PUE: I am told that it's a handful, Your
15 Honor --

16 JUDGE TATEL: I see.

17 MR. DE PUE: -- which we're talking about in the
18 teens, I think, at the most.

19 JUDGE TATEL: I see. The rest are all subject
20 to --

21 MR. DE PUE: The 9/11 --

22 JUDGE TATEL: Right.

23 MR. DE PUE: -- defendants, Your Honor --

24 JUDGE TATEL: This is not a problem for them,
25 right? Yes.

1 MR. DE PUE: This is -- yes.

2 JUDGE ROGERS: You remember the President's speech
3 about who was at Guantanamo, and he characterized them in
4 three categories, and where can you give me a cite for only
5 a handful in response to --

6 MR. DE PUE: I can't give you a citation.

7 JUDGE ROGERS: That's right. Yes.

8 MR. DE PUE: I'm just giving, I'm just telling you
9 what I've been told by --

10 JUDGE ROGERS: That's a hunch.

11 JUDGE TATEL: Right.

12 MR. DE PUE: -- by other people.

13 JUDGE TATEL: Actually, maybe I asked the question
14 the wrong way.

15 JUDGE ROGERS: Yes.

16 JUDGE TATEL: What percentage of detainees who are
17 trialed before conditions are charged only with conspiracy?

18 MR. DE PUE: I don't think any of them are at this
19 point.

20 JUDGE TATEL: With only -- really?

21 MR. DE PUE: Certainly we've -- certainly the
22 recent decision by, in the *Hamdan* case --

23 JUDGE TATEL: Yes.

24 MR. DE PUE: -- is kind of had a tendency to cause
25 people to proceed with caution.

1 JUDGE TATEL: I see.

2 MR. DE PUE: But I would also suggest that this
3 Court ought to proceed with caution in dealing --

4 JUDGE TATEL: We always do.

5 MR. DE PUE: -- with this particular issue because
6 there is a plethora of other offenses --

7 JUDGE TATEL: Yes.

8 MR. DE PUE: -- in the Military Commissions Act of
9 1909 --

10 JUDGE TATEL: Right.

11 MR. DE PUE: -- that are probably subject to the
12 same type of an attack or challenge that we have seen here
13 that are not themselves violations.

14 JUDGE ROGERS: But we can't deal --

15 JUDGE TATEL: I got you.

16 MR. DE PUE: I know.

17 JUDGE ROGERS: -- can we?

18 JUDGE TATEL: I understand that.

19 JUDGE ROGERS: Yes.

20 MR. DE PUE: But I'm simply asking you that by
21 looking at the class of people who are charged with
22 conspiracy does not create the end of our problem.

23 JUDGE ROGERS: But all I want to be clear on is
24 that this data you're giving us it's just speculation at
25 this point --

1 MR. DE PUE: No, there's nothing --

2 JUDGE ROGERS: -- because the prosecutor has taken
3 the view reading *Hamdan* by the Supreme Court that is more in
4 line with Bahlul's argument than the Government's argument.

5 MR. DE PUE: No, I think the prosecutor's view --

6 JUDGE ROGERS: Well, I mean, it's in writing so we
7 can both read it, but --

8 MR. DE PUE: Yes. In *Hamdan* it's simply to look
9 for a way around what one might perceive the implications of
10 *Hamdan* to be, and one way of dealing with that problem is by
11 suggesting that in some instances, at least, the conspiracy
12 offense alleges a consummated crime that is itself
13 punishable, not punishable just as a conspiracy.

14 JUDGE HENDERSON: All right. Thank you.

15 MR. DE PUE: Thank you.

16 JUDGE HENDERSON: Does Mr. Paradis have any time
17 left?

18 THE CLERK: No time remaining.

19 JUDGE HENDERSON: All right. Why don't you take
20 two minutes?

21 MR. PARADIS: I'm sorry, Your Honor?

22 JUDGE HENDERSON: Take two minutes.

23 MR. PARADIS: Thank you.

24 ORAL ARGUMENT OF MICHEL PARDIS, ESQ.

25 ON BEHALF OF THE PETITIONER

1 MR. PARADIS: Just as a point of information, my
2 understanding is that there are three active cases in
3 Guantanamo, all of the charged subsequent to offenses, and I
4 think two are capital. But I think the --

5 JUDGE TATEL: Could you respond directly to the
6 argument Counsel just made about *Quirin*?

7 JUDGE ROGERS: Right.

8 MR. PARADIS: Well, and I think it's actually, I
9 was glad to hear, because I think this is actually a point
10 of agreement between us, at least if I understood him
11 correctly, and it's that *Quirin* says, and I have the quote,
12 that it is essential to look to both international law and
13 domestic practice, and we would agree with that, it is
14 essential to look to both, you have to ensure that the
15 offense is recognized under international law, and it is
16 subject to military trial, or non-Article 3 trial, non-jury
17 trial in the United States. Those are the two heads of our
18 argument, and we agree with that.

19 JUDGE TATEL: Your point is it's not one or the
20 other, it's both?

21 MR. PARADIS: It's not one or the other, it's
22 both, and it's not just my point, the Supreme Court in
23 *Yamashita* only looks to international law, in *Eisentrager*
24 they looked to international law, and specifically with
25 respect to the define and punish clause colloquy you had

1 with my friend, Congress only looked to the define and
2 punish clause both when enacting the military, the subject
3 matter jurisdiction portions of the Military Commissions
4 Act, as well as the War Crimes Act in 1996, citing in fact
5 *Ex parte Quirin*. So, this has been a relatively well
6 established principle of our law for about 80 years, and
7 it's the Government that is trying to sort of upend and go
8 through the nits of *Quirin* to make it more confusing than
9 perhaps it is.

10 JUDGE TATEL: And what about his argument about
11 spying?

12 MR. PARADIS: I don't think it's possible to look
13 at the history of international law scholarship certainly
14 leading up to *Quirin* or the language of *Quirin* and find that
15 spies, at least the Court viewed spying as an offense
16 against international law, the clearest example of that is
17 at footnote 12 of the Court's opinion where they say that
18 spies are, I'm paraphrasing, under international law
19 considered war crime, war criminals.

20 JUDGE ROGERS: They say it in the text, too.

21 MR. PARADIS: And they say it in the text, too,
22 it's repeated throughout the case, and if you look to any of
23 the scholarship, including the scholarship the Government
24 relies upon to say spying isn't a violation of the law of
25 war, that scholarship looks to *Quirin* and says oh, *Quirin*

1 got it all wrong, and I guess my only point to this Court
2 would be *Quirin* is binding in this Court, international
3 legal scholars may be helpful, but at the end of the day the
4 Supreme Court is infallible because it's final. And the
5 Supreme Court squarely held, and has always been understood
6 to hold that spying was a violation of international law,
7 and I think more importantly to Judge Rogers' questions an
8 offense under international law. There's a modern trend,
9 obviously, to view crimes entailing universal jurisdiction
10 as the exclusive sweep of war crimes, but that certainly is
11 not historically true, there are a variety of crimes under
12 international law like spying, which is the subject of the
13 Hague Convention. So, I think, I've never fully understood,
14 candidly, the Government's arguments with respect to spying
15 given that history.

16 The only other two or three points I would make,
17 if, with Your Honor's permission --

18 JUDGE TATEL: Yes, go ahead.

19 MR. PARADIS: -- is this is a run of the mill
20 conspiracy, and this Court held that in the earlier en banc
21 decision, in order to hold that conspiracy did not violate
22 the *ex post facto* clause this Court effectively ruled, or
23 ruled that this was in effect an assimilation of Section
24 2332. And to the extent that that is and has always been a
25 domestic crime that is prosecuted nearly every day, this is

1 then a run of the mill conspiracy case.

2 With respect to waiver the only point I would add
3 to what's been said already is the Government waived waiver
4 on the first two issues before the CMCR, these issues were
5 squarely presented to the CMCR, the Government argued waiver
6 of our other issues, including *ex post facto*, but below they
7 said we do not argue waiver, or forfeiture, or plain error
8 with respect to the Article 1 and Article 3 issues, and
9 so --

10 JUDGE TATEL: Didn't the en banc court reject that
11 argument?

12 MR. PARADIS: No. With respect to *ex post facto*
13 the Government did argue waiver --

14 JUDGE TATEL: I see.

15 MR. PARADIS: -- before the CMCR --

16 JUDGE TATEL: I see.

17 MR. PARADIS: -- and to the extent that that
18 preserves a forfeiture objection sort of a fortiori I think
19 this Court was reasonable in relying on that. Here the
20 Government, the Government wanted clarity on these legal
21 points below.

22 JUDGE TATEL: Right.

23 MR. PARADIS: I think it's now that they're
24 doubting their, the strength of their legal arguments, that
25 it is now that they're looking for procedural devices to

1 weaken the standard of review that they must meet to
2 demonstrated jurisdiction in the military commissions.

3 And the only point, the last point I would make
4 with Your Honors' permission, is that they failed to give
5 you any rational reason for segregating the justice system,
6 not one, it was a carte blanche, the war powers is a
7 talisman, we can discriminate, and that is belied in this
8 context, especially, Anwar Al-Awlaki, we killed him with a
9 drone, he was a U.S. citizen, and under this law he would
10 have had to have been tried at a federal court; Jose
11 Padilla, captured in the Chicago airport; Yassar Hamdi held
12 temporarily in Guantanamo, there's no rational reason to
13 distinguish between citizens and non-citizens, particularly
14 in a conflict, a non-international armed conflict, and so
15 the controlling cases I would point this Court to are not
16 only *Wong Wing*, and not only *Plyler v. Doe*, but *Clayborn*,
17 this is *Clayborn* where the Government is asserting well,
18 there's a special issue, there's a special threat, without
19 ever actually articulating, or giving this Court comfort
20 that there is a reason to discriminate. Instead, this is a
21 law that puts separate and unequal into our justice system,
22 it violates what the Supreme Court has called the basic
23 premise of our entire law, equal justice under law, and that
24 is unconstitutional, and this Court should hold that. And
25 if there are no further questions I would reserve the

1 remainder of my time.

2 JUDGE HENDERSON: Okay.

3 (Whereupon, at 10:42 a.m., the proceedings were
4 concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Paula Underwood

October 30, 2014

DEPOSITION SERVICES, INC.