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Court Urged To Overturn Ruling That Restricts Trials Of Al Qaeda Leaders

al Bahlul v. United States

The Washington Legal Foundation (WLF) this week urged the U.S. Court of Appeals for the District of Columbia Circuit to uphold the Obama Administration's right to bring al Qaeda leaders to trial before military tribunals. WLF asked the court to reverse a 2012 ruling that prohibited the filing of any conspiracy charges, thereby calling into question the military's ability to proceed.

At issue is whether a 2006 federal law is unconstitutional because it (allegedly) imposes retroactive liability on al Qaeda leaders for their conduct leading up to the September 11, 2001 attacks. In a brief filed in *al Bahlul v. United States*, WLF argued that the 2006 statute – which sets forth a list of offenses (including conspiracy) that may be tried by military commissions – does not operate retroactively but rather merely codifies long-time common-law understandings regarding the jurisdiction of military commissions. WLF devoted most of its brief to a second issue: does the statute violate the Constitution's Ex Post Facto Clause if the courts determine that it *does* operate retroactively?

WLF filed its brief on behalf of five retired generals and admirals: Major General John D. Altenburg, U.S. Army (Ret.); Rear Admiral Steven B. Kantrowitz, U.S. Navy (Ret.); Major General Michael J. Marchand, U.S. Army (Ret.); Major General Michael J. Nardotti, U.S. Army (Ret.); and Brigadier General Thomas L. Hemingway, U.S. Air Force (Ret.). WLF also filed on behalf of itself and the Allied Educational Foundation.

“We are concerned that the prior decisions of the federal appeals court impose unwarranted restrictions on the authority of the elected branches of government to convene military commissions to conduct trials of law-of-war offenses. Those decisions call into question the viability of charges against every senior al Qaeda leader now in U.S. custody,” said WLF Chief Counsel Richard Samp after filing WLF's brief. “Given the primacy of the elected branches of government in foreign affairs, the courts have no business second-guessing Congress's decision to proceed with trials before military commissions,” Samp said.

The case involves charges filed against Ali Hamza Ahmad Suliman al Bahlul, who is being detained at Guantanamo Bay, Cuba. Until his capture in December 2001, Bahlul served as the head of media relations for al Qaeda and played a major role in events leading up to the September 11 attacks. In 2008, a U.S. military commission convicted him of three charges (conspiracy to commit terrorism, solicitation of terrorist acts, and providing material support for terrorism) and sentenced him to life imprisonment. The D.C. Circuit overturned the conviction. The court ruled that it was not until 2006 that Congress authorized the three offenses to be tried before military commissions, and noted that the conduct giving rise to the charges against Bahlul took place many years before

2006. The court held that imposing criminal sanctions under those circumstances raised serious issues under the Ex Post Facto Clause, which forbids enacting any law that imposes criminal punishment for an act that was not punishable at the time it was committed.

In its brief urging reversal, WLF argued that nonresident aliens (such as Bahlul) who lack any connections with the U.S. have few if any rights under the U.S. Constitution. WLF noted that although the Supreme Court held in its 2008 *Boumediene* decision that nonresident aliens being held at Guantanamo Bay have a constitutional right of access to federal courts, the decision not specify what, if any, substantive right the detainees should be permitted to raise once they succeed in getting into federal court. WLF argued that Congress never intended to permit nonresident aliens to assert rights under the Ex Post Facto Clause.

WLF noted that both Congress and the President have determined that al Qaeda leaders should be subject to trial before military commissions for the full range of offenses set forth in the 2006 statute governing military commissions. WLF argued that particularly when addressing foreign policy issues of this sort, the Courts should defer to the views of the elected branches of government with respect the offenses that may be tried before military commissions.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 states. It devotes a considerable portion of its resources to promoting America's national security.

For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.