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In WLF Victory, DC Circuit Upholds Military Commission's Conspiracy Conviction of al Qaeda Operative

(*al Bahlul v. United States*)

“The supreme law of the land is the U.S. Constitution and laws adopted pursuant to it—not international legal opinion. The *en banc* DC Circuit got it right, heeding Congress and the Commander-in-Chief regarding the conduct of military tribunals rather than the international community.”— Richard Samp, WLF Chief Counsel

WASHINGTON, DC—The *en banc* DC Circuit yesterday (with Chief Judge Merrick Garland and Judge Sri Srinivasan not participating) upheld the federal government’s ability to try the former head of al Qaeda’s media relations efforts before a U.S. military commission on a charge of conspiracy. When Congress adopted the Military Commissions Act of 2006, it established procedural rules for the conduct of trials by military commissions and set out a list of offenses that should be triable by such commissions, including conspiracy. Petitioner al Bahlul, who was found guilty by a commission and sentenced to life in prison, contended that Congress could not authorize conspiracy charges before military commissions, because the international law of war does not define conspiracy as an offense. A divided 3-judge panel of the DC Circuit had agreed.

WLF’s brief in support of the U.S. government argued that the U.S. Constitution tasks Congress with deciding what offenses violate the law of war. Yesterday’s *en banc* decision affirmed that Articles I and III of the Constitution permit Congress to make conspiracy punishable in a military commission. Six of the nine *en banc* judges voted to affirm al Bahlul’s conviction for inchoate conspiracy, though two of the six (Judges Millett and Wilkins) affirmed the conviction on much narrower, case-specific grounds.

WLF filed our brief on behalf of six retired generals and admirals with extensive experience in addressing law-of-war issues: John Altenburg, Maj. Gen., U.S. Army (Ret.), Steven Kantrowitz, Rear Adm., JAGC, U.S. Navy (Ret.), Michael Nardotti, Jr., Maj. Gen., U.S. Army (Ret.), Michael Marchand, Maj. Gen. U.S. Army (Ret.), Thomas Hemingway, Brig. Gen., U.S. Air Force (Ret.), and Christian Reismeier, Rear Adm. (Lower Half), JAGC, U.S. Navy (Ret.). The *amici curiae* brief was joined by the Allied Educational Foundation.

Upon learning of the decision, WLF issued this statement by Chief Counsel Richard Samp: “The supreme law of the land is the U.S. Constitution and laws adopted pursuant to it—not international legal opinion. The *en banc* DC Circuit got it right, heeding Congress and the Commander-in-Chief regarding the conduct of military tribunals rather than the international community.”

WLF is a national, public-interest law firm and policy center that devotes significant resources to promoting national security and defending separation of powers as a bulwark of liberty.

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