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Legal Sidebar

Supreme Court Declines to Take Up Military Commission Challenges – Al Bahlul and Al-Nashiri

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Update: The Supreme Court denied certiorari in both cases in October 2017.

Two detainees at Guantanamo Bay earlier this year petitioned the Supreme Court for certiorari challenging the current military commission system under the Military Commissions Act (MCA), but in October 2017, the Court denied both petitions. The Supreme Court last addressed military commissions in *Hamdan v. Rumsfeld,* a 2006 case that struck down the tribunal system established by the executive branch. The Supreme Court's denial of certiorari in these two cases means that the issues will remain unresolved for the time being. In Al Bahlul's case, due to the fractured nature of the opinion below, the Court of Military Commission Review (CMCR) opinion technically remains controlling, even though none of the appellate judges on the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) addressed its theory of the case and the government did not press for affirmance on that basis. In Al-Nashiri's case, the accused may have the opportunity to raise the challenges again if he is convicted by military commission, but, given that he was challenging the jurisdiction of the military commission to begin with and asserting the right not to be subject to it, prevailing on appeal would not provide the relief sought.

As described in a previous Sidebar, Ali Hamza Ahmad Suliman al Bahlul was convicted in 2009 by a military commission for conspiracy, solicitation, and material support of terrorism in connection with his

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role as Osama bin Laden's public relations manager. He chose not to put up a defense at the military commission, but appealed his conviction at the CMCR on the basis that the military commission had applied ex post facto law. The CMCR validated Congress's determination that the offenses at issue are ones that violate international law and are customarily triable by military commission under U.S. military law.

In 2014, the D.C. Circuit, sitting en banc, voided Al Bahlul's convictions for material support of terrorism and solicitation on *ex post facto* grounds. But the court sent the conviction for inchoate conspiracy back to a three-judge panel of the D.C. Circuit to determine what standard should apply to Al Bahlul's appeal and whether Congress exceeded its Article I, §8 authority by defining crimes triable by military commission to include offenses that, like inchoate conspiracy, do not violate the international law of war. After the three-judge panel deemed the conspiracy conviction unconstitutional in June 2015, the appellate court granted the government's petition for rehearing en banc, directing the parties to brief the questions of what is the appropriate standard for appellate review; whether the conspiracy charge was an improper exercise of Congress's authority to "define and punish … Offences against the Law of Nations"; and whether the trial of such a charge by military commission violates Article III's vesting of judicial power in the courts.

In October 2016, the splintered full bench of the D.C. Circuit reinstated Al Bahlul's conviction for conspiracy with a six-judge majority voting to affirm the conviction, although the judges who agreed with that conclusion arrived at it in different ways. The per curiam opinion explains that four judges concluded that the Constitution permits Congress to make conspiracy to commit war crimes an offense triable by military commission, even though it was conceded that conspiracy is not a crime recognized under the international law of war. Three of those judges found this authority among Congress's war powers, while another judge pegged it to Congress's power to define and punish international crimes. Two other judges who affirmed the conviction would have avoided the constitutional question by deciding the issue on other grounds. Three of the nine participating judges dissented, determining that the Constitution does not allow Congress to make inchoate conspiracy triable by military commission.

Al Bahlul filed a petition of certiorari, in March 2017, asking the Supreme Court to address whether Congress, by assigning to the military the task of trying non-war crimes, has usurped the role of the judiciary. He also asked for an opinion on whether the retroactive application of the MCA definitions of crimes violates the Ex Post Facto clause of the Constitution. Finally, he asked the Court to consider whether Congress violated the equal protection guarantee of the Fifth Amendment by limiting the jurisdiction of military commissions to non-citizens.

The second petition concerned Abd Al-Rahim Hussein Al-Nashiri, a Saudi national charged before a military commission with conspiring to commit terrorism and murder in violation of the law of war in connection with the U.S.S. *Cole* bombing in 2000, an earlier attempt to bomb the U.S.S. *The Sullivans*, and the 2002 bombing of a French vessel, M/V *Limburg*. He initially attempted to avoid trial by military commission in 2012, but the U.S. Court of Appeals for the Ninth Circuit declined to stop his trial, as described in a previous Sidebar.

Al-Nashiri then sought habeas protection in April 2014 in the federal district court in the District of Columbia, claiming that jurisdiction was lacking because the charges contravene the MCA requirement that offenses be committed "in the context of and associated with hostilities." "Hostilities" are defined to mean "any conflict subject to the laws of war." Al-Nashiri argued in essence that the law of war did not apply until the conflict between Al Qaeda and the United States was recognized in late 2001, and that the bombing of the French tanker did not take place in the context of hostilities because France never considered itself to be a party to an armed conflict. The district court denied his petition applying the doctrine of abstention from the 1975 Supreme Court case *Schlesinger v. Councilman*, which holds that "Federal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted."

A divided panel of the D.C. Circuit affirmed the decision. The appellate court majority denied that extraordinary circumstances compel the district court to consider Al-Nashiri's interlocutory argument for sparing him from trial by military commission. The court deemed the military commission system set up by Congress, including the opportunity for review on appeal to an Article III court, fully adequate to consider Al-Nashiri's jurisdictional arguments. In order for Al-Nashiri to avoid the abstention doctrine, the court explained he would have to show "both that he will suffer a 'great and immediate' harm absent federal-court intervention and that the alternative tribunal is 'incapable of fairly and fully adjudicating the federal issues before it.'" The majority did not agree that Al-Nashiri's alleged mistreatment in detention and resulting post-traumatic stress syndrome compelled a civilian trial in his case. The court also rejected the claim that the MCA and the Constitution give Al-Nashiri the "right not to be tried" by military commission.

One judge dissented, highlighting differences between *Councilman* (a court martial challenge) and the military commission context when the accused is not a member of the U.S. military. He also thought that even if abstention were generally applicable to military commission trials, Al-Nashiri's claims of having endured years of abuse were the type of unusual and extraordinary circumstances that might outweigh the principles of inter-branch comity and equity underlying the abstention doctrine.

Al-Nashiri's petition for certiorari asked the Supreme Court to consider (1) whether the abstention doctrine applies to military commission trials; (2) whether the "extraordinary circumstances" exception to abstention is met where a capital defendant will suffer irreparable harm if subjected to trial by military commission due to the government's past conduct; and (3) whether questions of first impression may be addressed through a writ of mandamus (i.e., a court order directing an official to take a certain action).