11-1324

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 11-1324

ALI HAMZA SULIMAN AHMAD AL BAHLUL,

Petitioner,

v.

UNITED STATES,

Respondent.

APPEAL FROM
COURT OF MILITARY COMMISSION REVIEW (CMCR-09-001)

RESPONSE TO PETITION OF THE UNITED STATES FOR REHEARING EN BANC

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

I. PARTIES AND *AMICI* APPEARING BELOW

The parties and *amici* who appeared before the Court of Military Commission Review in connection with this appeal were:

1. Ali Hamza Ahmad Suliman al Bahlul, *Appellant*
2. United States of America, *Appellee*
3. *Amicus Curiae* the Office of the Chief Defense Counsel, Col Peter Masciola, USAF (on brief)
4. *Amicus Curiae* Robert David Steele and Others in the United States Intelligence Community, McKenzie Livingston (on brief)
5. *Amicus Curiae* Historians, Political Scientists and Constitutional Law Professors, Sarah Paoletti (on brief)
6. *Amicus Curiae* National Institute of Military Justice, Michelle Lindo (on brief)
7. *Amicus Curiae* Montana Pardon Project, Jeffrey Renz (on brief)
8. *Amicus Curiae* Human Rights Committee of the American Branch of the International Law Association, Jordan J. Paust (on brief)

B. Parties Appearing in this Court

1. Ali Hamza Ahmad Suliman al Bahlul, *Petitioner*
2. United States of America, *Respondent*
3. *Amicus Curiae* Int'l Law Scholars, David Weissbrodt (on brief)
4. *Amicus Curiae* Retired Military and Intelligence Officers, McKenzie Livingston (on brief)
5. *Amicus Curiae* The National Institute of Military Justice, Steve Vladeck (on brief)
6. *Amicus Curiae* First Amendment Historians, Jeffrey Renz (on brief)

II. RULINGS UNDER REVIEW

This appeal was from a decision of the United States Court of Military Commission Review in *United States v. Ali Hamza Ahmad Suliman al Bahlul*, CMCR 09-001(*en banc* September 9, 2011). The decision is provided at App. 3-141 and is reported at 820 F.Supp.2d 1141 (C.M.C.R. 2011). This Court vacated the judgment below on January 25, 2013. *Bahlul v. United States*, Case No. 11-1324, slip op. (Jan. 25, 2013) (per curiam).

III. RELATED CASES

This case has not previously been filed with this court or any other court. Counsel are aware of no other cases that meet this Court's definition of related. However, the judgment below was vacated pursuant to the government's stipulation that vacatur was required under this Court's decision in *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012).

Dated: March 20, 2013

By: /s/ Michel Paradis
Counsel for Petitioner

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GLOSSARY OF TERMS

2006 Act..... Military Commissions Act of 2006, Pub. L. No. 109-366 (2006)

2009 Act..... Military Commissions Act of 2009, Pub. L. No. 111-84 §§ 1801-1807 (2009)

App. ..... Petitioner's Appendix I, filed March 9, 2012

CMCR..... U.S. Court of Military Commission Review

Pet. ..... Petition for Rehearing En Banc, filed March 5, 2013

Resp. ..... Brief for the Respondent, filed May 16, 2012

UCMJ..... Uniform Code of Military Justice, 10 U.S.C. §§ 801, *et seq*.

ARGUMENT

I. REHEARING *EN BANC* IS ONLY WARRANTED IF THE PANEL DECIDING *HAMDAN II* ERRED ON A LEGAL ISSUE OF EXCEPTIONAL IMPORTANCE.

This case is one of the two contested convictions to have arisen from the military commissions at Guantanamo Bay. The other, *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) ("*Hamdan II*"), was the first to be decided by this Court. Common to both is the question of whether inchoate offenses, which the government concedes are not war crimes under international humanitarian law, are triable in a war crimes tribunal convened under the Military Commissions Act of 2006, Pub. L. No. 109-366 (2006) ("2006 Act"). *Hamdan II* held that such offenses were not triable if committed prior to the 2006 Act's enactment.

After supplemental briefing, this Court issued a *per curiam* order vacating Mr. Bahlul's conviction on the strength of *Hamdan II* and the government's concessions. The government does not ask this Court to revisit the application of *Hamdan II* to this case. Rather, after forgoing the opportunity to seek rehearing or *certiorari* in *Hamdan II* directly, it asks this Court to use the vehicle of *en banc* rehearing in Mr. Bahlul's case to revisit *Hamdan II*'s underlying merits.

For rehearing to be warranted, the full Court must be persuaded that the panel deciding *Hamdan II* clearly erred on a legal question of "exceptional importance." Fed. R. App. Pro. 35(a). "Under this rule, it is well-understood that it

is only in the rarest of circumstances when a case should be reheard *en banc*. In other words, for the appellate system to function, judges on a circuit must trust one another and have faith in the work of their colleagues." *Bartlett v. Bowen*, 824 F.2d 1240, 1242-44 (D.C. Cir.1987) (Edwards, J., concurring in the denial of rehearing *en banc*). Because of the "substantial expenditure of time and effort by three judges and numerous counsel," rehearing is ordered "only in the most compelling circumstances." *Id*.; *accord Mitts v. Bagley*, 626 F.3d 366, 369-71 (6th Cir. 2010) (Sutton, J., concurring in the denial of rehearing *en banc*).

Neither this case nor *Hamdan II* is at odds with this Court's precedents. And neither presents any danger of a circuit-split. Rehearing is therefore only justifiable if the panel erroneously decided "questions of real significance to the legal process as well as to the litigants[.]" *Bartlett*, 824 F.2d at 1244.

II. ALL THAT IS AT STAKE IN THIS CASE IS A NARROW QUESTION OF STATUTORY CONSTRUCTION THAT THIS COURT ANSWERED WITH WELL-SETTLED LAW.

We acknowledge that this case and *Hamdan II* raised important legal issues when they first came to this Court. The Court of Military Commission Review ("CMCR") found it necessary to opine on novel constitutional questions in order to affirm both convictions. Our merits brief to this Court spanned the equal justice component of the Fifth Amendment, the First Amendment's applicability to the

Internet, the limits of the *Ex Post Facto* Clause, and the scope of the political branches' constitutional authority to divert criminal prosecutions from the federal courts to Article I tribunals. These issues are undoubtedly important; not just to military commissions but to the legal system as a whole.

As this case progressed, however, this Court narrowed the relevant legal issues down to the single question of how a little-used federal law should be interpreted. The 2006 Act post-dated the allegations underlying this case and *Hamdan II* by a half-decade or more. To determine whether its application in these particular cases was lawful, this Court looked to see whether any other federal laws proscribed the offenses charged as war crimes triable by military commission at the times relevant to their respective indictments. *Hamdan II*, 696 F.3d at 1249.

The only possible candidate was Article 21 of the Uniform Code of Military Justice ("UCMJ"), which broadly conferred commission jurisdiction over war crimes arising under that subpart of international law known as the "law of war," or in modern parlance, "international humanitarian law." 10 U.S.C. § 821; *see also Hamdan II*, 696 F.3d at 1245. Because the inchoate offenses charged in *Hamdan II* were concededly not war crimes, this Court held that they lacked any legal basis prior to the 2006 Act. Instead of pronouncing broadly on foundational questions about the rule of law, this Court decided both cases by applying over seventy years of settled law to facts. *Hamdan II*, 696 F.3d at 1247 (*citing Hamdan v. Rumsfeld*,

548 U.S. 557, 602-03 & n.34, 605 (2006) (plurality op.)); *see also Hamdan*, 548 U.S. at 613; *Madsen v. Kinsella*, 343 U.S. 341, 354 (1952); *In re Yamashita*, 327 U.S. 1, 14 (1946); *Ex parte Quirin*, 317 U.S. 1, 28 (1942).

While the outcome of this case is important to Mr. Bahlul, it is difficult to see precisely what legal issue promises to matter far beyond the confines of this case. The government's only complaint is that this Court did not accept its preferred reading of a criminal statute. Its only claim of error is that this Court did not construe the 2006 Act, and by extension Article 21 of the UCMJ, to authorize the judicial creation of a new body of common law crimes, which it calls the "U.S. law of war." Pet. 10-11; Resp. 20-28. This new common law, we are told, should be created on the basis of statutory ambiguity, fragmentary archival records, and decontextualized snippets of judicial opinions that, when read in full, describe the "law of war" as a "branch of international law." *Quirin*, 317 U.S. at 29.

The government offers no reason to believe that the full court, or any court, is likely to accept this argument. This Court's rejection of the "U.S. law of war" was concise and unanimous. *Hamdan II*, 696 F.3d at 1247-48. Indeed, members of this Court have held up Article 21 of the UCMJ and its reference to the "law of war" as a paradigm example of Congress' incorporation of international law into federal law. *Al-Bihani v. Obama*, 619 F.3d 1, 14-15 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc); *id*. at 6 (Brown, J.) (endorsing

Judge Kavanaugh's "detailed concurrence" and its enumeration of those "international norms" which have been "explicitly incorporated into our domestic law by the political branches").

Below, the government did not rest on the "U.S. law of war," as such. But it did press the CMCR to hold that international humanitarian law was irrelevant to the commissions' subject-matter jurisdiction. The CMCR, nine senior military officers appointed by Secretary Gates sitting *en banc*, unanimously held "we are not persuaded by the Government's suggestion that Congress' power to 'define and punish ... Offences against the Law of Nations,' ... even when exercised in collaboration with the President in a time of armed conflict, includes the power to make conduct punishable by military commission without any reference to international norms." App. 25.

The government is therefore asking this Court to convene *en banc* so that it can rehear an argument that is so at odds with settled law and so lacking in textual support that it has been rejected, in one form or another, by every judge to consider it. Rehearing *en banc* should therefore be denied; "[g]iven that the panel here agreed unanimously on the result, this particular case presents no question of 'exceptional importance' in the sense required by [this Court's] rule on *en banc* review." *In re Grand Jury Subpoena*, 405 F.3d 17, 18 (D.C. Cir. 2005) (Tatel, J., concurring in the denial of rehearing *en banc*).

III. *HAMDAN II* DOES NOT HAMPER TERRORISM PROSECUTIONS OR THE MILITARY COMMISSIONS ENTERPRISE.

The government seeks to elevate the importance of this case with dire warnings about how this Court's decisions will hamstring the use of military commissions. It complains that the "detrimental effect of *Hamdan II* on the military commission system is apparent: every pending military commission prosecution, and every conviction already obtained under that system, have included either conspiracy or material support charges (or both) for conduct committed before 2006." Pet. 2.

What the government fails to disclose, however, is that the total number of defendants who have been convicted under the 2006 Act and the 2009 Act combined amounts to seven people, including Mr. Bahlul and Mr. Hamdan. The remaining five pled guilty in exchange for release. One was repatriated to Canada, another to Australia, and a third to Sudan. The last two are still in Guantanamo and presumably will renegotiate the terms of their release if necessary.

In the two commission cases still pending, the government never brought material support charges. As it acknowledges in a footnote toward the end of its brief, it has already represented to the commission's judicial officers that it does not need inchoate offenses to prevail in these two cases. Pet. 14, n.2. Instead, it has pursued incontrovertible, death-eligible war crimes such as targeting civilians.

The government also complains that this Court's decisions constrain its ability "to pursue military commission prosecutions against other alien enemy belligerents involved in planning or supporting terrorist acts before 2006[.]" Pet. 14-15. The government's ominous words, however, do not match the alacrity with which it has proceeded against these hypothetical, pre-2006 defendants.

The 2006 Act was passed nearly seven years ago. Many Guantanamo detainees have been in custody for eleven years. No one has been added to the detainee population in six years. While we accept that the scope of speedy trial rights in Guantanamo remains a subject of dispute, the exceptional importance that the government claims to place on the use of military commissions to try these people must be weighed against its own laches. At a certain point, the government's bare desire to persist with a legal experiment no longer warrants placing exceptional demands on the legal system.

This argument is also an implicit acknowledgement that this Court's decisions have not constrained the government's use of commissions to prosecute inchoate offenses committed after the passage of the 2006 Act. *Hamdan II*, 696 F.3d at 1246 n.6 (Kavanaugh, J., concurring) (opining that commissions would have jurisdiction over post-enactment material support offenses). There is no reason to believe, therefore, that judicial review has inhibited the government's ability to deter terrorist plots with the threat of military prosecution.

In the end, the government has failed to show why this Court's decisions are exceptional, let alone exceptionally in error. Its arguments were fully briefed before two panels of this Court and have been unanimously rejected at every turn. Its claims of exceptional importance reduce to preserving the conviction in this case and *Hamdan II*'s theoretical impact on a trifling handful of legacy cases to arise out of Guantanamo Bay. If the government feels that it needs its interpretation of the 2006 Act to prevail as a policy matter, it can try and persuade the Supreme Court to overturn its precedents or Congress to re-amend the law. The government has not, however, given this Court any reason to believe that the time and resources required to rehear this case *en banc* will be well spent.

CONCLUSION

For the foregoing reasons, this Court should deny the government's petition and issue the mandate forthwith.

Dated: March 20, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

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Dated: March 20, 2013

Respectfully submitted,

/s/ Michel Paradis
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2013 a copy of the foregoing was filed electronically with the Court. Notice of this filing will be sent to all parties by operation of this Court's electronic filing system. Parties may access this filing through the Court's system.

Dated: March 20, 2013

Respectfully submitted,

/s/ Michel Paradis
Counsel for Petitioner