

THE LAWYERS THAT STAYED, THE LAWYERS THAT LEFT

Charlie Savage covers a very troubling development in the case of Ali al-Bahlul, a Yemeni who is serving a life sentence for serving as Al Qaeda's videographer.

After Hamdan had his conviction vacated by the DC Circuit last year because material support was not a war crime at the time of his support for al Qaeda, Bahlul's conviction was put in jeopardy too. As Savage earlier reported, there was a debate among the national security lawyers. And in spite of the fact that almost everyone disagreed with Eric Holder on this count, Holder made them press forward anyway.

The Obama administration, after a high-level debate among its legal team, told a federal appeals court on Wednesday that the conviction of a Guantánamo Bay prisoner by a military commission in 2008 was valid even though the charges against him – including “conspiracy” and “material support for terrorism” – were not recognized as war crimes in international law.

Attorney General Eric H. Holder Jr. decided to press forward with the case, fighting the appeal of a guilty verdict against the prisoner, a Yemeni man named Ali al-Bahlul. In an unusual move, Mr. Holder overruled the recommendation of the solicitor general, Donald B. Verrilli Jr., who had wanted to drop the case because the appeals court had rejected the same legal arguments in another case several months ago, according to officials familiar with the deliberations.

The chief prosecutor of the military commissions system, Brig. Gen. Mark

Martins, had also urged the Justice Department to drop the case and pointedly did not sign the 22-page brief to the court on Wednesday. It concedes that the judges must side with Mr. Bahlul at this stage because of the earlier ruling in the other case, but argues that the earlier ruling was wrong.

It sure appears that Eric Holder is just counting on getting the same kind of batshit crazy ruling he got in Latif, so as to sustain his legally unjustified detention.

What's especially interesting about this, however, is the Kremlinology. Back in early December over the course of two days time, both Jeh Johnson and Harold Koh resigned. It felt very much like a protest, or a refusal to be part of something that struck them as legally unsound (I thought then—as still suspect—it was partly a response to John Brennan's halt of the effort to put drones on a sound legal footing).

And now we know that around that time, the Attorney General was overriding not just their advice, but that of most of the others involved in this, including the Solicitor General and the Military Commission Chief Prosecutor.

Yesterday's brief, incidentally, was signed by the Acting Deputy General Counsel at DOD, not Johnson (of course).

So Johnson and Koh are gone. And Eric Holder? The Administration just announced he will stay into the second term. (And, not incidentally, yesterday I floated the suggestion that Lisa Monaco, who sided with Holder on this fight, would be named to replace FBI Director Mueller later this year; a number of smart people suggested that was a smart prediction.)

Update: In the WaPo version of this story, Steve Vladeck suggests that if the government really planned to push forward with an appeal of this to SCOTUS (that is, to reverse the ruling in

Hamdan II), the language in the brief would have been stronger.

Incidentally, I wonder yet again about the case of the three Somalis in this context. Is this why they added a conspiracy charge to their indictment, to establish that as a precedent in this situation?