No. _____

In The
# Supreme Court of the United States

ALI HAMZA AHMAD SULIMAN AL BAHLUL,

*Petitioner*,

v.

UNITED STATES,

*Respondent.*

**On Application For A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Petitioner has been held at the United States Naval Station in Guantanamo Bay, Cuba, since January 2002. In November 2008, a military commission convicted him, *inter alia*, of the inchoate crime of conspiracy pursuant to the Military Commissions Act of 2006, 120 Stat. 2600. Respondent concedes that the stand-alone crime of conspiracy at issue here is not and was not recognized as a war crime under international law. Petitioner's conspiracy conviction raises three questions of exceptional importance:

1. Whether military commissions' assumption of the federal courts' subject-matter jurisdiction over wholly domestic crimes, such as conspiracy, violates Article III's reservation of the "trial of all crimes" to the judiciary?

2. Whether the Military Commissions Act's codification of crimes not otherwise recognized as war crimes under international law was intended to apply retroactively and, if so, does that violate the *Ex Post Facto* Clause?

3. Whether the Military Commissions Act's establishment of a segregated criminal justice system in which only non-citizens are subject to military commission jurisdiction violates the constitutional guarantee of equal justice under law?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

## CORPORATE DISCLOSURE STATEMENT

No corporations are parties, and there are no parent companies or publicly held companies owning any corporation's stock.

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## CONSTITUTIONAL, STATUTORY & REGULATORY PROVISIONS INVOLVED

Article I § 8, cl. 10 of the United States Constitution states:

> [The Congress shall have the power to] define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

Article I § 9, cl. 3 of the United States Constitution states:

> No Bill of Attainder or *ex post facto* Law shall be passed.

Article III § 1 of the United States Constitution states:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article III § 2, cl. 1 of the United States Constitution states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; —between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State,

> or the Citizens thereof, and foreign States, Citizens or Subjects.

Article III § 2, cl. 3 of the United States Constitution states:

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed

The Fifth Amendment of the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Military Commissions Act of 2006, 120 Stat. 2600, states in pertinent part:

> 10 U.S.C. 948c (2006) – Persons subject to military commissions Any alien unlawful enemy combatant is subject to trial by military commission under this chapter.
>
> 10 U.S.C. 948d(a) (2006) – A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law

of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.

10 U.S.C. 950p (2006) – Statement of substantive offenses.

(a) Purpose. – The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.

(b) Effect. – Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

10 U.S.C. 950v(28) (2006) – Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

The Military Commissions Act of 2009, 123 Stat. 2190, states in pertinent part:

10 U.S.C. 950f(d) – In a case reviewed by the Court under this section, the Court may act only with respect to the findings and sentence as approved by

> the convening authority. The Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses.
>
> 10 U.S.C. 950g(a) – Except as provided in subsection (b), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review) under this chapter.
>
> 10 U.S.C. 950g(d) – Scope and Nature of Review. — The United States Court of Appeals for the District of Columbia Circuit may act under this section only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review, and shall take action only with respect to matters of law, including the sufficiency of the evidence to support the verdict.

The Department of Defense, Manual for Military Commissions, Rules for Military Commissions (2007) states in relevant part:

> Rule 905(e) – *Effect of failure to raise defenses or objections*. Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under section (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from

the waiver. Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the commission is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

Rule 907(b)(1) – *Nonwaivable grounds*. A charge or specification shall be dismissed at any stage of the proceedings if: (A) The military commission lacks jurisdiction to try the accused for the offense; or (B) The specification fails to state an offense.

## PETITION FOR WRIT OF CERTIORARI

Petitioner, Ali Hamza Ahmad Suliman al Bahlul, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The decisions of the United States Court of Appeals for the District of Columbia Circuit (App. 1-454) are published at 840 F.3d 757, 792 F.3d 1, 767 F.3d 1, and 2013 WL 297726. The decision of the United States Court of Military Commission Review (App. 455-680) is published at 820 F.Supp.2d 1141.

## JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit issued its opinion and judgment in this case on October 20, 2016, and denied a timely petition for rehearing on November 28, 2016. App 681. On February 3, 2017, the Chief Justice granted petitioner's motion to extend the time to file until March 28, 2017. The jurisdiction of this Court is invoked under 10 U.S.C. 950g(e) and 28 U.S.C. 1254(1).

## PRELIMINARY STATEMENT

Respondent first charged petitioner before a military commission with the inchoate crime of conspiracy in 2004. It convicted him of that crime in 2008. Today, the threshold question of whether that military commission could lawfully exercise jurisdiction over that charge remains as unresolved as it was thirteen years ago. In just this post-trial appeal, there have been six rounds of merits briefing, five oral arguments, three rehearings *en banc*, and fourteen published opinions. Yet, this case comes to this Court with no controlling decision from the D.C. Circuit on a question of exceptional importance: Is it constitutional to try wholly domestic federal crimes, such as conspiracy, in these special non-judicial trial chambers?

"Trial by military commission raises separation-of-powers concerns of the highest order." *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring). The modern military commission system created by the Military Commissions Act raises those concerns to a level never confronted before. Traditionally, military commissions were convened on the battlefield by a military commander to try universally recognized war crimes during or soon after the cessation of hostilities. While they frequently invited criticism for procedural irregularities, they were part-and-parcel of military operations, conducted in wars of definite geographic scope, and temporary. Not so here.

The modern military commission system was designed to be a permanent alternative to the federal court system. They are administered by a large civilian bureaucracy within the Department of Defense and statutorily adjoined, like the bankruptcy and tax courts, to the statutory jurisdiction of the D.C. Circuit. They are conducted in Guantanamo, which was recently described

by the military judge presiding over the September 11th case as "an active and relatively modern U.S. Navy base in existence since 1903. The Commission is not convened in Iraq, Afghanistan, or the Horn of Africa where the U.S. presence is truly expeditionary." *United States v. Mohammed*, AE485C (Jan. 19, 2017). Their procedural flaws, such as the lack of judicial independence, curtailed counsel rights, and the admission of hearsay and evidence derived from torture, are not *ad hoc* adaptations to battlefield conditions. They are codified features. And, as noted in the petition filed in *Nashiri v. Trump* (No. 16-___), these tribunals openly compete for the district courts' jurisdiction over the most routinely charged federal crimes in some of the most high-profile trials in U.S. history. Never have military commissions posed such a clear danger to the structural integrity of the judicial branch.

Even in the first few months after Pearl Harbor, when the dangers to national security could not have been greater, this Court only permitted the use of military commissions subject to two conditions. *First*, this Court limited the offenses triable to those that Congress could codify pursuant to its Article I § 8, cl. 10 power to "Define and Punish … offenses against the law of nations." *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942) . *Second*, even where offenses might be sustainable under the Define & Punish Clause, this Court held that they were not eligible for non-judicial trial if "they are of that class of offenses constitutionally triable only by a jury." *Id.* at 29, 39-40. Hence, this Court ruled that "offenses against the law of war" were, like petty offenses, not "'crimes' and 'criminal prosecutions'" within the meaning of Article III because they were "not triable by jury at common law." *Id.* at 40.

Here, the parties agree that petitioner's stand-alone conspiracy conviction is not an *offense* under the law of nations. And conspiracy has long been recognized to be

an infamous *crime*, triable only by jury at common law. This case asks, therefore, whether the very high ceiling set by *Quirin* – requiring military commissions to try only law of war offenses that are not crimes triable by jury at common law – remains good law.

Relatedly, the retroactive prosecution of crimes first criminalized in the Military Commissions Act, such as conspiracy, has left every military commission in Guantanamo under a constitutional cloud. This statute was enacted nearly five years after petitioner was taken into custody and three years after he was first charged. The Circuit divided by a vote of 4-3 on whether ambiguities in petitioner's trial-level objections should be construed to constitute a forfeiture of his claim that this violated the *Ex Post Facto* Clause. The result was a ruling that avoided the merits via the plain error rule. As Judges Rogers, Brown, and Kavanaugh noted in dissent, this reach for the plain error rule was both erroneous and improper. Without this Court's review, prosecutors and defendants alike will lack needed legal clarity for a decade to come.

Finally, the Military Commissions Act violates the Constitution's most basic guarantees of equal justice under law. Congress has created a non-judicial criminal justice system with general subject-matter jurisdiction but with personal jurisdiction limited to non-citizens. The majority below ruled that segregating non-citizens in this way was constitutionally defensible because the federal government is permitted to discriminate against non-citizens on matters of national security. But this blanket deference is inconsistent with this Court's precedents which have held that discrimination against non-citizens must at least be rationally related to a law's objectives. It may not be invidious, particularly where it impacts the criminal justice system. Thus in *Wong Wing v. United States*, 163 U.S. 228 (1896), this Court invalidated a

similarly discriminatory law, which segregated non-citizens into a non-judicial trial process for immigration law violations. The majority below neither cited nor distinguished *Wong Wing*. And it ignored the Act's legislative history, which shows that lawmakers enacted this limit merely to avoid the political accountability that would result if citizens were subject to these tribunals' truncated procedures.

Like the other two questions presented, the equal protection issue looms over every military commission case and continues to remain unresolved after more than a decade of litigation. The costs of this legal uncertainty are not limited to those on trial in Guantanamo. The threat of being segregated into a special trial chamber for crimes as broadly sweeping as conspiracy and material support for terrorism looms over at least twenty-three million non-citizens in this country. And it undermines the American justice system's credibility as a role model to the world for equal justice under law.

## STATEMENT OF THE CASE

**Initial Custody.** Petitioner is a Yemeni national. In 1999, he traveled to Afghanistan and became a follower of Usama bin Laden. He returned to Yemen in December 1999, but then left again for Afghanistan in the spring of 2000 to join al Qaeda. He was seized by local authorities in Pakistan in December 2001 and transferred to Guantanamo in January 2002.

**Trial Proceedings.** In 2004, the Department of Defense charged petitioner with conspiracy and slated him for trial before a military commission pursuant to 10 U.S.C. 821. The overt acts alleged that petitioner provided secretarial services to bin Laden and was the principal editor of a 90-minute propaganda film celebrating al Qaeda's ideology. Petitioner has never been alleged to have directly participated in or had any foreknowledge of any terrorist attack.

During pre-trial proceedings, petitioner raised various objections, principally to the requirement that he have a military lawyer represent him. Petitioner sought representation by a Yemeni lawyer or, in the alternative, to represent himself. He wrote nine of his objections down in an Arabic document he called the "nine points of boycott" or "Nine Points." For reasons that remain unclear, the government retained custody of petitioner's legal papers and lost the only known copy of the Nine Points. In its place, a portion of transcript from a hearing in January 2006, during which petitioner first discussed the Nine Points, is included as Appellate Exhibit 30. The translation quality, however, is very poor and the transcript inexplicably omits the discussion of Objection #4 altogether.

In February 2008, the Department of Defense issued new charges against petitioner under the Military Commissions Act of 2006, 120 Stat. 2600. The Act

contained thirty-one enumerated offenses made triable by military commission. 10 U.S.C. 950t-950w (2006). Petitioner was charged with three of the statute's inchoate crimes. The first charge, conspiracy (10 U.S.C. 950v(b)(28) (2006)), was substantively identical to the prior charge. Two other charges of solicitation (10 U.S.C. 950u (2006)) and providing material support for terrorism (10 U.S.C. 950v(b)(25) (2006)) were also levied based on the same overt acts.

Petitioner was not charged with any substantive crime, nor with complicity in any completed crime. With respect to the charge of material support for terrorism, petitioner was only charged with the 18 U.S.C. 2339B variant of the offense, which proscribes providing support to a terrorist organization. He was not charged with the section 2339A variant of the offense, which proscribes providing material support "to be used in preparation for, or in carrying out, an act of terrorism." 10 U.S.C. 950v(b)(25) (2006). And with respect to the conspiracy charge, the prosecution expressly disclaimed any allegation that petitioner was guilty of a substantive crime via a conspiracy-type theory of liability. Specifically, the 2008 conspiracy charge originally alleged that petitioner "join[ed] al Qaeda, an enterprise of persons who shared a common criminal purpose, that involved, at least in part, the commission or intended commission of [a war crime]." App. 110. Prior to petitioner's entry of his pleas, the prosecution *sua sponte* moved to strike this language in order to "reduce[] the offense." Trans. 113. Accordingly, the military judge charged the members (i.e. the military "jury") only on the stand-alone, inchoate crime of conspiracy, stating that "the overt act required for this offense does not have to be a criminal act," and "proof that [any object offenses] actually occurred is not required." Trans. 848.

Other than to renew his request to represent himself, petitioner made no formal motions. He did, however, orally announce his "boycott" of the proceedings, object to the loss of his Nine Points, reject his military lawyer, and question the presiding military judge on the retroactive application of the Military Commissions Act. Trans. 104. The military judge construed petitioner's self-styled "boycott" as a challenge to the military commission's legality. "If someone makes such a motion and loses it," the military judge advised him, "their continued presence at the trial does not waive the motion for appeal. … Some of those reasons can be that the court was not lawfully created. Other reasons can be that the charge itself does not state a crime." Trans. 98-99. Petitioner then admitted most of the factual allegations against him and pleaded "not guilty, and what I did was not a crime." Trans. 175.

Trial commenced on October 27, 2008. The government called fourteen witnesses. The Bureau of Prisons brought three federal prisoners to testify about seeing petitioner's film at terrorist training camps. Law enforcement officers testified on the film's production and the chain of custody linking it to petitioner. Three interrogators testified largely about petitioner taking credit for the film's production. As its last witness, the government called a "propaganda expert [to] breakdown this video and place it in the context of other propaganda[.]" Trans. 318. On November 3, 2008, the commission found petitioner guilty on all charges and sentenced him to life.

**Appeal to the Court of Military Commission Review.** In June 2009, the Convening Authority approved the judgment without exception. The case was fully briefed and argued before the United States Court of Military Commission Review (USCMCR) in January 2010. In addition to its arguments on the merits, respondent argued that all of petitioner's legal claims, except for his claim that Article I and Article III precluded the trial of

non-war crimes before a military commission, should be deemed waived because a military lawyer appointed to represent him in his absence agreed to "waive all motions" during a pre-trial hearing in August 2008.

In September 2010, the USCMCR *sua sponte* ordered rehearing *en banc* and specified two additional issues: 1) whether the international law theory of liability known as "joint criminal enterprise" supported the conclusion that "Charges I through III constitute offenses triable by military commission and whether those charges violate the *Ex Post Facto* Clause of the Constitution;" and 2) whether "the offense of aiding the enemy limited to those who have betrayed an allegiance or duty to a sovereign nation[.]" App. 467.

In September 2011, the USCMCR affirmed the judgement without exception. It reasoned that

> "[w]here Congress' determination that certain acts constitute offenses under the law of nations is consistent with international norms, we also conclude that the specific statutory scheme employed by Congress to include the name of the offense, the elements of that offense, the forum by which that offense is punishable, and the applicable rules/procedures, is due great deference."

App. 495. Finding "international norms" condemning terrorism, the USCMCR held all three crimes charged constitutionally triable by military commission. App. 587.

The USCMCR then rejected petitioner's equal protection challenge due to its decision in *United States v. Hamdan*, 801 F.Supp.2d 1247, 1313–23 (U.S.C.M.C.R. 2010), where it had held that "Congress and the President have rightly determined that the treatment of foreign detainees captured on the battlefield in a foreign land has foreign policy implications[.]"

Finally, the USCMCR rejected respondent's waiver argument as moot. The USCMCR noted, however, that the "record also reveals ambiguity surrounding detailed defense counsel's authority to act in appellant's stead when he 'waived all motions,' and the absence of explicit, on the record discussion of the effect of, or appellant's understanding of his voluntary absence on motions, defenses or objections." App. 668.

**D.C. Circuit's First Panel Decision.** Petitioner timely appealed to the D.C. Circuit. In its briefing, respondent abandoned the USCMCR's decision and conceded that none of the charges it brought against petitioner were cognizable under international law. It contended, however, that they could nevertheless be prosecuted in a military commission under the "U.S. Common Law of War."

While petitioner's case was pending, Judge Kavanaugh, joined by Judges Sentelle and Ginsburg, ruled in a related case that the Military Commissions Act should not be construed to authorize the retroactive prosecution of offenses not otherwise triable by military commission under pre-existing law. *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (*Hamdan II*). The panel rejected respondent's "U.S. Common Law of War" argument, holding that under pre-2006 law (10 U.S.C. 821), military commissions' jurisdiction reached only violations of the international law of war. *Id.* at 1252.

In January 2013, respondent conceded that petitioner's conviction could not survive *Hamdan II* and notified the Circuit of its intention to seek certiorari in petitioner's case to have *Hamdan II* overturned. The Circuit duly vacated petitioner's conviction on all charges. App. 454.

**D.C. Circuit's First *En banc* Decision.** Instead of seeking certiorari, respondent sought rehearing *en banc*. The Circuit granted rehearing and specified two additional

questions: 1) whether "the *Ex Post Facto* Clause appl[ies] in cases involving detainees at Guantanamo;" and 2) "was conspiracy a violation of the international law of war at the time of [petitioner's] offense."

By a vote of 4-3, the Circuit held that petitioner had forfeited his *ex post facto* challenge by failing to raise it with sufficient specificity at trial, making it reviewable only for plain error. App. 314. Judges Rogers, Brown, and Kavanaugh dissented, arguing that petitioner had adequately raised the claim, that the plain error rule was not part of the law governing military commissions, and that the *ex post facto* challenge was non-forfeitable in any event. Judge Rogers and Kavanaugh also highlighted a circuit split that the majority had created on the forfeitability of *ex post facto* claims specifically and claims challenging statutes' facial constitutionality generally. App. 388, 449.

On the merits, respondent conceded the applicability of the *Ex Post Facto* Clause and the Circuit assumed without deciding that it applied. The Circuit unanimously vacated petitioner's convictions for solicitation and material support for terrorism. The four-member majority, however, affirmed the conspiracy conviction, finding that it was "not a plain *ex post facto* violation to transfer jurisdiction over [18 U.S.C 2332(b)] from an Article III court to a military commission," App. 332, and it was "not 'obvious' that conspiracy was not traditionally triable by law-of-war military commission under [10 U.S.C.] 821." App. 346. Judges Kavanaugh and Brown would have affirmed on *de novo* review and solely based on the scope of 10 U.S.C. 821. Judge Rogers dissented on *de novo* review, adhering to Judge Kavanaugh's reasoning in *Hamdan II*. The Court then remanded the case back to the panel so that it could to decide petitioner's remaining claims.

**D.C. Circuit's Second Panel Decision.** On remand, the panel vacated petitioner's conviction for conspiracy, holding "petitioner's conviction for inchoate conspiracy by a law of war military commission violated the separation of powers enshrined in Article III § 1 and must be vacated." App. 205. The majority ruled that *de novo* review was required given the Article III challenge's structural character and given respondent's concession that *de novo* review applied both before the USCMCR and before the panel. App. 167. Judge Henderson dissented, arguing that plain error review should apply and that "the definition and applicability of international law is, in large part, a political determination[.]" App. 217. (Henderson, J., dissenting) (citations omitted). The panel reserved judgment on the remaining grounds.

**The D.C. Circuit's Second *En banc* Decision.** Respondent again petitioned for rehearing *en banc*. The Circuit granted rehearing and directed the parties to address the standard of review and the scope of Congress' power under the Define & Punish Clause.

On October 20, 2016, the Circuit issued a *per curiam* opinion affirming the judgment of the USCMCR, in turn affirming petitioner's conviction of conspiracy and rejecting petitioner's outstanding equal protection challenge. App. 4. Five opinions were issued for the nine-member court. None garnered a majority. Judges Tatel, Rogers, and Pillard issued a joint dissent.

On the standard of review, the Circuit held 7-2 that petitioner's Article III challenge was subject to *de novo* review. Judges Henderson and Millet filed opinions arguing that the plain error rule should apply and that petitioner's conspiracy conviction survived plain error review, albeit for different reasons.

Applying *de novo* review, Judge Kavanaugh, joined by Judges Brown and Griffith, would have ruled that it

was within Congress' Article I power to make conspiracy triable by military commission. Based upon the historical practice of the political branches ostensibly reflected in the military trial of the Lincoln Assassins and Nazi Saboteurs, Judge Kavanaugh concluded that Congress could also exempt conspiracy from Article III. Judge Wilkins, writing only for himself, would have affirmed petitioner's conspiracy conviction, in effect, on harmless error grounds.

The joint dissent would have ruled that this Court "has recognized a limited Article III exception for the prosecution of internationally recognized war crimes in military tribunals." App. 140. The joint dissent found that respondent "offered no reason—rooted in history, the Constitution, case law, or anything else—for extending that exception further." *Ibid.* Because conspiracy was concededly not an internationally recognized war crime, the joint dissent concluded that it could not be diverted from the Article III courts. The joint dissent also disputed the historical accuracy of Judge Kavanaugh's characterization of the Lincoln and Saboteur cases.

Six judges ruled against petitioner's equal protection claim, though divided on the standard of review. Judge Kavanaugh, joined by Judges Brown and Griffith, relied upon his separate opinion in the first *en banc* rehearing, rejecting petitioner's equal protection claim *de novo*. App. 4. Judge Henderson also joined Judge Kavanaugh's opinion, but would have subjected all of petitioner's claims to plain error review. App. 221. Judge Millet, joined by Judge Wilkins, rejected petitioner's equal protection challenge only on plain error review. App. 80. The joint dissent did not address the issue.

Petitioner filed a timely petition for rehearing. On November 28, 2016, the Circuit denied rehearing. This petition followed.

## REASONS FOR GRANTING THE PETITION

### I. THIS COURT NEEDS TO SETTLE WHETHER CONGRESS MAY EXEMPT WHOLLY DOMESTIC CRIMES, SUCH AS CONSPIRACY, FROM ARTICLE III.

Congress has created a permanent criminal justice system that assumes the federal courts' jurisdiction over the trial of domestic crimes and operates within the Executive Branch for all but the disposition of post-trial appeals. Petitioner stands convicted of conspiracy, an infamous crime that this Court has squarely held to be within the exclusive jurisdiction of the courts of law. *Callan v. Wilson*, 127 U.S. 540 (1888). While respondent claims the benefit of this Court's precedents respecting the use of military commissions to try law-of-war offenses, respondent also concedes that conspiracy is not a war crime under international law. App. 6. This Court is therefore squarely presented with a constitutional question of fundamental importance: May Congress vest these military commissions with the federal courts' jurisdiction over wholly domestic crimes?

1. As noted in the petition filed with this Court in *Nashiri v. Trump*, this issue is made especially pressing because these modern "military commissions" bear little resemblance to the battlefield tribunals that supposedly stand as their precedent. Pet. for Cert. in *Nashiri v. Trump* (No. 16-___), 3-4. The trial in this case served no "need to dispense swift justice," but instead occurred seven years after petitioner was taken into custody. *Hamdan*, 548 U.S. at 607 (plurality op.). It took place, not "on the battlefield," but at a U.S. penal colony. *Ibid.* The evidence introduced at trial was not salvaged from the fog of war, but meticulously presented by law enforcement agents, cooperating witnesses in the custody of the Bureau of Prisons, and government-paid experts. And

rather than prove his guilt for atrocities, prosecutors convicted petitioner of inchoate crimes based on his alleged collusion with a criminal organization.

Indeed, the military commission system operating in Guantanamo is barely a military endeavor at all. These tribunals operate, not under the authority of a battlefield commander, but a civilian bureaucracy administered under the Secretary of Defense. That is significant, in part, because this Court has always been careful not to extend the deference accorded the military's wartime operations to a "civilian agency" that does nothing but brandish military auspices. *Ex parte Endo*, 323 U. S. 283, 298 (1944). But its overriding significance is that it lays bare the stakes of this case. This case is not about what the military may do in wartime. It is about whether the political branches may create a permanent competitor to the federal courts within the civilian bureaucracy.

This Court has been left as the only court with jurisdiction to answer the threshold question of what criminal subject-matter jurisdiction may be withdrawn from the Article III courts and given to these tribunals. While there is no circuit split, the Circuit's failure to issue a controlling opinion has had the same effect. By statute, 10 U.S.C. 950g(a), and this Court's decisions, *Gherebi v. Bush*, 374 F.3d 727, 739 (9th Cir. 2004), the D.C. Circuit has exclusive jurisdiction over Guantanamo issues generally and the military commissions specifically. When sitting *en banc*, its word is final unless this Court grants review. But after granting rehearing *en banc* for a second time in this case, no opinion garnered a majority, forcing the Circuit to issue a *per curiam* order supported by six of its members, who concurred only in the result in four divergent opinions. Like when the *en banc* Federal Circuit fails to resolve legal questions within its exclusive jurisdiction, responsibility for settling what

the law is now rests with this Court alone. *See*, *e.g.*, *Alice Corp. Pty. v. CLS Bank Int'l*, 134 S.Ct. 2347, 2353 (2014).

Compounding matters, if this Court does not grant certiorari, the governing law for the foreseeable future will be the USCMCR's decision from 2011. This fact has already been noted in a capital military commission that remains pending in Guantanamo. *United States v. Nashiri*, AE048U (Feb. 2, 2017). This is truly an absurd result. The reasoning of the USCMCR's decision is so questionable that it has been ignored or rejected outright by all eight members of the D.C. Circuit to have written opinions in this case. In fact, the USCMCR's core premise – that conspiracy to commit terrorism constituted an offense under the international law of war – was abandoned by respondent as soon as this case reached the Circuit. A decision that has been abandoned or rejected at every turn, therefore, now threatens to govern for the next decade by simple default.

This case squarely asks this Court to resolve a question of exceptional importance that the D.C. Circuit could not. The prosecution of conspiracies is the most routine and emblematic exercise of federal criminal jurisdiction in use today. The encroachment into the role of the judiciary under Article III in this case is neither "slight" nor "innocuous at first blush." *Stern v. Marshall*, 564 U.S. 462, 503 (2011). Instead, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). It tells the public that the federal courts are not up to the task of adjudicating some of the highest profile criminal cases in this country's history and it dilutes the status of federal judges as readily replaceable by the Department of Defense. This Court must decide whether the war powers broadly construed allow the political branches to re-allocate the judicial power over domestic crimes to special tribunals within the Executive Branch.

2. This Court should also grant certiorari because the prosecution of inchoate conspiracy charges before military commissions requires a substantial break, if not explicit overruling, of this Court's key precedents on military commission jurisdiction. In *Quirin*, this Court articulated two minimum conditions that determine "whether it is within the constitutional power of the National Government to place petitioner[] upon trial before a military commission for the offenses with which [he was] charged." *Quirin*, 317 U.S. at 29. To be "triable by military tribunal," the offenses charged must be both: 1) "recognized by our courts as violations of the law of war" and 2) not otherwise included among "that class of offenses constitutionally triable only by a jury." *Ibid.*

The first condition is rooted in the textual limits of Congress' power under the Define & Punish Clause, Article I § 8, cl. 10, to vest military commissions with jurisdiction over "offenses against the law of nations." *Quirin*, 317 U.S. at 28; *In re Yamashita*, 327 U.S. 1, 7 (1946). The second condition is rooted in Article III's independent reservation of the "trial of all crimes" to the courts of law. "Offenses" against the law of war, like petty offenses, are not considered "crimes" within the meaning of Article III. *Quirin*, 317 U.S. at 29, 39-40; *see also Military Commissions*, 11 U.S. Op. Atty. Gen. 297, 312-13 (1865) ("Infractions of the laws of nations are not denominated *crimes*, but *offenses*. … *Offenses* against the laws of war must be dealt with and punished under the Constitution as the laws of war, they being a part of the law of nations, direct; *crimes* must be dealt with and punished as the Constitution, and laws made in pursuance thereof, may direct.") (original emphasis).

As respondent concedes, conspiracy is not "recognized in international law as [a] violation[] of the law of war." *Yamashita*, 327 U.S. at 14; *see also* App. 8, 113, 180, 209. The leading authorities on international law and

U.S. war crimes practice are unanimous. "United States Military Tribunals … have not recognized as a separate offense conspiracy to commit war crimes or crimes against humanity." 15 L. Rep. Trials of War Criminals 90 (1950); *see also* App. 113-120 (joint dissent) (collecting authorities).

Conspiracy is also an infamous crime "of the class traditionally triable by jury at common law." *Quirin*, 317 U.S. at 40. And in *Quirin*, this Court strongly suggested, if not implicitly held, that it was not triable as a stand-alone offense in a military commission. In setting forth the scope of "the right to jury trial as it had been established by [Article III § 2]," *id.* at 39, *Quirin* placed special emphasis on *Callan v. Wilson*, 127 U.S. 540 (1888). This Court's decision in *Callan*, in turn, held that the stand-alone offense of conspiracy was triable only by jury even where the object offense of the conspiracy might not be. *Callan*, 127 U.S. at 556.

3. Judge Kavanaugh's opinion, which was the only opinion to affirm joined by other members of the Circuit, fails to answer the Article III problem at the center of this case. Indeed, Judge Kavanaugh admitted that "[b]ased solely on the text of Article III, [petitioner] might have a point." App. 23. Judge Kavanaugh instead dedicated most of his opinion to rejecting the argument that Congress' legislative power is constrained by international law. When he turned to the Article III question, Judge Kavanaugh admitted that he could offer no rule to define the "outer limits of the Constitution in this context, other than to say that international law is not such a limit." App. 28. And he highlighted his concern that even cyber-attacks might be triable by military commission without such a rule. *Ibid.* In place of a legal rule, Judge Kavanaugh deferred to "the historical practice of the Legislative and Executive Branches," which he asserted

embraced the military trial of conspiracy charges in the Lincoln Assassins and Nazi Saboteur cases. App. 16.

As an initial matter, Judge Kavanaugh's exclusive reliance on the practice of the political branches does not answer the question presented here. When this Court answers separation-of-powers questions by reference to historical practice, it looks to the historical practice of the branches whose powers are involved. *Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2091 (2015). The Lincoln and Saboteur episodes reflect – at most – the practice of the political branches, not the courts; the branch whose core constitutional responsibilities are under assault.

These two episodes also do not demonstrate the kind of "firmly established historical practice" that is necessary to establish an exemption from Article III. *Stern*, 564 U.S. at 504-05 (Scalia, J., concurring). As the joint dissent noted below, even if these cases involved conspiracy charges (which is by no means obvious), they also involved completed war crimes and jurisdictional facts – such as martial law – not present here. App. 136-140. And whatever they may be examples of, it is doubtful that these two isolated episodes deserve to be given any precedential value at all. Prior to this litigation, both had earned degrees of infamy unusual in the annals of American criminal law. Martin Lederman, *The Law(?) of the Lincoln Assassination*, 118 COLUMBIA L. REV. ___ (2018) ("They are aberrant cases, noteworthy in large measure because they deviated so dramatically from the norm.").[1]

In the fifteen years since the attacks of September 11, 2001, more than 488 terrorism cases have been successfully prosecuted in federal court, the vast majority involving the crimes of conspiracy and material support for terrorism. Center on National Security,

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[1] *Available at* https://ssrn.com/abstract=2854195

Statistical Analysis (Feb 24, 2017);[2] Tom Hays, *As Trump touts Guantanamo, civilian prosecutors notch wins*, Associated Press (Mar. 17, 2017).[3] The time is right for this Court to reaffirm that the Lincoln and Saboteur cases are legal exceptions, confined to their unique historical circumstances. The war on terrorism is not a civil war in which vast swaths of this country subsist under martial law. It is not a world war between the greatest industrial powers on earth. As this Court held in *Hamdan*, the resort to military commissions depends upon "military necessity." *Hamdan*, 548 U.S. at 590. This Court should grant certiorari to hold that the federal courts' duty to preside over the trial of all crimes is not optional.

## II. THIS COURT MUST DETERMINE WHETHER CONGRESS MAY CODIFY CRIMES AND MAKE THEM RETROACTIVELY APPLICABLE BY LEGISLATIVELY DETERMINING THAT ITS OWN STATUTE IS DECLARATIVE OF EXISTING LAW.

Even assuming Congress has the power to divert the prosecution of non-war crimes to military commissions, every trial in Guantanamo has involved crimes committed before the enactment of the Military Commissions Act of 2006. Here, petitioner was prosecuted under a law passed five years after his arrest and nearly three years after he was first charged. The retroactivity question presented is therefore extraordinary and implicates the precise separation of powers danger that the presumption against retroactivity and the *Ex Post Facto* Clause aim to prevent: the political branches' arrogation of the power to say what the law is, as opposed to what the law will be.

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[2] *Available at* https://perma.cc/A32Y-FLWY

[3] *Available at* https://perma.cc/8WBA-BCLX

1. Prior to 2006, the only statute conferring subject-matter jurisdiction on military commissions was the Uniform Code of Military Justice (UCMJ). *Hamdan*, 548 U.S. at 593-94. The UCMJ proscribed aiding the enemy and spying specifically and vested military commissions with jurisdiction over offenses under the "law of war" generally. 10 U.S.C. 821, 904, 906. Whether conspiracy or any other crime enumerated in the Military Commissions Act is being applied retroactively therefore turns on whether the Act's specification of that crime merely re-codified one of the "offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals" under the UCMJ. *Quirin*, 317 U.S. at 28.

While this Court split 4-3 in *Hamdan* over whether conspiracy was a war crime under international law, one of the few points of unanimity was that "the law of war is derived not from domestic law but from the wartime practices of civilized nations, including the United States[.]" *Hamdan*, 548 U.S. at 701 n.14 (Thomas, J., dissenting); *id.* at 641 (Kennedy, J., concurring); *id.* at 601-11 (plurality op.). This common-sense definition of the "law of war" was unanimously accepted by the panel that decided *Hamdan II*, when it held "The 'law of war' cross-referenced in [the UCMJ] is the international law of war." 696 F.3d at 1241. And though contrary to Justice Thomas' dissent in *Hamdan*, respondent has now stipulated that the position of the United States is that conspiracy was not and is not a war crime under international law.

Petitioner's conviction for the stand-alone conspiracy offense therefore presents two questions that confront every currently pending military commission: 1) does the Military Commissions Act's codification of new crimes, such as conspiracy, overcome the presumption against

retroactivity; and 2) if so, does its retroactive proscription of those crimes violate the *Ex Post Facto* Clause?

2. With respect to the Military Commissions Act's retroactive scope, the Circuit divided over whether it evinced a sufficiently "clear congressional intent" to apply retroactively. *Martin v. Hadix*, 527 U.S. 343, 354 (1999). In *Hamdan II*, the panel concluded that the Act was at best ambiguous and to the extent it augmented, as opposed to simply re-codified, the jurisdictional scope of the UCMJ, "Congress would *not* have wanted *new* crimes to be applied retroactively." *Hamdan II*, 696 F.3d at 1248 (original emphasis). Based on this holding, respondent conceded that petitioner's conviction had to be vacated. App. 453.

On rehearing this case *en banc*, the Circuit overruled *Hamdan II*, finding the statute "is unambiguous in its intent to authorize retroactive prosecution for the crimes enumerated in the statute—regardless of their pre-existing law-of-war status[.]" App. 317. For the reasons stated in *Hamdan II* as well as this Court's cases respecting how the temporal scope of all laws – and criminal laws in particular – must be construed, this Court should correct the majority's finding that the Military Commissions Act overcame the presumption against retroactivity.

3. If this Court agrees with the Circuit on the statutory question, the resulting *Ex Post Facto* Clause question must be resolved because at least three of its implications are far-reaching. *First*, ongoing military commissions have been bogged down by uncertainty over whether they may exercise jurisdiction over crimes first criminalized in the Military Commissions Act. As Judge Brown argued below in dissent, without this Court's review, "it may be many years before the government receives a definitive answer on whether it can charge the

September 11 perpetrators with conspiracy, or whether Congress has the power to make such an offense triable by military commission even prospectively." App. 416. (Brown, J., dissenting in part).

*Second*, the ambiguity over the Military Commissions Act's retroactive scope stems from Congress' stated intention to declare the law, rather than to enact the law. Instead of giving the Act's punitive sections unambiguous retroactive applicability through the usual method of an effective date provision, Congress enacted 10 U.S.C. 950p (2006). Section 950p was a self-styled statement of "purpose" and "effect," which stated that the Act did "not establish new crimes" but instead was "declarative of existing law" and therefore did not preclude prosecution for pre-enactment conduct.

This Court must therefore decide whether the statutory declaration of existing law violates the *Ex Post Facto* Clause when it "alters the definition of criminal conduct" after the fact. *Lynce v. Mathis*, 519 U.S. 433, 441 (1997). This Court has historically invalidated declaratory laws as an unconstitutional effort by Congress to substitute its interpretation of pre-existing law for the judiciary's. *Postmaster-General v. Early*, 12 Wheat. 136, 148-49 (1827) (Marshall, C.J.); 1 *Kent's Comm. on Am. L.* 513, n.*b* (10th ed. 1860). This case, where Congress has unequivocally stated its intent to pass a declaratory law, affords the Court an opportunity to provide guidance on whether and how such laws may be given retroactive effect.

*Third*, the Circuit's decision has created uncertainty respecting the meaning of the "law of war." Having stipulated that conspiracy was not a war crime as that term has traditionally been understood, respondent was forced to argue below that UCMJ's use of the phrase "law of war" encompassed not simply offenses under the law

of armed conflict but also a heretofore unrecognized "U.S. Common Law of War." *Hamdan II*, 696 F.3d at 1252. The Circuit did not accept this argument outright. Instead, for reasons stated *supra*, the Circuit applied the plain error rule, concluded that it was not plain that the law of war is "limited to the international law of war," and therefore left the meaning of the "law of war" unsettled. App. 341.

Respondent's novel re-definition of the "law of war" has profound consequences. That phrase is used in at least twenty-one sections of the U.S. Code to define and constrain Executive power over everything from federal jurisdiction, 28 U.S.C. 1442a, to the seizure of private property. 50 U.S.C. 2204. The law of war defines the source and limits of the Executive's power to detain citizens, *Hamdi v. Rumsfeld*, 542 U.S. 507, 548 (2004), and to target citizens in drone strikes. *Al-Aulaqi v. Panetta*, 35 F.Supp.3d 56, 64 n.13 (D.D.C. 2014). As the fount of Executive power yielding so many serious consequences over the past fifteen years, the law of war cannot have a quixotic or indefinite meaning for years to come.

## III. THE SEGREGATION OF THE CRIMINAL JUSTICE SYSTEM PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE THAT THIS COURT MUST ADDRESS.

The Military Commissions Act limits the military commissions' personal jurisdiction to non-citizens. 10 U.S.C. 948c. For only the second time in U.S. history, therefore, Congress has attempted to segregate the criminal justice system to deprive non-citizens of a judicial trial.

The first was the Chinese Exclusion Acts' provision for the prosecution of non-citizen Chinese before commissioners for immigration law violations. 27 Stat. 25.

This Court struck that law down because equal justice is guaranteed in this country "without regard to any differences of race, of color, or nationality, and the equal protection of the laws is a pledge of the protection of equal laws" *Wong Wing*, 163 U.S. at 238 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)). Accordingly, "even aliens shall not be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law." *Ibid.*

Here, Congress has gone even further because unlike the immigration laws at issue in *Wong Wing*, these military commissions' subject-matter jurisdiction is neither germane to nor necessarily depends upon the defendant's nationality. Instead, they exercise jurisdiction over a broad range of offenses for which citizens and non-citizens are prosecuted with regularity. *See*, *e.g.*, *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011) (affirming the convictions of two citizens, José Padilla and Kifah Jayyousi, along with a non-citizen, Adham Hassoun, of conspiracy, material support, and other "offenses relating to their support for Islamist violence overseas.").

There is simply no good precedent for the wholesale denial of equal justice under law presented here. The closest analogs are the special magistrate courts and commissions of *oyer* and *terminer* used during the antebellum period for the prosecution of slaves. *See* Thomas D. Morris, Southern Slavery and the Law, 1619-1860 210-15 (1996); *State v. Kentuck*, 8 La.Ann. 308, 309 (1853). This Court never ratified the segregation of that particular category of non-citizens into summary justice systems and its incompatibility with the Constitution's most basic post-Civil War guarantees is now self-evident. "Both equal protection and due process emphasize the central aim of our entire judicial system: all people

charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (*quoting Chambers v. Florida*, 309 U.S. 227, 241 (1940)).

That the Military Commissions Act styles its tribunals as "military commissions" only highlights what a profound break this law presents from this country's precedents and principles. Military commissions have always tried suspected citizen war criminals right alongside non-citizens. *See*, *e.g.*, *Quirin*, 317 U.S. at 37-38. In fact, it was the racialist powers of Imperial Japan and Nazi Germany that segregated war crimes suspects based upon citizenship. *United States v. Von Leeb*, *et al.*, 12 L. Rpts. of Trials of War Criminals 1, 37 (1949) (Night and Fog Decree); *United States v. Sawada*, *et al.*, JAGO File No. 119-19-5, ex. 25, at 6 (1946) (Military Law for the Japanese Expeditionary Army in China). In response, one of the principal lessons enshrined into the Geneva Conventions was the rejection of discriminatory justice. I.C.R.C., COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 623 (1960). ("Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts. There is therefore no question of setting up special tribunals to try war criminals of enemy nationality.").

The Circuit rejected petitioner's challenge, reasoning that the federal government may discriminate based upon alienage in furtherance of national security. App. 441-42. Given the D.C. Circuit's outsized influence among the circuit courts, this blanket deference to the political branches' views respecting their constitutional obligations is likely to have far reaching consequences. *See*, *e.g.*, *Hernandez v. United States*, 785 F.3d 117, 127 (5th Cir. 2015) *cert. granted* 137 S.Ct. 291 (2016) (relying on *Bahlul* to limit the Constitution's extraterritorial scope).

Yet, this uncritical deference is contrary to this Court's precedents and unjustified by the legislative record.

This Court has consistently held that, consistent with its text, the Fifth Amendment protects every *person* "from invidious discrimination by the Federal Government" regardless of citizenship. *Plyler v. Doe*, 457 U.S. 202, 210 (1982). "When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976).

Here, no rational national security objective is served by limiting military commissions' personal jurisdiction to non-citizens. Not only is doing so unprecedented, the threat posed by enemies with citizenship is at least as great as that posed by non-citizens. Citizens are just as capable of joining al Qaeda, just as capable of perpetrating acts of terrorism, and "if released, would pose the same threat of returning to the front during the ongoing conflict." *Hamdi*, 542 U.S. at 519 (plurality op.).

Furthermore, Congress' choice to discriminate based upon nationality was not motivated by a finding that non-citizens are somehow not amenable to prosecution alongside citizens. Instead, the legislative history is replete with statements by lawmakers reflecting a fear of the political accountability that would result if constituents had to bear the law's burdens as well. As just one example, Rep. Buyer felt compelled to reassure his colleagues that terrorism suspects equally situated in all respects except citizenship would be segregated on that basis alone:

> Let's say an American citizen has been arrested for aiding and abetting a terrorist, maybe even

> participating in a conspiracy, or maybe participating in an action that harmed or killed American citizens. That American citizen cannot be tried in the military commission. His coconspirators could be tried in a military commission if they were an alien, but if that other coconspirator is an American citizen, they will be prosecuted under title 18[.]

152 Cong. Rec. H7940 (Sept. 27, 2006) (statement of Rep. Buyer). The Military Commissions Act is by design a law that "lays an unequal hand on those who have committed intrinsically the same quality of offense," which is no less "invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964).

If the federal criminal justice system is to be segregated in this way, this Court should settle that fact now. At present, twenty-three million people are subject to this law within the United States. U.S. Census Bureau, American Fact Finder.[4] Of the eight convictions the military commissions have yielded thus far, at least one defendant had lawful status. Matthew Hay Brown, *From Owings Mills High School to a cell at Guantanamo*, The Baltimore Sun (Mar. 3, 2012).[5] The jurisdictional reach of these tribunals is potentially unlimited and already includes such broadly inchoate crimes as conspiracy and material support for terrorism, which can sweep in everything from financial crime, *United States v. Awan*, 607 F.3d 306 (2d Cir. 2010), to drug trafficking. *United States v. Rubio*, 677 F.3d 1257 (D.C. Cir. 2012). And given the amount of time that the post-conviction appeals take, countless prosecutions may go through this system before this Court has another opportunity to

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[4] *Available at* https://perma.cc/JZ83-8AHJ

[5] *Available at* https://perma.cc/4FB9-ATS5

decide whether the threat of terrorism renders separate and unequal justice necessary for the first time in this nation's history.

## IV. THE CIRCUIT'S INVOCATION OF THE PLAIN ERROR RULE TO AVOID DECIDING THE *EX POST FACTO* AND EQUAL PROTECTION GROUNDS WAS ERRONEOUS AND HAS RESULTED IN NOTHING BUT LEGAL UNCERTAINTY.

As noted *supra*, the Circuit avoided a decision on the merits of petitioner's *ex post facto* and equal protection challenges by resort to the plain error rule. In the D.C. Circuit, the "plainness" of the error is treated as a threshold question. If the appellant cannot cite "clear precedent in the Supreme Court or this circuit" demonstrating error, further review – even of whether there was error at all – is foreclosed. *United States v. Terrell*, 696 F.3d 1257, 1260 (D.C. Cir. 2012). Here, the Circuit's reach for the plain error rule was erroneous. Moreover, as pure questions of law, the issues before this Court are presented squarely and any ambiguity over the adequacy of petitioner's trial-level objections in no way impairs this Court's ability to provide much needed clarity now.

1. As a threshold matter, the record shows that the Circuit's findings of trial-level forfeiture below were, at best, the result of ambiguity over petitioner's objections, not petitioner's failure to object at all. "[A]lthough not a model of clarity," petitioner complained about the law's retroactivity in a manner that "was sufficient to preserve those arguments." App. 395 (Brown, J., dissenting in part). And with respect to equal protection, petitioner asserted "discrimination based on nationality" as Objection #7 of the written Nine Points described *supra*. The stringency of the Circuit's pleading requirements, therefore, departs

from the liberal construction ordinarily afforded to arguments raised by *pro se* defendants, *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), and the standard ordinarily applied to preservation questions generally. *Ford v. Georgia*, 498 U.S. 411, 419 (1991).

The majority below could also point to no prejudice resulting from any ambiguity in petitioner's trial-level objections. The issues presented were pure questions of law that have loomed over the military commissions since their inception and which had been decided in respondent's favor by every other military commission at the time of petitioner's trial.[6] What possible benefit would have come from petitioner more fulsomely raising then-futile objections at trial is unclear. And no judicial economy interest was served by the majority's invocation of plain error six years into the appellate process. The only thing the majority's stringent application of plain error has assured is that every military commission defendant now feels compelled to make "a long and virtually useless laundry list of objections," pleaded from every conceivable legal angle, to avoid the accusation of forfeiture in a legal system plagued at every level by novelty and uncertainty. *Johnson v. United States*, 520 U.S. 461, 468 (1997).

2. On the law, the majority erred by importing Fed.R.Crim.Pro. 52's plain error rule into its appellate review. Rule 52 does not apply to military commissions and there is no comparable provision in the Military Commissions Act, the Rules for Military Commissions, or the applicable regulations. To the contrary and as

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[6] *United States v. Khadr*, AE077 (Mar. 15, 2008) (equal protection); *United States v. Khadr*, AE089 (Apr. 21, 2008) (*ex post facto*); *United States v. Hamdan*, AE211 (Jun. 1, 2008) (*ex post facto*); *United States v. Hamdan*, AE288 (Jul. 15, 2008) (equal protection); *United States v. Darbi*, AE039 (Aug. 8, 2008) (*ex post facto*); *United States v. Darbi*, AE040 (Aug. 8, 2008) (equal protection)

the dissenters noted below, *ex post facto* objections go squarely to whether the charge fails to state an offense, which is a non-forfeitable objection under the Rules for Military Commissions. App. 387 (Rogers, J., dissenting in part); App. 449 (Kavanaugh, J., dissenting in part). Likewise, as a matter of long-standing military law, constitutional and statutory defects in "jurisdiction over the person … may not be the subject of waiver." *United States v. Garcia*, 5 C.M.A. 88, 94 (C.M.A. 1954); *see also United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000) ("When an accused contests personal jurisdiction on appeal, we review that question of law *de novo*[.]").

3. Finally, there is uncertainty in the lower courts over whether claims, such as petitioner's *ex post facto* and equal protection claims, would be subject to the plain error rule even had they arisen in a federal district court. As a matter of first principles, allowing a conviction to stand based on nothing more than trial-level forfeiture is irreconcilable with the axiom that an "unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Ex parte Siebold*, 100 U.S. 371, 376-77 (1880). Avoiding the merits of such objections on plain error grounds also creates a wasteful procedural anomaly because they, by definition, implicate "the scope of the underlying criminal proscription." *Welch v. United States*, 136 S.Ct. 1257, 1266 (2016). Assuming this Court or the D.C. Circuit favorably decides the questions presented here in another case a decade from now, petitioner can obtain relief in a post-trial collateral attack that the Circuit held is precluded on direct appeal. 28 U.S.C. 2255(f)(3). Neither judicial economy nor the orderly administration of justice is served by such a labyrinthine procedure for obtaining relief on a pure question of law.

This Court has never extended the plain error rule to pure questions of law respecting the constitutionality of a statute. And as Judge Kavanaugh noted in dissent, other circuits "have determined that constitutional objections such as *Ex Post Facto* Clause claims … may be raised for the first time on appeal and reviewed *de novo* even if those objections were not timely raised in the district court proceedings." App. 449 (Kavanaugh, J., dissenting in part); *see also* App. 388-39 (Rogers, J., dissenting in part) (collecting cases from other circuits). In fact, the Tenth Circuit has squarely held that *ex post facto* claims are not subject to forfeiture. *United States v. Haddock*, 956 F.2d 1534 (10th Cir. 1992). Among the other important merits issues presented, therefore, this case provides this Court an opportunity to resolve uncertainty in the lower courts over whether facial challenges to a statute's constitutionality are subject to the plain error rule.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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