No. 16-1307

IN THE
Supreme Court of the United States

ALI HAMZA AHMAD SULIMAN AL BAHLUL,
Petitioner,

v.

UNITED STATES,
Respondent.

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

BRIEF FOR *AMICUS CURIAE* ON BEHALF OF MR. AMMAR AL BALUCHI IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* AND SOURCE OF AUTHORITY TO FILE[1]

Mr. al Baluchi is one of five defendants charged jointly in a capital military commission at Guantanamo Bay, Cuba, for his alleged role in the attacks of September 11, 2001. Like Mr. Bahlul, the government has charged Mr. al Baluchi with conspiracy under section 950t(29) of the 2009 Military Commissions Act ("MCA");[2] but unlike Mr. Bahlul, Mr. al Baluchi potentially faces the death penalty if convicted of this charge.

On January 25, 2012, Mr. al Baluchi was charged for the second time with capital conspiracy, having been in the custody of the United States Government since 2003.[3] The validity of conspiracy as a charge triable by military commission has been the subject of intense controversy and litigation dating back to the inception of the original Guantanamo military commissions under Presidential Order of November 13, 2001. The issue has also come under review in

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[1] Pursuant to this Court's Rule 37, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the amicus curiae or his counsel made any monetary contribution to the preparation or submission of this brief. All parties received timely notice of intent to file this brief and have consented to the filing.

[2] Although Mr. Bahlul was charged with section 950v(28) of the 2006 MCA, the conspiracy offense remains substantially the same, and both differ from the provisions of section 950q of both MCAs which define "principals" under the MCA.

[3] Mr. al Baluchi was charged with conspiracy in a capital military commission under the 2006 MCA on April 15, 2008. These charges were dismissed without prejudice in 2009.

the Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and forced Congress to enact two iterations of the MCA in 2006 and 2009.

STATEMENT OF THE CASE

In 2004, the government charged petitioner with conspiracy and set him for trial before a military commission pursuant to President Bush's Military Order of November 13, 2001 and 10 U.S.C. § 821. This trial, however, did not occur. In February 2008, the government brought new charges, including conspiracy, against petitioner under the 2006 MCA. On November 3, 2008, petitioner was found guilty on all charges and sentenced to life.

In September 2011, the United States Court of Military Commission Review ("USCMCR") affirmed the judgment. Petitioner timely appealed to the D.C. Circuit. In January 2013, the Circuit vacated petitioner's conviction on all charges. The D.C. Circuit then granted respondent's request for rehearing *en banc*. The four-member majority affirmed petitioner's conspiracy conviction on plain error review, 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." *Bahlul v. United States*, 767 F.3d 1, 19 (D.C. Cir. July 14, 2014) (*en banc*). The majority further determined that it was "not 'obvious' that conspiracy was not traditionally triable by law-of-war military commission under [10 U.S.C.] 821." *Id.* at 27. The case was then remanded back to the panel to decide petitioner's remaining claims, to include his claim that Article III prohibited his trial by military commission.

On remand, the panel vacated petitioner's conviction for conspiracy. Respondent again petitioned for rehearing *en banc*. The D.C. Circuit granted rehear-

ing. On October 20, 2016, the court issued a *per curiam* opinion affirming the judgment of the USCMCR, in turn affirming petitioner's conviction of conspiracy.

Petitioner filed a timely petition for rehearing. On November 28, 2016, the D.C. Circuit denied rehearing. On March 28, 2017, petitioner filed a petition for a writ of *certiorari* to this Court.

SUMMARY OF ARGUMENT

The lack of definitive guidance from Article III courts has exacerbated the ability of the 9/11 military commission to manage what has been termed the most important terrorism trial in the history of the United States. Since 2012, it has heard arguments concerning the validity of the conspiracy charge against the background of fractured decisions of the D.C. Circuit in the *Hamdan* and *Bahlul* appeals. Even the prosecution has taken contradictory positions on whether the military commission should proceed with a conspiracy charge. Without a clear, binding ruling from Article III courts, the same chaotic litigation in the 9/11 case continues today.

The Supreme Court alone can provide the needed clarity on the issues presented. Mr. al Baluchi respectfully urges this Court to grant the petition for a writ of *certiorari*.

ARGUMENT

I. THE LACK OF A DEFINITIVE ANSWER FROM ARTICLE III APPELLATE COURTS ON THE PROPER SCOPE OF MILITARY COMMISSION JURISDICTION WITHIN THE U.S. CONSTITUTION'S TRIPARTITE STRUCTURE AND APPLICATION OF FUNDAMENTAL CONSTITUTIONAL PROTECTIONS IN THE COMMISSIONS HAS REDUCED THEIR LEGITIMACY AND LED TO INCREASED CONFUSION WITHIN THE 9/11 MILITARY COMMISSION.

The 9/11 military commission is the most important terrorism trial in our country's history. Yet, whether the capital conspiracy charge is even legal remains unknown. Given multiple opportunities, the D.C. Circuit has failed to provide needed clarity—resulting in years of unnecessary litigation in the 9/11 military commission.

Before enacting the MCA in 2006, "Congress had simply preserved what power, under the Constitution and the common law of war, the President had before 1916 to convene military commissions." *Hamdan*, 548 U.S. at 593. A plurality of the Supreme Court determined that Article 15 of the 1916 Articles of War, or its successor, Article 21 of the Uniform Code of Military Justice, "'incorporated by reference' the common law of war . . . [which] render[ed] triable by military commission certain offenses not defined by statute." *Hamdan*, 548 U.S. at 602. The definition of the law of war and its implica-

tions for the proper constitutional limits of military commission jurisdiction thus remain critical determinations for Mr. Bahlul's appeal and the ongoing military commissions at Guantanamo Bay, Cuba.

Two structural limitations are particularly relevant to Mr. Bahlul's appeal and the ongoing commissions trials—the applicability of the *Ex Post Facto* Clause at Guantanamo Bay, and the content of the law of war which delimits the boundary between permissible military jurisdiction and Article III's vesting of the judicial power of the United States in federal courts along with the direction that trial of criminal cases shall be by jury. Article III, U.S. Constitution. The D.C. Circuit's two fractured *en banc* decisions below have failed to determine either issue, leaving the permissible limits of military commission jurisdiction, and whether fundamental constitutional protections apply therein, subject to many more years of uncertainty.

A. *Ex Post Facto* Clause Considerations.

In its first *en banc* review of Mr. Bahlul's convictions, the D.C. Circuit applied plain error review to determine that the *Ex Post Facto* Clause did not preclude the conspiracy charge. *See Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. July 14, 2014) (*en banc*) (hereinafter *Bahlul I*). Because this issue was determined on a plain error basis, and because the court was deeply divided on this issue, this ruling has provided no guidance for the government or the defendants concerning the applicability of the *Ex Post Facto* Clause in ongoing military commission trials. This is particularly relevant for the 9/11 and *U.S.S. Cole* bombing commissions, where all alleged

acts predated the passage of the MCA in 2006, thus making any divergences between what offenses were "incorporated by" Article 21 of the Uniform Code of Military Justice ("UCMJ") and the offenses charged under the MCA particularly relevant for *ex post facto* purposes. Given the fundamental nature of the prohibitions imposed by the *Ex Post Facto* Clause in our justice system,[4] failure to resolve this issue has led to a myriad of motions based on unclear legal authority, and has left the military judges on uncertain ground with any adverse ruling subject to interlocutory appeal, and continuing delay to trial on the merits. Since both the 9/11 and *U.S.S. Cole* bombing cases subject the defendants to capital punishment in the event of a guilty finding, delay in resolving this issue for a further ten to twenty years after trial on the merits is unsupportable.

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[4] *Federalist* No. 44, at 282 (Madison) (C. Rossiter ed. 1961) ("Bills of attainder, ex-post-facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights . . . . They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding."); *Federalist* No. 84, at 511–12 (Hamilton), *id.* ("The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.")

B. Jurisdictional Limits.

Because all acts alleged in the 9/11 and *U.S.S. Cole* bombing military commissions predate the passage of the 2006 and 2009 MCAs, the content of what law of war was "incorporated by" Article 21, UCMJ, is particularly relevant as to the permissible jurisdiction of military tribunals in contradistinction to the jurisdiction reserved by Article III to the federal courts. Even in *Quirin*, the high-water mark of military commissions jurisdiction, this Court both defined the law of war as a subspecies of the law of nations, or as it is now understood, the international law of war, and subjected its exercise to other constitutional limitations, such as the jury trial protections in Article III. *Ex parte Quirin*, 317 U.S. 1, 29 (1942).

In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), this Court addressed whether conspiracy is a recognized violation of the law of war. Four Justices determined that the conspiracy offense alleged was not triable by law-of-war military commission. *Id.* at 603–13 (plurality op.). Three Justices concluded that it was. *Id.* at 697–704 (Thomas, J., dissenting). Thus, the issue remained undecided. In response to *Hamdan*, Congress passed the Military Commissions Act of 2006, 120 Stat. 2600. The Act specifically listed conspiracy as a war crime subject to trial by military commission. Congress later enacted the Military Commissions Act of 2009, 123 Stat. 2574, which also listed conspiracy as a war crime subject to trial by military commission. Similar disagreements ensued in the D.C. Circuit's consideration of this issue in two panel and two *en banc* decisions, both decided in fractured plain-error-based decisions. As a result, this issue remains unresolved at the D.C. Circuit, the

sole federal circuit court with appellate jurisdiction over appeals under the 2009 MCA.[5]

C. Specific Result—Years of Chaotic Litigation in the 9/11 Military Commission.

Fractured, inconsistent appellate opinions have forced litigants to spend years reframing their arguments before the 9/11 military commission. Defendants have filed motions relying on law that is either called into question or expressly overturned while the motion is pending. The government has struggled just to determine its own position—at one point even agreeing with the defense and disagreeing with the convening authority. And both sides have submitted numerous supplemental filings in a continuous attempt to account for D.C. Circuit decisions, particularly throughout *Bahlul*, that lack definitive guidance.

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[5] It is important to note that there are two aspects to the consideration of this issue and the issue of congressional power. First, what offenses under what definition of the "law of war" were incorporated under Article 21, UCMJ. That issue determines which offenses would have been applicable to the present military commissions defendants for acts that predated September 11, 2001 (or the operative date of the 2006 MCA) (in other words, what *did* Congress incorporate in Article 21). Secondly, what are the constitutional limitations on Congress imposed by Article III or other provisions of the Constitution that would operate prospectively (after the passage of the 2006 MCA) to limit military tribunal jurisdiction (what *can* Congress prohibit and make subject to trial by military commission). Obviously the *ex post facto* considerations, and other constitutional limitation on military jurisdiction if applicable, are relevant to both aspects.

Litigation began on May 31, 2011 when, pursuant to the 2009 MCA, the government preferred charges against Mr. al Baluchi and four other defendants for their alleged role in the attacks of September 11, 2001. These charges were referred to a capital military commission on April 4, 2012. Charge I alleges a standalone conspiracy to commit offenses triable by military commission under 10 U.S.C. § 950t(29), not as an alleged mode of liability as a principal under § 950q.

The U.S. Court of Appeals for the D.C. Circuit decided *Hamdan II* six months after the referral of charges against the 9/11 defendants. *United States v. Hamdan*, 696 F.3d 1238 (D.C. Cir., Oct. 16, 2012). In its decision, the court held that the MCA "did not authorize *retroactive* prosecution for conduct that was committed before the Act's enactment and was not prohibited by U.S. law at the time the conduct occurred." *Id.* at 1247. That decision, in turn, spurred years of continuing litigation in the 9/11 hearings on the applicability of the *Ex Post Facto* Clause and the viability of the charged offenses that remains unresolved to this day.

On November 2, 2012, two weeks after the D.C. Circuit's decision in *Hamdan II*, Mr. al Baluchi and Mr. al Hawsawi filed a joint motion to dismiss all charges for lack of jurisdiction. AE107 (MAH,AAA) Defense Motion to Dismiss for Lack of Jurisdiction, *available at* http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE107(MAHAAA)).pdf. They argued that in light of the ruling and reasoning in the October 2012 *Hamdan II* decision, in order to charge an individual in the 9/11 military commission without running

afoul of Congress' express desire to avoid an *ex post facto* problem, the Government must only charge offenses that were existing offenses under the law of war when committed. At the time the motion to dismiss was filed, the status of conspiracy as a law of war offense was pending review before the D.C. Circuit in *United States v. Ali Hamza al Bahlul*, Case No. 11-1324. Ironically, the motion therefore requested the opportunity to further brief the military commission as soon as Mr. Bahlul's case clarified the issue. AE107 (MAH,AAA) Defense Motion to Dismiss for Lack of Jurisdiction at 3 n.1.

Even the Chief Prosecutor, Brigadier General Mark Martins, believed that the decision in *Hamdan II* directly and fatally impacted the government's ability to maintain the conspiracy charge against the 9/11 defendants. On January 6, 2013, he took the extraordinary measure of submitting a memorandum to the Convening Authority formally recommending withdrawal and dismissal of the charge of conspiracy as a standalone offense. BG Martins reasoned that the decision in *Hamdan II* presented "significant litigation risks" in proceeding with the charge "and that it is no longer advisable to do so." Memorandum from BG Mark S. Martins, USA, to Convening Authority (January 6, 2013), *available at* http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE107A)_Part2.pdf

As of January 16, 2013, the Convening Authority had not acted upon BG Martins' recommendation. On that date, the government filed two motions in response to the defense motion in AE107: (1) a response to the defense motion to dismiss; and (2) a motion to make minor conforming changes to the

charge sheet. AE107A Government Response to Defense Motion to Dismiss for Lack of Jurisdiction, *available at* http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE107A)_Part1.pdf; AE120 Government Motion to Make Minor Conforming Changes to the Charge Sheet, *available at* http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE120)_Part1.pdf. In its response, the government agreed to dismissal of the conspiracy charge as a separate, standalone offense, so long as the military commission accepted changes to the charge sheet preserving a co-conspirator theory of liability as to the remaining charges. AE107A Government Response to Defense Motion to Dismiss for Lack of Jurisdiction at 1. The government acknowledged that *Hamdan II* created a substantial risk that appellate courts would not uphold a conviction for the conspiracy charge. *Id.* at 2. It expressed concern over both the "appellate risk," as well as "the associated uncertainty surrounding the commission's proceedings and rulings henceforth." *Id.*

The following day, January 17, 2013, the Convening Authority declined to adopt BG Martins' recommendation. Of particular relevance here, the Convening Authority stated that dismissal was premature as "the Department of Justice maintains that conspiracy is a cognizable offense in trials by military commission in the case *Al Bahlul v. United States* . . . the issue has not been fully decided." Memorandum from Bruce MacDonald, Convening Authority for Military Commissions, to BG Mark Martins, Chief Prosecutor (January 17, 2013), *available at*

http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE107A(Sup)).pdf. Nonetheless, the government continued to press the issue with the military commission. On January 21, 2013, it filed a supplement to its response reiterating that it did not oppose the defense motion to dismiss the conspiracy charge, if the military commission accepted accompanying changes to the charge sheet. AE107A (Gov Supp) Government Supplement to Defense Motion to Dismiss for Lack of Jurisdiction, *available at* http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE107A(Sup)).pdf. No immediate ruling followed.

On July 14, 2014, more than a year later, the U.S. Court of Appeals for the D.C. Circuit issued its first *en banc* decision in *Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. July 14, 2014). In *Bahlul I*, the court fractured over the issue of whether the *Ex Post Facto* Clause prohibits a conviction for conspiracy under the 2006 MCA for pre-2006 conduct.[6] The controlling factor in the case was that Mr. Bahlul boycotted his military commission trial, and—in the majority's view—forfeited every forfeitable issue. *Id.* at 18 (opinion of the Court). As a result, only a plain error

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[6] The *en banc* majority did, however, overrule *Hamdan II*'s statutory conclusion that the 2006 MCA "does not authorize *retroactive* prosecution for conduct committed before enactment of that Act unless the conduct was already prohibited under existing U.S. law as a war crime triable by military commission." 696 F.3d at 1248. After analyzing congressional intent, the D.C. Circuit then determined that "the 2006 MCA unambiguously authorizes Bahlul's prosecution for the charged offenses based on pre-2006 conduct. *Bahlul I*, 767 F.3d at 11–15. This reversal makes definitive resolution of the applicability of the *Ex Post Facto* Clause in military commissions even more critical.

analysis was applied by the majority. Accepting the government's concession, the Court assumed without deciding that the *Ex Post Facto* Clause applied at the Guantanamo military commissions. *Id.* Nonetheless, the court first determined that it was not "plain error" to try conspiracy in a military commission when 18 U.S.C. § 2332(b) prohibited conspiracy to kill a national of the United States. *Id.* (opinion of the Court). Secondly, the D.C. Circuit also held that it "was 'not plain' that [inchoate] conspiracy was not already triable by law-of-war military commission under [Article 21] when Bahlul's conduct occurred." *Id.* In light of the split in the Supreme Court and the views of at least two judges of the D.C. Circuit that Article 21 might not be limited to the international law of war, the *en banc* court determined that it was not plain error to conclude that conspiracy was already triable by law-of-war military commission at the time of Mr. Bahlul's conduct. *Id.* at 24–27. Even these plain error conclusions were subject to considerable dispute among the judges on the D.C. Circuit both on the underlying legal analysis and in evaluation of the historical evidence.

Far from providing clarity, the *Bahlul I* majority, in applying a plain error standard of review, avoided the overriding issue—what law of war was incorporated by Article 21. The opinion stated enough, however, for the government to abruptly reverse course and oppose the defense motion to dismiss the conspiracy charge. On August 27, 2014, it filed a second supplement. AE107A (GOV 2nd Sup) Government Second Supplemental Filing to AE107A – Government Response to Defense Motion to Dismiss for Lack of Jurisdiction, *available at*

http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE107A(Gov%202nd%20Sup))_Part1.pdf. The government's new position was that "[t]he defense motion clearly lacks authority in law as a result of *Bahlul I*, which strongly supports retaining the conspiracy charge and specification on the charge sheet." *Id.* at 1.

On September 23, 2014, the military commission entered an order denying the government's original, 2013 motion to make changes to the charge sheet. AE120F Order, *available at* http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE120F).pdf. Like the majority in *Bahlul I*, the military commission utilized an alternative to actually deciding the fundamental question over the conspiracy charge. The order essentially stated that the government's proposed changes to the charge sheet would not suffice under Department of Defense Regulation for Trial by Military Commission (2011 Edition), paragraph 20-6.b.1—dealing with technical aspects of what information from the charge sheet is provided to the panel before *voir dire*. *Id.* at 2. Given the way the AE120F order was framed, whether the 9/11 defendants may be convicted of conspiracy remains an open issue in the ongoing trial.[7]

The recent *en banc* decision in *Bahlul III* did nothing to resolve the lingering issue. The U.S.

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[7] Significantly the D.C. Circuit's *Bahlul I en banc* decision did dismiss Mr. Bahlul's solicitation and providing material support to terrorism convictions, finding it plain error that they were not violations of the law of war, however defined. *Bahlul I*, 767 F.3d at 27–31.

Court of Appeals for the D.C. Circuit again fractured, this time over the issue of Congress' authority to define conspiracy as a war crime in the Military Commissions Act of 2009. *Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016) (*en banc*). The five opinions in *Bahlul III* apply at least four different approaches: deference to Congress; *id.* at 4 (Henderson, J., concurring); jurisdiction through international law or U.S. history; *id.* at 5 (Kavanaugh, J., concurring); jurisdiction because Military Commissions Act conspiracy is consistent with international law; *id.* at 49 (Millett, J., concurring); *id.* at 109 (Wilkins, J., concurring); and lack of jurisdiction because Military Commissions Act conspiracy is not consistent with international law. *Id.* at 129 (Joint Dissent).

The Joint Dissent ventured a guess as to the precedential value of *Bahlul III* and suggested it had none. Because only four judges applying *de novo* review voted to affirm the conviction, the Joint Dissent reasoned that "the majority of judges declines to endorse the government's view of the Constitution. [The] decision thus provides no precedential value for the government's efforts to divert the trial of conspiracy or any other purely domestic crime to law-of-war military commissions." *Id.* at 838 (Joint Dissent).

After this latest, unclear appellate decision, Mr. al Baluchi and Mr. Hawsawi moved to withdraw their joint motion to dismiss for lack of jurisdiction. On November 30, 2016, the military commission granted the motion to withdraw without prejudice. AE107F Order, *available at*

http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE107F).pdf.

D. Current, Continued State of Uncertainty in the 9/11 Military Commission.

Five years have passed since the referral of charges and all involved still await straightforward guidance from Article III courts supervising the Guantanamo military commissions. Without it, old disputes are rehashed.

On February 24, 2017, Mr. al Baluchi filed a new motion, again requesting that the military commission dismiss the conspiracy charge (among others) on the basis that it violates the *Ex Post Facto* Clause of the United States Constitution. AE490A (AAA) Mr. Al Baluchi's Motion to Decline Joinder in Part and Separate Position Regarding AE490(MAH) Defense Motion to Dismiss Charges I, VI, and VII due to Lack of Jurisdiction Based on *Ex Post Facto* Violation, *available at* http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE490A(AAA)).pdf. On May 16, 2017, oral arguments commenced. The following exchange between the military commission and chief prosecutor captures the present status of the debate:

> Military Judge [COL James Pohl]: Nearly three years ago in 107A, the government moved to dismiss the conspiracy specification because you didn't want to run the potential, as I read your pleading, a potential risk of appellate issues. The 107 series was never litigated, since on 30 November, pursuant to defense request, it was withdrawn. But I am go-

> ing back to the government's original position. Would it be fair to say you have rethought that since you originally filed the 107A?
>
> Chief Prosecutor [BG Mark Martins]: I think everyone has rethought in light of the D.C. Circuit. You know, many, many separate opinions have been restated.

Unofficial/Unauthenticated Transcript of the *United States v. Khalid Shaikh Mohammad, et al.* Motions Hearing Dated May 16, 2017 from 10:54 A.M. to 12:13 P.M. at 15822, *available at* http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS16May2017-AM2).pdf.

The motion is still pending. In essence, the 9/11 military commission is returned to its original position: forced to make a critical ruling without the benefit of binding authority as to whether a pre-2006 conspiracy remains a viable charge in a military commission. Not even the preliminary question of whether the *Ex Post Facto* Clause applies has been answered. The military commission recently stated, "With regard to the *Ex Post Facto* Clause specifically, no superior ruling definitively resolves its application to these Commissions." AE251J Ruling at 5–6 (citing *Bahlul*, 767 F.3d at 18), *available at* http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE251J(RULING)).pdf. The Supreme Court alone can provide the needed, binding ruling on the issues presented. In its absence, uncertainty persists in the 9/11 military commission.

II. THIS COURT SHOULD GRANT CERTIORARI NOW TO DETERMINE IF THE *EX POST FACTO* CLAUSE APPLIES TO THE MILITARY COMMISSIONS ACT AND, IF SO, WHETHER CONSPIRACY IS TRIABLE IN A MILITARY COMMISSION FOR OFFENSES THAT PRE-DATE THE ACT.

If Mr. al Baluchi is convicted of conspiracy, the military commission is empowered to impose death as a penalty. *See* Military Commissions Act of 2009, 10 U.S.C. § 950t(29). Meanwhile Mr. al Baluchi continues to be held largely incommunicado at Guantanamo Bay, where he has been held at the secret Camp 7 since September 2006 following over three years in CIA custody at the "black site" secret prisons. A fair, American judicial process cannot possibly include requiring a capital defendant, in *any* venue, to resolve the ambiguity about the legality of a death charge. Given the historic undertaking of the 9/11 military commission at Guantanamo Bay, Cuba, the need for review is obvious.

"This legal saga has endured long enough." *Bahlul*, 767 F.3d at 51–52 (Brown, J., dissenting in part). The government too deserves definitive guidance that will govern litigation at the complex ongoing military commission. As outlined above, its position shifts as conflicting opinions trickle down from the D.C. Circuit. In 2014, Judge Brown explained that "it may be many years before the government receives a definitive answer on whether it can charge the September 11 perpetrators with conspiracy." *Id.* at 62 (Brown, J., dissenting in part).

It is now three years later and exactly what "many years" could turn out to be remains undetermined.

What is known is that there will never be a circuit split to induce review. The United States Court of Appeals for the D.C. Circuit has exclusive appellate jurisdiction over military commissions. Military Commissions Act of 2009, 10 U.S.C. § 950g(a). As a result, there are no means for the issue to further mature. The losing litigants in the 9/11 military commission will follow Mr. Bahlul's same path toward appellate relief, but not without considerable delay and expense to all parties, and additional agony for the family members and survivors of the 9/11 attacks and the *U.S.S. Cole* bombing.

Comparatively, Mr. Bahlul's case presents the better option to this Court for a less complex factual presentation of the legal issues. The 9/11 and *U.S.S. Cole* bombing cases are complex, involving difficult and interconnected issues of constitutional law, criminal law, human rights law, and international humanitarian law. In the 9/11 case, five defendants are joined in a single military commission. The charge sheet alleges nearly 3,000 victims and overt acts in fourteen different countries. According to the FBI's website, the investigation—more massive than any other in the bureau's history—included over 4,000 special agents and 3,000 professional employees responding to more than 500,000 investigative leads, conducting more than 167,000 interviews, and collecting more than 150,000 pieces of evidence. *Available at* https://archives.fbi.gov/archives/about-us/ten-years-after-the-fbi-since-9-11/by-the-numbers/the-fbi2019s-9-11-role-by-the-numbers.
Now, the ongoing military commissions are costing

taxpayers $91 million per year. *Available at* https://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf. Further, the 9/11 case is still only at the pretrial stage. The merits phase, not yet scheduled, is expected to take many months once it commences, with any death penalty sentencing phase to ensue thereafter. If this Court declines to review the critical issues in *Bahlul*, a decade or more will pass before the next, more complex option presents itself. The instant case is therefore the best vehicle for deciding this matter.

CONCLUSION

Courts are obligated in times of war to decide cases "with as much clarity and expedition as possible." *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) (Kavanaugh, J., concurring). The *Bahlul* decisions have failed to do so. As a result, the 9/11 and other ongoing military commissions are left with "little clarity or guidance on [the conspiracy] issue going forward . . . . There is a time to avoid and a time to decide. Now is the time to decide." *Bahlul*, 767 F.3d at 80–81 (Kavanaugh, J., dissenting in part). Mr. al Baluchi respectfully requests that this Court grant the petition for a writ of *certiorari*.

Respectfully submitted,

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