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

REPLY BRIEF FOR PETITIONER

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I. GIVING MILITARY COMMISSIONS SUBJECT-MATTER JURISDICTION OVER DOMESTIC CRIMES PRESENTS A CONSTITUTIONAL QUESTION OF EXCEPTIONAL IMPORTANCE AND THE LOWER COURT DIVIDED ON THE ANSWER.

This Court should grant certiorari because the D.C. Circuit could not resolve a constitutional question of exceptional importance: To what extent can the political branches give administrative tribunals jurisdiction over the trial of ordinary federal crimes? Respondent attempts to minimize the importance of this question, Br. in Opp. 19, 25-26, but its arguments are not credible. When a panel of the D.C. Circuit ruled against respondent on that question in 2015, respondent took the extraordinary step of petitioning for rehearing en banc a second time, arguing "the decision presents a question of exceptional importance meriting en banc review." *Bahlul v. United States*, Case No. 11-1324, Petition for Rehearing En Banc, 15 (Jul. 27, 2015), *available at* https://goo.gl/gp8vLA. Respondent never explains why the question presented was of exceptional importance when it lost in the court below, but is trivial now that it has nominally prevailed.

In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), this Court invited Congress to modify the Uniform Code of Military Justice's pretrial, trial, and post-trial procedures, so that military commanders could deviate from court-martial practice to meet the necessities of a modern battlefield. *Id.* at 636 (Breyer, J., concurring). But Congress went much further than that with the Military Commissions Act. It created an entirely new federal court system that is administered by a large civilian bureaucracy and exercises jurisdiction over high-profile cases involving domestic law crimes. The "military commission" that

convicted petitioner was not a military commission as that term is traditionally understood. It was a new kind of Executive Branch district court.

There is nothing in the text, history, or structure of the Constitution that supports the creation of such an open competitor to the federal judiciary. Textually, Article III requires that the "trial of all crimes" be in the courts of law. Historically, the Founders were deeply suspicious of prerogative courts, whether they were the much-hated vice-Admiralty courts or the infamous Star Chamber. *Stern v. Marshall*, 564 U.S. 462, 483-84 (2011). And there is nothing in the structure of the Constitution that suggests the Executive Branch can be given the option to divert federal prosecutions to its own special trial chambers, unsupported by military necessity or a Congressional declaration of war.

This Court therefore needs to decide whether the threat of terrorism requires such a novel redistribution of the Judicial Power. And the main reason it should do so now is that the governing law on this question is in disarray. The D.C. Circuit's failure to resolve the issue has imperiled a number of high-profile capital cases, including the trial of the September 11th case. And it compromises the integrity of the separation of powers in ways that have implications far beyond the use of military commissions in Guantanamo.

This case also comes to this Court with an unusually well-developed appellate record. Members of the D.C. Circuit articulated at least four different theories of military commission jurisdiction for this Court to consider. And respondent has put forward numerous and contradictory theories of its case as this appeal has made its way to this Court.[1] Like a case coming up after

[1] At the USCMCR, respondent claimed that Congress was entitled to near absolute deference, and alternatively, that conspiracy

a decade-long circuit split, a wide variety of arguments have been researched, aired, and refined. The Court is therefore in as good a position as it will ever be to finally answer this fundamental jurisdictional question with certainty.

Respondent nevertheless attempts to discourage this Court from granting review based upon 1) a belatedly made forfeiture argument that was thoroughly rejected below; 2) its characterization of petitioner as an unsavory character; and 3) its claim that the military commission system is making do in the face of legal uncertainty. None of these arguments gainsay the importance of the issues involved. And respondent does not claim that there is another case that will soon reach the Court with better facts on which to resolve them. As things currently stand, another post-trial appeal is unlikely to reach this Court for another decade. And as is reflected in the petition-stage briefing in *Nashiri v. Trump* (No. 16-8966), those cases will come to this Court as capital cases with vastly

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was well established under international law. App. 480. In the D.C. Circuit, it changed tacks and conceded that conspiracy was not established under international law, but nevertheless asked for the judicial recognition of a "U.S. common law of war," that contained these domestic law crimes. *Bahlul v. United States*, Case No. 11-1324, Brief of the United States 23 (D.C. Cir., May 16, 2012), *available at* https://goo.gl/KfzLs4. Having lost that argument in the parallel case of *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012), it dropped the "U.S. common law of war" brand in favor of an even more amorphous reliance on "domestic precedents to ascertain the scope of the authority Congress and the President have traditionally exercised under their war powers." *Bahlul v. United States*, Case No. 11-1324, Brief of the United States 47 (D.C. Cir., Nov. 2, 2015), *available at* https://goo.gl/dP6BU5. And before this Court, it appears to have reverted to the argument rejected by the USCMCR, under which the war powers alone "support Congress's authority to confer jurisdiction on military commissions to try alien unlawful enemy combatants for conspiracy to commit war crimes." Br. in Opp. 21.

more complicated records. Simply as a matter of sound judicial administration, therefore, respondent's "vehicle" arguments should be rejected. Respondent's arguments are also not credible in their own right.

1. Respondent's forfeiture argument is based on the claim that the question presented is clouded by the plain error rule. Br. in Opp. 16. For the reasons given in the petition, this is legally incorrect. Pet. 29-32. And this argument overwhelmingly failed below. It was rejected by seven out of nine members of the D.C. Circuit, including four who voted to affirm. Only two judges accepted this argument, albeit for different reasons and with neither joining the other's dissenting opinion on this point. Respondent is therefore asking this Court to ignore a case that it has described as exceptionally important because two members of the court below would have relied upon a procedural default for reasons explicitly rejected by every other judge to consider it. App. 7 n.1, 82, 98-106.

Respondent has also been inconsistent, indeed opportunistic, in raising this forfeiture argument over the past decade. Before the USCMCR, respondent never raised a forfeiture objection or an entitlement to plain error review. While it did make unavailing waiver arguments, respondent stipulated that the first question presented here "alleges a ground for relief that has not been waived." *United States v. Bahlul*, Case No. 09-001, Brief of the United States 4 (U.S.C.M.C.R. Oct. 21, 2009), *available at* https://goo.gl/d3yA3K. Before the Circuit, respondent belatedly included a forfeiture argument in its panel briefing, but then abandoned the claim at oral argument:

> JUDGE TATEL: Okay. So, then on [the Article III] issue we're looking at this de novo –
>
> MR. DE PUE: Yes.

JUDGE TATEL: – correct?

MR. DE PUE: Yes.

JUDGE TATEL: Okay. Great.

MR. DE PUE: And let's proceed with that issue.

Bahlul v. United States, Case No. 11-1324, Argument Transcript 29-30 (D.C. Cir., Oct. 22, 2014), *available at* https://goo.gl/ENh1Lw. And when seeking en banc rehearing from its subsequent loss before the panel, respondent did not raise plain error or suggest that it would be an impediment to en banc reconsideration.

Respondent argues that because this is a criminal case and not a civil case, strict forfeiture rules should apply no matter when respondent raised the issue. Br. in Opp. 19. The incentives, respondent claims, are such that there is no risk "of parties colluding and consenting to a non-Article III forum for resolution of their dispute." *Id.* (quoting App. 62 (Millet, J.)). But that is simply not true. Of the ten convictions rendered by the military commission system, eight have been the product of plea deals. *Guantanamo By the Numbers*, Miami Herald, *available at* https://goo.gl/LrCGhK. And all of these pleas have been colored by distorted incentives because guilty or not-guilty, charged or uncharged, respondent claims the discretion to hold any detainee pursuant to Guantanamo's preventative detention regime. *See United States v. Ghailani*, 743 F. Supp. 2d 261, 288 (S.D.N.Y. 2010). This, in turn, has created a well-documented practice of detainees asking to plead guilty, regardless of the strength of the evidence against them, in exchange for release. *See* Carol Rosenberg, *Guantanamo Plea Deal Unveils New Trial Strategy*, Miami Herald (Feb. 27, 2012), *archived at* https://perma.cc/BW3M-SFXP.

Those kinds of distorted incentives are one of the primary dangers this Court has warned about in its

Article III cases. *See*, *e.g.*, *Stern*, 564 U.S. at 493; *CFTC v. Schor*, 478 U.S. 833, 850-51 (1986). The bureaucracy's assumption of the federal courts' jurisdiction, and its resultant consolidation of discretionary enforcement powers with dispositive judicial powers, enables it to coerce parties with take-it-or-leave-it deals designed to evade judicial review.

2. Respondent also argues that petitioner himself is an unattractive vehicle for the weighty issues at stake. Br. in Opp. at 23-24. To be sure, petitioner has declared himself an enemy of the United States, he has done so ostentatiously, and he has been held in Guantanamo on that basis since 2002. But respondent's argument reflects a troubling trend that has become apparent over the course of this appeal. As its arguments in support of petitioner's conspiracy conviction have met greater judicial skepticism, respondent's characterization of petitioner's relative culpability has become more exaggerated and the trial record more unrecognizable.

Based on the uncontroverted record, petitioner never participated in or had any foreknowledge of any terrorist attack, not the least the September 11th attacks. Instead, he was categorized as a "Low Value Detainee" and the central charge against him was that he edited together a propaganda video. He was charged only with inchoate crimes. The jury instructions emphasized that "proof that [any object offenses] actually occurred is not required." Trial Tr. 848. And when the USCMCR evaluated this case, it entitled its analysis, "International Law and Inchoate Liability." App. 616. Since its inception, this has been respondent's test case for the trial of inchoate federal crimes before military commissions.

Over the course of this appeal respondent has increasingly suggested through innuendo that petitioner's culpability was far greater. But when finally pressed

at oral argument on whether the government actually had evidence to prove petitioner's responsibility for any completed crime, the former Acting-Solicitor General admitted, "I don't know." *Bahlul v. United States*, Case No. 11-1324, Argument Transcript 46-47 (D.C. Cir., Dec. 1, 2015), *available at* https://goo.gl/Fcphcf.

It also bears saying that this Court's reporter is filled with cases of unsympathetic litigants prevailing on constitutional issues because that was the result the law compelled. *See*, *e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011). And nowhere has that been truer or more important than in national security cases. *See*, *e.g.*, *Hamdan*, 548 U.S. at 635; *Ex parte Milligan*, 4 Wall. 2 (1866). This Court decides cases based upon principles, not litigants. And to accept respondent's argument invites the creation of a principle that will lie about "like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu v. United States*, 323 U. S. 214, 246 (1944) (Jackson, J., dissenting)

3. Respondent lastly argues that this Court's review is unnecessary because military commission prosecutors have attempted workarounds to compensate for how unsettled the law remains. Br. in Opp. 25. But that argument supports, rather than detracts from, the main reason this Court should take this case. High-profile capital trials should not be forced to jerry-rig fundamental jurisdictional questions.

Until this Court acts, the USCMCR's discredited opinion from 2011 remains controlling. Respondent says in a footnote that this Court should not worry because there is "no reason to doubt that military commission judges will … treat the court of appeals' decisions, rather than the USCMCR's, as the governing law." Br. in Opp. 26 n.6. But that is precisely the point. There is no governing decision from the court of appeals. And as noted in the

petition, the military commissions have already reverted to the USCMCR's opinion in denying motions to dismiss on Article III grounds. Pet. 16. If respondent is troubled by that result, as its footnote suggests it is, then the only responsible solution is for this Court to bring long-awaited certainty to the law now.

II. THE RETROACTIVE PROSECUTION OF CRIMES FIRST CODIFIED IN THE MILITARY COMMISSIONS ACT RAISES TWO QUESTIONS OF EXCEPTIONAL IMPORTANCE.

There are two questions embedded into the ex post facto issues in this case, one statutory and the other constitutional. Does the Military Commissions Act overcome the presumption against retroactivity? If so, does its retroactive expansion of military commission jurisdiction violate the Ex Post Facto Clause? Respondent's primary arguments against this Court's answering those questions are: 1) that respondent is right on the merits, 2) that the application of plain error by the Circuit makes this case a poor vehicle, and 3) that the questions themselves are of "diminishing importance" because they only affect crimes committed before 2006.

Like the Article III question, the ex post facto issues involve questions on which the D.C. Circuit ruled in petitioner's favor only to reinstate his conviction in an en banc decision that generated five Circuit court opinions. The merits are, therefore, at best debatable. It is true that the application of the plain error rule was determinative for the en banc majority's resolution of the constitutional question. App. 206 (Tatel, J., concurring). But the Circuit divided 4-3 on the legal propriety of deciding it on that basis. And with respect to the statutory question, respondent itself stipulated that plain error review was *not* appropriate. The Circuit accordingly decided de novo whether the Military Commissions Act

overcame the presumption against retroactivity in the first place. The relevant legal questions have therefore been comprehensively developed below and are ripe for this Court's consideration now.

Finally, respondent's position on the relative importance of the questions presented has again changed with its litigation interests. In its petition to have the ex post facto issues reheard en banc below, respondent based its whole argument on their "exceptional importance," going so far as to title its argument, "The Scope of Military Commission Jurisdiction over the Offenses Charged in This Case Is a Question of Exceptional Importance." *Bahlul v. United States*, Case No. 11-1324, Petition for Rehearing En Banc (D.C. Cir., Mar. 5, 2013), *available at* https://goo.gl/nXUxbk. That was true then, and it is true now.

III. SEGREGATING THE FEDERAL CRIMINAL JUSTICE SYSTEM IS SO UNPRECEDENTED AND BROADLY SIGNIFICANT THAT THIS COURT SHOULD DECIDE ITS CONSTITUTIONALITY NOW.

Respondent is correct that the equal protection issue did not receive the breadth of consideration below that this Court ordinarily looks for when granting certiorari. The issue has, however, received more consideration than respondent suggests. The USCMCR ruled on this issue in respondent's favor in 2011. *United States v. Hamdan*, 801 F.Supp.2d 1247, 1322 (U.S.C.M.C.R. 2011). Judge Kavanaugh ruled the same way but for different reasons in 2014. App. 442 (Kavanaugh, J.).[2] And there

[2] Respondent claims that Judge Kavanaugh determined that Congress segregated the justice system to provide "for a fundamentally fair proceeding without requiring that such aliens be admitted into the United States." Br. in Opp. 32. As the legislative record demonstrates, this was not Congress' rationale and, even if it were, the law says

are numerous decisions from the military commission system on this issue dating back to 2007. *See*, *e.g.*, *United States v. Hamdan*, Ruling on Motion to Dismiss for Lack of Jurisdiction, AE084 (Dec. 19, 2007), *archived at* https://perma.cc/WVA2-HDZ6.

On petitioner's side, the argument for the unconstitutionality of this segregation is straightforward. All petitioner asks is that this Court reaffirm the continuing vitality of *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). Alternatively, this Court could find that segregating the justice system violates the nation's commitment to equal justice under law. *See* Neal Katyal, *Equality in the War on Terror*, 59 Stan. L. Rev. 1365, 1367 (2007).

The arguments on both sides, therefore, have been well developed for over a decade and are ripe for decision. The only thing the Court must decide is whether the issue's systemic importance to the military commission system and the legal system more broadly means that it should be decisively resolved now.

The issue's systemic importance to the military commission system is self-evident. Respondent has even asked the military commissions to issue an advisory opinion on this issue because "[t]he question of whether the 2009 MCA violates equal protection is a foundational legal question that should, in the interest of judicial economy, be resolved early in the litigation." *United States v. Nashiri*, Government Motion for a Ruling that the Military Commissions Act of 2009 Does Not Violate Equal Protection, AE058 10 (Mar. 12, 2012), *archived at* https://perma.cc/DTW7-XQVV.

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nothing about where defendants are tried. Furthermore, Judge Kavanaugh does not offer anything like this rationale either at the page cited (App. 442) or anywhere else in his opinion.

The issue's systemic importance to the legal system as a whole is also considerable. This Court has never before condoned the segregation of the justice system on any basis. Deferring review now will in practice mean condoning it for the foreseeable future. It will put the rights of non-citizens within the jurisdiction of the United States, a class of individuals numbering more than twenty-million, in legal jeopardy. And it will foster profound doubts over the nation's continued fidelity to equal justice under law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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