EN BANC ORAL ARGUMENT SCHEDULED FOR DECEMBER 1, 2015
No. 11-1324

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALI HAMZA AHMAD SULIMAN AL BAHLUL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR REVIEW FROM THE UNITED STATES COURT
OF MILITARY COMMISSION REVIEW

BRIEF FOR THE UNITED STATES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES

Ali Hamza Ahmad Suliman al Bahlul is the petitioner in this case. The United States is the respondent. Amici supporting Bahlul include: The National Institute of Military Justice (NIMJ); Professor David Glazier; and International Law Scholars.

II. RULINGS

The ruling under review is the decision of the United States Court of Military Commission Review affirming Bahlul's convictions.

III. PRIOR DECISIONS AND RELATED CASES

The United States Court of Military Commission Review has issued a published decision in this case. United States v. Bahlul, 820 F. Supp. 2d 1141 (USCMCR 2011) (en banc). On January 25, 2013, a panel of this Court issued an order reversing Bahlul's convictions. Bahlul v. United States, No. 11-1324, 2013 WL 297726. The en banc Court vacated that order and issued a decision rejecting Bahlul's statutory and Ex Post Facto Clause challenges to his conspiracy conviction, vacating his convictions for solicitation and providing material support for terrorism, and remanding to the panel for consideration of Bahlul's remaining challenges to his conspiracy conviction. Bahlul v. United States, 767 F.3d 1 (D.C.

Cir. 2014). On remand, the panel vacated Bahlul's conspiracy conviction. Bahlul v. United States, 792 F.3d 1 (D.C. Cir. 2015). The Court granted the government's petition for rehearing en banc and vacated the panel's opinion. Order, Bahlul v. United States, No. 11-1324 (Sep. 25, 2015).

DATED: November 2, 2015

/s/ John F. De Pue
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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases:

* Authorities upon which we chiefly rely are marked with asterisks.

Rules:

Miscellaneous:

GLOSSARY OF ABBREVIATIONS

App. ..... Petitioner's Appendix

AUMF ..... Authorization for Use of Military Force

Br. ..... Petitioner's Brief

CFTC ..... Commodities Futures Trading Commission

Dig. Ops. ..... Digest of Opinions of The Judge Advocate General of the Army

DoD ..... Department of Defense

Ex. ..... Exhibit

FM ..... Field Manual

G.C.M.O. ..... General Court Martial Order

G.O. ..... General Order

HQ ..... Headquarters

JAGC ..... Judge Advocate General's Corps

MCA ..... Military Commissions Act

NIMJ ..... National Institute for Military Justice

Op. Att'y Gen. ..... Opinion of the Attorney General

Supp. App ..... Government Supplemental Appendix

UCMJ ..... Uniform Code of Military Justice

USCMCR ..... United States Court of Military Commission Review

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ISSUE PRESENTED

Whether the military commission plainly erred in not *sua sponte* dismissing the charge against Bahlul of conspiracy to commit war crimes on the ground that Congress lacked authority to make that offense triable by military commission.

INTRODUCTION AND STATEMENT OF THE CASE

In Hamdan v. Rumsfeld, 548 U.S. 557 (2006) ("Hamdan I"), a divided Supreme Court wrestled with the question whether conspiracy to commit certain war-related offenses can be tried in a military commission. Recognizing that "Congress, not the Court, is the branch in the better position" to determine the

"validity of the conspiracy charge," Members of the Court invited guidance. Id. at 655 (Kennedy, J., concurring); id. at 636 (Breyer, J., concurring). In response, two Congresses and two Presidents determined that trying an enemy combatant in a military commission for conspiracy is a lawful exercise of constitutional power.

Bahlul contends that the judgment of the political branches should be overturned. To be sure, the judicial branch must ultimately determine the constitutional constraints on the government, even in an armed conflict. But a joint judgment of the political branches in this arena is entitled to the utmost deference. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). For it is the political branches that the Constitution provides with war powers to conduct our Nation's armed conflicts, and it is Congress that the Constitution provides with the power not just to "punish" but to "define" offenses against the law of nations.

Bahlul urges that Article III and Article I nonetheless require that his conviction be reversed, principally because the international community has not recognized conspiracy to commit war crimes as a violation of customary international law. But there is no constitutional violation, much less one that is plain. In determining the scope of Article III, history matters. And here, the experience of our wars and the acts and orders of our wartime tribunals reflect a

long history of trying conspiracy to violate the laws of war in a military commission. That history includes the most highly-publicized military commission trials this Country has seen – from the Civil War trials of the Lincoln conspirators, Henry Wirz, and George St. Leger Grenfel, to the World War II trials of the Nazi saboteurs in Ex parte Quirin, 317 U.S. 1 (1942), and Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956).

Nor is this a situation in which Congress has created a new war crime out of whole cloth or adopted a principle of criminal liability wholly unknown to international law. To the contrary, customary international law already prohibits certain conspiracies (such as conspiracy to commit genocide), and analogues to conspiracy such as joint criminal enterprise exist. Congress has simply modified those offenses to meet the particular threat posed by al Qaeda.

Indeed, the need for flexibility to adapt to evolving threats explains why Bahlul's arguments are of such consequence. For Bahlul asks this Court to impose substantial constitutional constraints on the use of military commissions to prosecute enemy combatants both in the current declared armed conflict and in conflicts yet to come.

Three judges from this Court have already adopted a view of our Nation's military history and a construction of the Constitution that require rejection of the

constraints that Bahlul urges here. The en banc Court should do the same.

1. On September 11, 2001, the terrorist organization al Qaeda attacked the United States and murdered nearly 3,000 people. Prosecution Ex. 14A, at 10-11. In response, Congress authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). The President issued a military order authorizing the trial by military commission of non-citizens for certain offenses. See 66 Fed. Reg. 57,833, 57,834, § 4 (Nov. 13, 2001).

In Hamdan I, the Supreme Court held that the military commission system the President established contravened statutory restrictions on military commission procedures in the Uniform Code of Military Justice (UCMJ). 548 U.S. at 613-35. The Court was divided on whether conspiracy was an offense triable by military commission in the absence of specific statutory authorization. See id. at 595-612 (Stevens, Souter, Ginsburg, Breyer, JJ., plurality opinion) (concluding that conspiracy is not a recognized offense under the law of war as incorporated in 10 U.S.C. § 821); id. at 697-706 (Thomas, Scalia, Alito, JJ., dissenting) ("[C]onspiracy to violate the laws of war is itself an offense cognizable before a

law-of-war military commission."). Four Justices joined concurrences inviting Congress to clarify the President's authority with regard to military commissions. See id. at 636 (Breyer, Kennedy, Souter, Ginsburg, JJ., concurring) ("Nothing prevents the President" from seeking from Congress "legislative authority to create military commissions of the kind at issue here."); id. at 655 (Kennedy, J., concurring) (noting that "Congress may choose to provide further guidance" regarding the "validity of the conspiracy charge").

In response, Congress enacted the Military Commissions Act of 2006, Pub. L. No. 109-366, 10 U.S.C. § 948a *et seq*. ("2006 MCA"). The 2006 MCA established a military commission system "to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission." Id. § 948b(a). The 2006 MCA codifies a number of specific war crimes, including murder of protected persons, attacking civilians, and terrorism. See id. § 950v(b)(1), (2), (24). The 2006 MCA includes a separate conspiracy provision, which prohibits conspiring to commit one or more of the specified substantive offenses. Id. § 950v(b)(28). To be convicted of conspiracy, the accused must personally, and knowingly, commit an "overt act to effect the object of the conspiracy." Id.

2. Ali Hamza Ahmad Suliman al Bahlul was born in Yemen. Tr. 477. In

the late 1990s, Bahlul went to Afghanistan to join al Qaeda. Tr. 504-08. Bahlul completed paramilitary training at an al Qaeda camp. Tr. 507-08. He met Usama bin Laden and swore an oath of loyalty to bin Laden and al Qaeda. Tr. 509-11, 589-90; United States v. Bahlul, 820 F. Supp. 2d 1141, 1161 (USCMCR 2011).

Bin Laden assigned Bahlul, who was well educated and spoke English, to work in al Qaeda's media office. Tr. 476-77, 513. Bin Laden directed Bahlul to create an al Qaeda recruitment video highlighting the October 2000 attack on the *U.S.S. Cole*, which killed 17 American sailors. Tr. 514. Bahlul's video, which called on viewers to execute terrorist attacks against the United States and to come to Afghanistan for training, was used heavily in the months before the 9/11 attacks at the same al Qaeda camps it depicts and was distributed widely outside Afghanistan. Tr. 534-35, 588-89, 621, 651-52, 669, 700, 789, 807-10; Prosecution Ex. 14A, at 5-6. Bin Laden also appointed Bahlul to be his personal secretary. Tr. 556. Bahlul took extensive notes of new al Qaeda recruits' questions about killing and martyrdom. Tr. 526-29; Prosecution Ex. 33A, at 370-75, 399. He also assisted bin Laden in preparing public statements, and he operated bin Laden's communications equipment. Tr. 514; Bahlul, 820 F. Supp. 2d at 1161-62.

While he was in Afghanistan, Bahlul lived in the same guest house with Muhammed Atta and Ziad al Jarrah, both of whom later piloted aircraft in the 9/11

attacks. Tr. 550-55. Bahlul administered the two hijackers' oaths of loyalty to bin Laden. Tr. 192, 550-55; Prosecution Ex. 15. He also transcribed their "martyr wills" and hand-delivered the documents to bin Laden. Tr. 552-55; Prosecution Ex. 15; Bahlul, 820 F. Supp. 2d at 1162.

Just before the 9/11 attacks, Bahlul evacuated al Qaeda's headquarters in Kandahar with bin Laden. Tr. 562. While bin Laden was fleeing the U.S. response, Bahlul operated the radio that bin Laden used to track news of the attacks. Tr. 562-63; Bahlul, 820 F. Supp. 2d at 1162.

Bahlul was captured in Pakistan, turned over to the United States, and detained at Guantánamo. Tr. 946; Bahlul, 820 F. Supp. 2d at 1156. Bahlul voluntarily spoke with investigators. Bahlul, 820 F. Supp. 2d at 1162. Bahlul acknowledged that he was an officer in al Qaeda, and he outlined his role in producing the *Cole* video and providing other public relations services to bin Laden and al Qaeda. Id.; Tr. 485, 492, 512-14. Bahlul also admitted that he had roomed with eventual 9/11 hijackers Atta and Jarrah and that he had administered their loyalty oaths. Prosecution Ex. 15. Bahlul told investigators he had "great respect" for the hijackers and for the attacks they carried out. Tr. 593. During his detention, Bahlul wrote letters to other al Qaeda leaders expressing pride in his role "in the 9/11 events," explaining that he had arranged Atta's and Jarrah's oaths and

typed their martyr wills. Prosecution Ex. 15; Tr. 552; Bahlul, 820 F. Supp. 2d at 1162.

3. In 2008, military authorities charged Bahlul under the 2006 MCA with conspiracy, solicitation, and providing material support for terrorism. The substantive offenses underlying the conspiracy charges were murder of protected persons, attacking civilians, attacking civilian objects, murder and destruction of property in violation of the law of war, terrorism, and providing material support for terrorism. App. 97. The charge sheet alleged that Bahlul personally committed eleven specific overt acts in furtherance of the conspiracy. The overt acts included: undergoing military-type training at an al Qaeda camp; swearing loyalty to bin Laden and performing personal services for him; preparing the *Cole* video; carrying weapons and a suicide belt to protect bin Laden; arranging for two of the 9/11 hijackers to swear loyalty to bin Laden; and "prepar[ing] the propaganda declarations styled as martyr wills of Muhammed Atta and Ziad al Jarrah in preparation for the acts of terrorism perpetrated by [them] and others at various locations in the United States on September 11, 2001." App. 99.

During pretrial hearings, Bahlul announced his intent to boycott the proceedings. Bahlul's defense counsel, following Bahlul's instructions, "waive[d] all pretrial motions of any kind." Tr. 85. Bahlul pleaded not guilty but conceded

that he had engaged in the charged conduct, except he denied wearing a suicide belt. Tr. 167, 175-79, 190-95.

At his military commission trial, Bahlul instructed his counsel not to make arguments or to present a defense. Tr. 15-17, 77-78, 85, 95, 114; Bahlul v. United States, 767 F.3d 1, 7 (D.C. Cir. 2014) (en banc) ("Bahlul I"). Bahlul did not cross-examine government witnesses, and he did not object to any of the physical, forensic, and documentary evidence introduced to corroborate his voluntary statements. Tr. 373, 403-04, 427, 448, 457, 484, 572, 597, 641, 656, 680, 716, 749, 815. Bahlul did not raise any claim that Congress lacked authority under Article I to make conspiracy triable by military commission, nor did he claim that his military commission trial violated Article III, the First Amendment, or the Due Process Clause. See Bahlul I, 767 F.3d at 10; Bahlul, 820 F. Supp. 2d at 1258.

The military commission members unanimously convicted Bahlul of all three charges. The members specifically found Bahlul "guilty" of each of the seven objects of the conspiracy, including murder of protected persons and attacking civilians. App. 115. The members also specifically found Bahlul "guilty" of all the overt acts, except for arming himself to prevent bin Laden's capture. App. 116-17.

At sentencing, Bahlul again praised the 9/11 attacks. He claimed that he had

been al Qaeda's "media man" and that he would have been the 20th hijacker "but bin Laden refused" because Bahlul's media services were too important to lose. Tr. 968-69, 979; Bahlul I, 767 F.3d at 6. The military commission sentenced Bahlul to life imprisonment. Bahlul, 820 F. Supp. 2d at 1164.

The convening authority approved Bahlul's convictions and sentence. Bahlul, 820 F. Supp. 2d at 1157, 1264. The USCMCR affirmed in an en banc opinion. Id. at 1158-59.

4. Bahlul's appellate counsel appealed, arguing, inter alia, that his military commission convictions violated Article I, Article III, and the Ex Post Facto Clause of the Constitution. The government conceded that, under the reasoning of Hamdan v. United States, 696 F.3d 1238 (D.C. Cir. 2012) ("Hamdan II"), the 2006 MCA did not authorize military commission jurisdiction over Bahlul's offenses because his charged conduct pre-dated the Act. The panel vacated Bahlul's convictions. Bahlul I, 767 F.3d at 8. The Court granted the government's petition for rehearing en banc. Id.

5. On July 14, 2014, the en banc Court issued its decision in Bahlul I. The Court (1) rejected Bahlul's statutory and ex post facto challenges to his conspiracy conviction; (2) vacated his convictions for solicitation and providing material support for terrorism; and (3) remanded to the panel to consider Bahlul's

remaining challenges to his conspiracy conviction. 767 F.3d at 31.

At the outset, the en banc Court held that Bahlul's claims were subject to plain-error review. Bahlul I, 767 F.3d at 8-11. The Court recognized that Bahlul "forfeited the arguments he now raises" by "flatly refus[ing] to participate in the military commission proceedings and instruct[ing] his trial counsel not to present a substantive defense." Id. at 10. The Court acknowledged that Bahlul "objected to the commission's authority to try him" but held that those objections, which were "couched entirely in political and religious terms," were "too general" to preserve his legal claims. Id. The Court also held that Bahlul's ex post facto claim was not "jurisdictional" because "[t]he question whether [the 2006 MCA] is unconstitutional does not involve 'the courts' statutory or constitutional *power* to adjudicate the case.'" Id. at 10 n.6 (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)).

On the merits, the Court rejected Bahlul's statutory claims and held that the 2006 MCA unambiguously provided for military commission jurisdiction over all offenses in the statute, regardless of whether the conduct took place before or after the statute was enacted. Bahlul I, 767 F.3d at 11-17. The Court, applying plain-error review, then rejected Bahlul's ex post facto challenge to his conspiracy conviction because there was no "clear precedent" establishing it was error to try

Bahlul for that offense. Id. at 22-27. The Court explained that, although some authorities described the "law of war" as a branch of international law, "[t]here is also language in [Supreme Court decisions] that domestic precedent is an important part of our inquiry." Id. at 23. The Court found it "[s]ignificant[]" that "both the Hamdan plurality and dissent relied primarily on *domestic* precedent to ascertain whether conspiracy could be tried" and that the Supreme Court in Quirin had similarly "evaluat[ed] domestic precedent" to determine whether the Nazi saboteurs were properly charged. Bahlul I, 767 F.3d at 23-24. The Court concluded that the domestic conspiracy precedents – including Civil War and World War II-era precedents – provided "sufficient historical pedigree" to sustain Bahlul's conspiracy conviction on plain-error review. Id. at 24-27. The Court remanded to the panel to consider, inter alia, Bahlul's Article I and Article III claims. Id. at 31.

In a concurring opinion, Judge Henderson concluded that the Ex Post Facto Clause does not apply to alien unlawful enemy combatants detained at Guantánamo. Id. at 31-34.

Judge Rogers concurred in the judgment in part and dissented. Id. at 34-51. In her view, Bahlul's inchoate conspiracy conviction violated the Ex Post Facto Clause because inchoate conspiracy is not a violation of international law and has

not traditionally been triable in U.S. military commissions. Id.

Two judges dissented from the decision to remand the Article I and Article III claims. Judge Brown would have rejected those claims because the Define and Punish Clause provides Congress with the power to make conspiracy triable by military commission. Id. at 59-61. Judge Kavanaugh, too, would have rejected the Article I and Article III claims: "Congress's authority to establish military commissions," he concluded, "does not arise exclusively from the Define and Punish Clause," but also from Congress's war powers, which are not limited by international law. Id. at 72-74.

6. On remand, a divided panel held that Bahlul's "conviction for inchoate conspiracy by a law-of-war military commission violated the separation of powers enshrined in Article III." Bahlul v. United States, 792 F.3d 1, 22 (D.C. Cir. 2015) ("Bahlul II"). The majority applied de novo review, reasoning that Bahlul's challenges "include a structural objection under Article III that cannot be forfeited." Id. at 3. On the merits, the majority concluded that the Article III exception for military commissions is limited to violations of the international law of war. Id. at 8-11. The majority read Quirin as relying exclusively on international law to determine whether the defendants were properly charged. Id. The majority also found that the historical practice of trying conspiracy in U.S.

military commissions was too "thin" and "equivocal" to establish an Article III exception. Id. at 11. And the majority held that the scope of the applicable Article III exception is governed exclusively by the Define and Punish Clause, which embraces only international-law violations. Id. at 14-19.

Judge Tatel concurred, emphasizing the different standards of review in explaining his decision to join the panel opinion even though he had joined the en banc decision. Id. at 22-27.

Judge Henderson dissented. In her view, all of Bahlul's constitutional claims were forfeited and subject to plain-error review. Id. at 29-42. Addressing the merits, Judge Henderson maintained that the courts should defer to the determination of Congress and the President that conspiracy was triable by military commission. Id. at 27-28, 43. She reasoned that Congress's power to codify war crimes derives from all its war powers, not just from the Define and Punish Clause. Id. at 43-44, 55-63. In the alternative, she concluded that Congress may, under the Define and Punish Clause and the Necessary and Proper Clause, make conspiracy triable by military commission because the object offenses are internationally recognized war crimes, and the international community has recognized that individuals may be held liable for war crimes under doctrines analogous to conspiracy. Id. at 44-55. The MCA's conspiracy provision is "consistent with

international law – even if not a perfect match," id. at 52, and in these circumstances Congress may "track somewhat ahead of the international community," id. at 50.

SUMMARY OF ARGUMENT

1. This Court should review Bahlul's constitutional claims – all of which were forfeited – for plain error. The plain-error standard applies to Bahlul's constitutional claims regardless of whether they implicate "structural" principles of Article III.

2. Congress had ample constitutional authority under its war powers, consistent with Article III, to define conspiracy to commit war crimes as an offense triable by military commission. Neither Article III nor the war powers restrict Congress to codifying only offenses recognized as violations of international law. The scope of the military commission exception to Article III is determined by reference to Congress's broad war powers under Article I, coupled with the Necessary and Proper Clause. Those provisions do not restrict Congress to codifying only offenses recognized as violations of international law. Bahlul's contrary argument is inconsistent with (1) the breadth of Congress's war powers; (2) Congress's longstanding codification of spying and aiding the enemy, which are not international law-of-war offenses; (3) the reasoning of the Supreme Court's

military commission cases; and (4) the historical practice of U.S. military commissions. Conspiracy, in particular, has been prosecuted as a war crime throughout our nation's history.

Even if Congress's authority in this realm arose only under the Define and Punish Clause, that Clause does not restrict Congress to proscribing only crimes that are violations of international law. Where, as here, Congress has authority to make the underlying object offenses triable by military commission, Congress has discretion under the Define and Punish Clause, consistent with Article III, to define conspiracies to commit such offenses as crimes subject to military commission jurisdiction.

3. The Court should reject Bahlul's forfeited First Amendment and equal protection claims rather than remand them to the panel.

ARGUMENT

I. CONGRESS'S DECISION TO CODIFY CONSPIRACY TO COMMIT WAR CRIMES AS AN OFFENSE TRIABLE BY MILITARY COMMISSION UNDER ITS ARTICLE I POWERS DOES NOT VIOLATE ARTICLE III

A. Standard of Review

"'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as

well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" United States v. Olano, 507 U.S. 725, 731 (1993) (quoting Yakus v. United States, 321 U.S. 414, 444 (1944)). Bahlul did not properly preserve before the military commission any of the constitutional claims he has raised in this Court. Those claims should therefore be reviewed for plain error. Bahlul I, 767 F.3d at 9-10 & n.4. A plain error is "[1] an error [2] that is plain and [3] that affect[s] substantial rights." Id. at 9-10 (internal quotation marks and citation omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Id. (internal quotation marks and citation omitted).

1. Bahlul Did Not Properly Preserve Any Constitutional Claims

Bahlul contends (Br. 35) that statements he made to the military commission protesting the illegitimacy of his trial were sufficient to preserve the constitutional claims he raises here. That contention is foreclosed by Bahlul I. As this Court explained, to preserve a claim for appellate review, the accused must make a timely objection with sufficient clarity and specificity to "have alerted the trial court to the substance of the petitioner's point." 767 F.3d at 9 (citation omitted). The vague statements Bahlul relies on were far "'too general'" to preserve the

constitutional claims now before this Court. Id. at 9-10 (noting that Bahlul's objections "were couched entirely in political and religious terms"). And although, as Bahlul notes, the military commission judge interpreted Bahlul's statements as "close" to a motion claiming that the "court, for whatever reason, lacks jurisdiction," App. 49-50, Bahlul did not advance, and the judge did not identify, any legal claim that might support such a motion.

2. Bahlul's Constitutional Claims Are Not Jurisdictional

Bahlul's contention (Br. 38-41) that his constitutional challenge to Congress's authority to proscribe conspiracy is jurisdictional and therefore not forfeitable is also foreclosed by precedent. The Supreme Court has explained that nonwaivable jurisdictional limitations are those concerning "the courts' statutory or constitutional *power* to adjudicate the case." Cotton, 535 U.S. at 630 (internal quotation marks and citation omitted). Here, the 2006 MCA "explicitly confers jurisdiction on military commissions to try [Bahlul for] the charged offenses." Bahlul I, 767 F.3d at 10 n.6; see also 10 U.S.C. § 948d(a) (2006) (authorizing trial by military commission of "any offense made punishable by this chapter"); id. § 950v(b)(28) (codifying conspiracy). This provision is analogous to 18 U.S.C. § 3231, which provides district courts with subject-matter jurisdiction over "offenses against the laws of the United States," while specific offenses are

codified in separate sections of Title 18 and elsewhere. See United States v. Baucum, 80 F.3d 539, 540 (D.C. Cir. 1996) ("When a federal court exercises its power under a presumptively valid federal statute, it acts within its subject-matter jurisdiction pursuant to [18 U.S.C.] § 3231.").

Bahlul contends that Congress transgressed the limits of Article I and Article III when it gave military commissions jurisdiction over his conspiracy offense. But this Court has squarely held that challenges to Congress's authority to create offenses are not "jurisdictional" challenges. See Baucum, 80 F.3d at 539 (holding that a Commerce Clause challenge to 21 U.S.C. § 860(a), which prohibits certain drug activity near schools, was not jurisdictional); see also United States v. Drew, 200 F.3d 871, 876 (D.C. Cir. 2000) (rejecting defendant's attempt to "label[] a challenge to the constitutionality of a statute a jurisdictional issue"); United States v. Miranda, 780 F.3d 1185, 1188-90 (D.C. Cir. 2015) (holding that a Define and Punish Clause claim did not "fall within the subject-matter jurisdiction exception to waiver"); United States v. Nueci-Peña, 711 F.3d 191, 197 (1st Cir. 2013) (holding a Define and Punish Clause claim was subject to plain-error review). As this Court has explained, treating such challenges as jurisdictional would mean that federal courts (or military commissions), which "hav[e] an obligation to address jurisdictional questions *sua sponte*, would have to assure themselves of a statute's

validity as a threshold matter in any case," contravening the settled principle that courts should "declin[e] to address constitutional questions not put in issue by the parties." Baucum, 80 F.3d at 541.

Consistent with that principle, the en banc Court held that Bahlul's ex post facto claim was not "jurisdictional." Bahlul I, 767 F.3d at 10 n.6. The Court reasoned that "the 2006 MCA explicitly confers jurisdiction on military commissions to try the charged offenses" and that "[t]he question whether that Act is unconstitutional does not involve the courts' statutory or constitutional *power* to adjudicate the case." Id. (internal quotation marks and citations omitted). That rationale applies equally to the constitutional claims Bahlul raises here. Id. at 80 (opinion of Kavanaugh, J.) (noting that "plain error review" is the "standard of review that the majority opinion indicates must be applied" to Bahlul's remaining claims); see also Peretz v. United States, 501 U.S. 923, 953 (1991) (Scalia, J., dissenting) (noting that the claim that the district court delegated functions to a magistrate in violation of Article III "goes to the lawfulness of the manner in which [the court] acted, but not to its jurisdiction to act").[1]

[1] The en banc Court has also foreclosed Bahlul's argument (Br. 39) that Rules 905 and 907 of the Rules of Military Commissions mandate de novo review here. See Bahlul I, 767 F.3d at 10 n.6 (holding that neither Rule required de novo review of Bahlul's ex post facto claim). Those rules govern the timing of motions before the military commission and do not purport to address the standard of

3. The Supreme Court's Decisions in *Sharif* and *Schor* Do Not Bar Plain-Error Review of Forfeited "Structural" Article III Claims

Bahlul contends (Br. 41-45) that the Supreme Court's decisions in Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015), and CFTC v. Schor, 478 U.S. 833 (1986), establish that ordinary principles of forfeiture do not apply to Bahlul's "structural" Article III claim. Bahlul is mistaken, because Schor and Sharif addressed whether an Article III error occurred at all in light of litigants' consent, not the distinct question whether a litigant may forfeit an Article III claim by failing to raise it.

In Schor, the Supreme Court addressed whether Congress had violated Article III by giving the Commodities Futures Trading Commission (CFTC), an Article I tribunal, the power to adjudicate certain claims in cases where the parties elected to invoke the CFTC as a forum. See Schor, 478 U.S. at 836. The Court explained that "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver," but that "[t]o the extent [the] structural principle [of Article III] is implicated in a given case, . . . notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." Id. at 850-51; see also

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review on appeal where, as here, the accused never raised his claims before the military commission.

Peretz, 501 U.S. at 936-37; Kuretski v. Commissioner, 755 F.3d 929, 937 (D.C. Cir. 2014). As a result, in deciding whether Congress had violated Article III, the Court considered not only the parties' consent to CFTC adjudication, but also the nature, purpose, and scope of Congress's delegations, before concluding that "the limited jurisdiction that the CFTC asserts over state law counterclaims . . . does not contravene separation of powers principles or Article III." 478 U.S. at 857.

Schor did not create an exception to ordinary forfeiture principles for "structural" claims, because the question addressed in Schor – whether a constitutional violation occurred – is distinct from the question whether a litigant may obtain after-the-fact relief for a violation to which he failed to timely object. See Freytag v. Commissioner, 501 U.S. 868, 896 (1991) (Scalia, J., concurring) (distinguishing whether a litigant's consent has a "legitimating effect" from whether "a judgment already rendered [must] be set aside because of an alleged structural error to which the losing party did not properly object"); Puckett v. United States, 556 U.S. 129, 138 (2009) (precedents requiring that certain waivers be personal, knowing, and voluntary "say nothing about the proper standard of review when [a] claim of error is not preserved.").

Sharif reinforces that Schor did not create an exception to forfeiture principles. In Sharif, the Supreme Court again addressed the merits of an Article

III-based claim and concluded that there was no constitutional violation when a non-Article III bankruptcy court adjudicated, with the parties' consent, certain claims that the Constitution would ordinarily require to be adjudicated in Article III courts. See Sharif, 135 S. Ct. at 1945 n.10. After reaching this merits finding, the Supreme Court instructed the court of appeals on remand to determine both whether Sharif had consented to bankruptcy adjudication – meaning there would be no Article III violation – and also whether he had "forfeited his [Article III] argument below." Id. at 1949; see also id. at 1949 (Alito, J., concurring) (noting that Sharif's claims "vindicate[] Article III, but that does not mean that [they] are exempt from ordinary principles of appellate procedure"). These instructions necessarily imply that even if there had been an Article III violation, failure to timely assert this "structural" Article III claim could deprive a litigant of relief on appeal. See Bahlul II, 792 F.3d at 35-36 & n.5 (Henderson, J., dissenting); see also Freytag, 501 U.S. at 893-94 (Scalia, J., concurring) ("A party forfeits the right to advance on appeal a nonjurisdictional claim, structural or otherwise, that he fails to raise at trial.").

Finally, the fact that Schor and Sharif considered the Article III challenges raised in those cases de novo does not mean that such challenges can never be forfeited. The Supreme Court in both instances exercised its discretionary

authority in *civil* cases, deployed under rare circumstances, to correct even nonjurisdictional errors despite the absence of a timely objection. See Freytag, 501 U.S. at 894 (Scalia, J., concurring) (agreeing that "appellate courts may, in truly exceptional circumstances, exercise discretion to hear forfeited claims," but finding "no basis for the assertion that the structural nature of a constitutional claim in and of itself constitutes such a circumstance"); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 231-32 (1995) (explaining that the Schor Court "*cho[]se to consider* [the litigant's] Article III challenge" in light of the principle that the court may exercise its discretion to consider waived challenges) (citing Freytag, 501 U.S. at 878-79) (emphasis added). Even assuming this Court has such discretion in this *military commission* case, Bahlul has not identified any exceptional circumstances here. Although forfeiture often results from an inadvertent mistake by a defendant's counsel, Bahlul's forfeiture in this case was his own deliberate decision to boycott the proceedings and to prevent his counsel from making legal arguments in his defense. And because unlawful alien combatants have reason to raise Article III challenges to the military tribunals before which they are tried (even though litigants like Schor who consented to proceed before an Article I forum may not), no exception to forfeiture principles is necessary to prevent MCA tribunals from being insulated from separation-of-powers challenges. This is not the rare case

that warrants an exception to ordinary principles of appellate review.

4. The Government Properly Preserved Its Plain-Error Argument

Bahlul's argument (Br. 35-38) that the government "forfeited its forfeiture argument" by failing to raise it in the petition for rehearing en banc and in the government's brief to the USCMCR lacks merit.

Bahlul is wrong in claiming (Br. 37) that the government was required to "object[] to the panel's holding respecting the standard of review" in its en banc petition. The purpose of the petition is not to enumerate specific objections to the panel opinion (which has now been vacated), but rather to explain why the case presents a question that meets the standards for en banc review. See Fed. R. App. P. 35(b). The appropriate standard of review governing a particular issue is generally within the scope of a petition presenting that issue on the merits, and any doubt on that score in this case is removed by the Court's order specifically directing the parties to address the standard of review.

Nor does the government's position on waiver before the USCMCR preclude it from arguing for plain error here. In the USCMCR, the government asserted that Bahlul waived his various claims except his claim that the military commission lacked subject-matter jurisdiction because the charged offenses were not war crimes triable by military commission. See App. 160-61 & n.5. Bahlul's

claim was styled as a challenge to the military commission's subject-matter jurisdiction (which could not be waived), and it was ambiguous whether the claim was, at bottom, statutory or constitutional in nature. Moreover, the government's position regarding the USCMCR's standard of review is not contrary to the government's position on plain-error review here, because the USCMCR has a broader scope of appellate review than this Court. Compare 10 U.S.C. § 950g(d) (2009) (the D.C. Circuit "shall take action only with respect to matters of law, including the sufficiency of the evidence") with id. § 950f(d) (requiring the USCMCR to affirm only findings that it determines are "correct in law and fact" and "should be approved," and noting that the court may "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact"); see also Bahlul, 820 F. Supp. 2d at 1258 (noting that this language "includes discretionary authority to determine the circumstances, if any, under which [the USCMCR] would apply waiver or forfeiture") (internal quotation marks and citation omitted).

B. The Constitution Permits Unprivileged Enemy Belligerents To Be Tried for Conspiracy To Commit War Crimes in Law-of-War Military Commissions

In enacting the 2006 and 2009 MCAs, two Congresses and two Presidents responded to the Supreme Court's express invitation that the political branches

clarify the scope of military commission jurisdiction over conspiracy offenses, see Hamdan I, 548 U.S. at 636 (Breyer, J., concurring); id. at 655 (Kennedy, J., concurring), by concluding that conferring jurisdiction over war crimes conspiracies on military commissions was lawful and appropriate. In making that determination, Congress and the President did not run afoul of Article III. On the contrary, both Congress's war powers and its powers pursuant to the Define and Punish Clause provided ample basis for Congress (acting here in concert with the President) to make conspiracies to commit war crimes triable by military commission – as a long history of trying such conspiracies before military tribunals confirms.

1. The Scope of the Article III Exception for Military Commission Jurisdiction Is Defined by Congress's Broad War Powers and Historical Practice

The Constitution's vesting of "[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," U.S. Const. art. III, § 1, "must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole." Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64 (1982) (plurality opinion). Interpreting Article III in light of these principles, the Supreme Court has sanctioned Article I

courts in a variety of areas, focusing on whether Congress established the courts pursuant to "a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue," and on whether historical practice supported Congress's decision to assign particular matters to non-Article III tribunals. Id. at 66. For example, Article III permits Congress to establish non-Article III courts to exercise criminal jurisdiction in the territories and in the District of Columbia, to serve as courts-martial adjudicating violations of military law, to adjudicate disputes over "public rights," and to adjudicate certain bankruptcy proceedings. Northern Pipeline, 458 U.S. at 64-70.

The military tribunals established under the MCA to try unlawful enemy combatants for war crimes and conspiracies to commit those offenses are consistent with Article III under these principles. As explained more fully below, the MCA tribunals are permissible exercises of Congress's war powers and its powers under the Define and Punish Clause, in an area where the Court's deference to the political branches is at its zenith.

Article III has never been understood to restrict the political branches' authority to convene military commissions as an incident to these powers. See Quirin, 317 U.S. at 40 (Article III "cannot be taken to have extended the right to

demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts."). And longstanding and consistent historical practice confirms that Congress may, consistent with Article III, provide for military commission jurisdiction over conspiracy to commit war crimes.

2. War Powers Enable Congress To Establish Military Commissions and To Define Their Jurisdiction

For over 200 years Congress and the President, exercising their respective constitutional war powers, have convened military tribunals to "subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." Quirin, 317 U.S. at 28-29. The Supreme Court has recognized that trial and punishment of enemy combatants for war crimes are "important incident[s] to the conduct of war." Id. at 28; see also Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion). Congress's war powers include the inherent authority to create military commissions when it deems them necessary to the effective prosecution of the war. See Application of Yamashita, 327 U.S. 1, 11 (1946) (noting that the military commission derives its existence from the war powers); Johnson v. Eisentrager, 339 U.S. 763, 788 (1950) (noting that, "of course, grant of war power includes all that is necessary and

proper for carrying these powers into execution"). The Hamdan I Court stated that "'[i]n general, it is those provisions of the Constitution which empower Congress to "declare war" and "raise armies," and which, in authorizing the initiation of *war*, authorize the employment of all necessary and proper agencies for its due prosecution, from which [the military commission] derives its original sanction.'" 548 U.S. at 592 n.21 (quoting William Winthrop, Military Law and Precedents 831 (2d ed. 1920) ("Winthrop"); see also Winthrop at 831 (The military commission is "an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war"); Quirin, 317 U.S. at 25-26 (enumerating Congress's war powers as the source of authority to establish military commissions).

The fact that the Executive Branch has historically established military commissions without specific authorization from Congress confirms this conclusion. See Winthrop at 831 ("In general, . . . [Congress] has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war.").[2] The Executive does not possess any explicit

[2] During the Civil War, law-of-war commissions were convened despite the lack of specific statutory authorization. See Winthrop at 833. In 1863, Congress did endorse the use of military commissions to try members of the military for

power to "define and punish" offenses against the law of nations, but it does possess war powers. See, e.g., Quirin, 317 U.S. at 26. It would be anomalous if the Executive Branch could draw on its war powers in creating military commissions but that Congress could not draw on its own war powers when codifying offenses subject to trial by military commission.

Bahlul and amici agree that the war powers authorize Congress to *establish* law-of-war military commissions but contend (Bahlul Br. 18-24, 47-50; NIMJ Br. 16, 23, 25; Glazier Br. 8-9; Int'l Law Scholars Br. 3-4) that Congress's authority to codify particular offenses comes from the Define and Punish Clause alone. However, the power to establish military commissions necessarily includes the power to proscribe offenses to be tried by such tribunals – otherwise, the power to establish military commissions would not be meaningful. Cf. Madsen v. Kinsella, 343 U.S. 341, 347-48 (1952) (the "jurisdiction . . . of military commissions" has been "adapted in each instance to the need that called it forth"). Moreover, the text of Article I contains no limitation suggesting that Congress's war powers restrict

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certain offenses. See Act of Mar. 3, 1863, ch. 75, § 30, 12 Stat. 736. That statute, however, did not purport to establish military commissions; instead, it acknowledged their existence as a matter of inherent executive authority (and sanctioned their use as alternatives to courts-martial in some cases). See Ex parte Vallandigham, 68 U.S. (1 Wall.) 243, 249 (1864) ("In the armies of the United States, . . . cases which do not come within the . . . jurisdiction conferred by statute or court-martial, are tried by military commissions.").

Congress to establishing military commission jurisdiction only over wartime acts that are recognized violations of international law. Bahlul I, 767 F.3d at 73 (opinion of Kavanaugh, J.) (noting that, because "the Declare War Clause and the other Article I war powers clauses do not refer to international law" and are not limited by it, "international law is not a constitutional constraint when Congress proscribes war crimes triable by military commission").

3. Longstanding Practice Demonstrates That the MCA's Conspiracy Provisions Fall Within the Political Branches' Constitutional Power

"[T]he longstanding practice of the government . . . can inform our determination of what the law is." NLRB v. Noel Canning, 134 S. Ct. 2550, 2560 (2014) (internal quotation marks and citation omitted). The Supreme Court "has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs long acquiesced in" informs the construction to be given its provisions. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 412 (1928); see also Marsh v. Chambers, 463 U.S. 783, 798 (1983). Longstanding statutes and historical practice confirm that Congress's war powers enable it to codify non-international law offenses as offenses triable by military commission.

Contemporaneous with the framing of the Constitution and continuing until the present, Congress has made subject to trial by military tribunal offenses committed by enemy belligerents that are not violations of international law. For example, "the offense of spying . . . was not and has never been an offense under the international law of war." Bahlul I, 767 F.3d at 74 (opinion of Kavanaugh, J.). International law scholars have long recognized that "[t]he actions of a spy are not an international crime." Richard R. Baxter, So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs, 28 Brit. Y.B. Int'l L. 323, 329, 333 (1951) ("Baxter"). Rather, a spy merely forfeits his claim to "any of the protected statuses which international law has created." Id. at 329 (noting "a virtual unanimity of opinion that . . . spies do not violate international law"); see also 2 L. Oppenheim, International Law 337-38 (5th ed. 1935) ("Oppenheim") (noting that "it has always been considered lawful to employ spies," but that such activity exposes them to treatment as "war criminals" subject to punishment). Likewise, aiding the enemy has never been a violation of international law. See Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2132 (2005) (describing "spying and aiding the enemy" as within the "historical jurisdiction" of U.S. military commissions although not offenses governed by international law).

Nonetheless, since the founding, the Continental Congress and the U.S. Congress have made spying and aiding the enemy offenses punishable by a military tribunal. See Winthrop at 518 (recounting 1780 trial of British Major John André by a board of officers for spying); id. at 765 (quoting 5 Journals of the Continental Congress 693 (Resolution of Aug. 21, 1776) (providing that "all persons," other than citizens, who are "found lurking as spies . . . shall suffer death, according to the law and usage of nations, by sentence of a court-martial")); see also Winthrop at 967, 981, 985, 989 (quoting provisions of the American Articles of War of 1776, 1806, and 1874 making spying and aiding the enemy triable by court-martial); Articles of War of 1916, art. 82 (spying) (39 Stat. 663); id. art. 81 (aiding the enemy); Articles of War of 1920, art. 82 (spying) (41 Stat. 804); id. art. 81 (aiding the enemy); 10 U.S.C. § 906 (art. 106, UCMJ) (spying); 10 U.S.C. § 904 (art. 104, UCMJ) (aiding the enemy). Congress continued this historical practice in the 2006 and 2009 Military Commissions Acts. See 10 U.S.C. § 950v(b)(27) (2006) (spying); id. § 950v(b)(26) (aiding the enemy); 10 U.S.C. § 950t(27) (2009) (spying); id. § 950t(26) (aiding the enemy).

The law governing the scope of offenses that are traditionally triable in U.S. military commissions has consisted of the "international law of war *supplemented by established U.S. military commission precedents*." See Bahlul I, 767 F.3d at 68

(opinion of Kavanaugh, J.); Winthrop at 773 ("[T]he Law of War *in this country* . . . consists mainly of general rules derived from International Law supplemented by acts and orders of the military power and a few legislative provisions"); id. at 839 (noting that, until the adoption of a system of international agreements, "violation[s] of the laws and usages of war [consisted of offenses] principally, *in the experience of our wars*, made the subject of charges and trial") (emphasis added). Thus, while the law of war applied in U.S. military commissions includes war crimes specified by international law, it also embraces other offenses that the jurisdiction of military commissions has traditionally included. Such unlawful acts committed by unprivileged belligerents during hostilities are within Congress's authority to punish as offenses triable by military commission. See Quirin, 317 U.S. at 35-36 (recognizing that, under both the "practical administrative construction by [U.S.] military authorities" and international law, the "commission of hostile acts" by "unlawful combatants" is "punishable as such by military commission").

The traditional practice of U.S. military commissions includes trying offenses not yet recognized as violations of international law such as the offense of conspiracy. As explained more fully below, individuals have been tried before military commissions for conspiracy to commit war crimes throughout this

Nation's history. Bahlul I, 767 F.3d at 24 (concluding that "domestic wartime precedent . . . provides sufficient historical pedigree to sustain Bahlul's [conspiracy] conviction on plain-error review"); id. at 52 (opinion of Brown, J.) (finding that "domestic practice traditionally treated conspiracy as an offense triable by military commission"); id. at 68-70 (opinion of Kavanaugh, J.) (same). The statutes proscribing spying and aiding the enemy as offenses triable by military commission, together with the historical Executive Branch practice of trying non-international law offenses, including conspiracy, in military commissions, "supports the conclusion that international law is not a constitutional constraint when Congress proscribes war crimes triable by military commission." Id. at 73 (opinion of Kavanaugh, J.).

4. Conspiracy Has Been Prosecuted by Military Commission Throughout Our Nation's History

Individuals have been tried before military commissions for conspiracy to commit war crimes throughout our nation's history. Indeed, given the nation's sporadic use of military commissions in time of war, that history is "robust." Bahlul II, 792 F.3d at 62 (Henderson, J., dissenting).

a. World War II Precedents

During the Second World War, enemy spies and saboteurs were convicted

by law-of-war military commissions of conspiring to commit war crimes. In Quirin, eight Nazi saboteurs were convicted of, among other offenses, conspiracy to violate the laws of war. 317 U.S. at 23. Similarly, in Colepaugh, other German saboteurs were convicted by a military commission of charges including conspiracy. 235 F.2d at 431-33. In connection with the Colepaugh case, then Assistant Attorney General Tom Clark issued an opinion stating that it was "well established that a conspiracy to commit an offense against the laws of war is itself an offense cognizable by a commission administering military justice." Memorandum of Law from Tom C. Clark, Assistant Att'y Gen., to Major Gen. Myron C. [C]ramer, Judge Advocate Gen. (Mar. 12, 1945) (Supp. App. 104-10). A special board of review reached the same conclusion. Opinion of Special Board of Review, United States v. Colepaugh, CM 276026, at 29 (Mar. 27, 1945) (Supp. App. 111-16). The Judge Advocate General and President Truman subsequently approved the convictions. See General Order ("G.O.") No. 52, War Dep't (July 7, 1945) (Supp. App 117).

Bahlul (Br. 14) and amici (NIMJ Br. 28; Glazier Br. 20-26) note that the judicial opinions in Quirin and Colepaugh did not specifically address the conspiracy charges. But, despite such judicial review, "[n]o U.S. court ha[s] ever cast any doubt on th[e] landmark military commission convictions [embracing

conspiracy charges], or [the validity of] trying conspiracy by military commission." Bahlul I, 767 F.3d at 70 (opinion of Kavanaugh, J.). Moreover, the President, who heads a branch co-equal with the judiciary, placed his imprimatur on the Quirin petitioners' conspiracy convictions. See Bahlul II, 792 F.3d at 61 (Henderson, J., dissenting). Similarly, in Colepaugh, the petitioners' conspiracy convictions arrived at the court "with the Executive Branch's full sanction," and their convictions, including those for conspiracy, were affirmed by the Tenth Circuit. Bahlul II, 792 F.3d at 61-62 (Henderson, J., dissenting); Colepaugh, 235 F.2d at 432 (affirming "the charges and specifications before us"). Finally, as Justice Thomas reasoned in Hamdan I, "the common law of war cannot be ascertained from [a court's] failure to pass upon an issue, or indeed even mention the issue in its opinion; rather, it is ascertained by the practice and usage of war." 548 U.S. at 699 (Thomas, J., dissenting) (citing Winthrop at 839) (footnote omitted).[3] The practice of military tribunals during World War II, together with

[3] Bahlul notes (Br. 15-16) that, in the Nuremberg Military Tribunals established under Control Council Law No. 10, American judges rejected prosecutors' charges of conspiracy as a separate offense because "the provisions of Law No. 10 and of the Charter of the International Military Tribunal . . . do not define conspiracy to commit a war crime . . . as a separate substantive crime." Trial of Alstötter, 6 L. Rep. Trials of War Criminals 109-10 (1948) (Supp. App. 119-21). However, that ruling was based on "treaty construction, akin to statutory construction, of the London Charter rather than abstract principles of international law." See Haridimos V. Thravalos, History, *Hamdan* and Happenstance, 3 Harv.

the Civil War-era military commission precedents discussed below, "establishes beyond any doubt that conspiracy to violate the laws of war is itself an offense cognizable before a law-of-war military commission." Hamdan I, 548 U.S. at 698 (Thomas, J., dissenting).

Following World War II, and continuing to this day, the Executive and Congress have continued to recognize that conspiracy to violate the law of war is triable by military commission. During the Korean conflict, General MacArthur issued regulations making conspiracy to commit war crimes an offense subject to trial by military commission. See Letter Order, Gen. HQ, United Nations Command, Tokyo, Japan, Trial of Accused War Criminals (Oct. 28, 1950) (Supp. App. 124). The Department of Defense has consistently considered conspiracy as an offense that may be charged in military commissions. See Dep't of the Army, Field Manual FM 27-10, The Law of Land Warfare ¶¶ 13, 500 (July 18, 1956 with Change 1, July 15, 1976) (identifying conspiracy to commit a crime under international law, including war crimes, as punishable in a military commission) (Supp. App. 125); DoD Law of War Manual ¶ 18.23.5 (2015) (reflecting the United States' position that "conspiracy to violate the law of war is punishable," including in military tribunals) (Supp. App. 130). Finally, Congress specifically

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Nat'l Sec. J. 223, 237 n.56 (2012) (citing official report of Justice Jackson).

found, in enacting the 2006 and 2009 MCAs, that all of the enumerated offenses, including conspiracy, had "traditionally been triable by military commission." 10 U.S.C. § 950p(d) (2009); see also Bahlul I, 767 F.3d at 70 (opinion of Kavanaugh, J.) ("Congress has never backed away from its express preservation of traditional U.S. military commission authority over conspiracy.").

b. Civil War Precedents

Conspiracy was an offense punished by military commissions throughout the Civil War. In the military commission trial of the individuals involved in the assassination of President Lincoln, the charge provided that they had "'combin[ed], confederat[ed], and conspir[ed]' . . . to kill and murder President Lincoln." See Hamdan I, 548 U.S. at 699 (Thomas, J., dissenting) (quoting General Court-Martial Order ("G.C.M.O.") No. 356, War Dep't (July 5, 1865), reprinted in H.R. Doc. No. 55-314, at 696 (1899) (Supp. App. 132)). A separate military commission convicted former Confederate Army Captain Henry Wirz of "combin[ing], confederat[ing], and conspir[ing] with [others] . . . in violation of the laws of war" to kill and mistreat Union prisoners. See G.C.M.O. No. 607, War Dep't (Nov. 6, 1865), reprinted in H.R. Doc. No. 55-314, at 785, 789 (Supp. App. 140).

Similarly, following a 60-day military commission trial, George St. Leger Grenfel, a well-known British soldier-of-fortune and later Confederate Army

colonel, was convicted of conspiracy based on his participation in an abortive plot to free Confederate prisoners held in Chicago and to burn the city. See Stephen Z. Starr, Colonel Grenfell's Wars – The Life of a Soldier of Fortune 4-6, 217-19, 244 (1971). The conspiracy specification alleged "[c]onspiring, *in violation of the laws of war*, to release the rebel prisoners" and "[c]onspiring, *in violation of the laws of war*, to lay waste and destroy the city of Chicago." G.C.M.O. No. 452, War Dep't (Aug. 22, 1865), reprinted in H.R. Doc. No. 55-314, at 724-25 (emphasis added) (Supp. App. 137).

Bahlul attempts to minimize the significance of these Civil War-era precedents by urging (Br. 13) that Winthrop recognized conspiracy as an offense whose jurisdiction was "rooted in the imposition of martial law," rather than an offense triable by "a pure law-of-war military commission." But the fact that conspiracy jurisdiction might have rested on both martial law and law-of-war grounds, see Winthrop at 839 n.5, 842, "does not establish that a military commission would not have jurisdiction to try that crime solely on the basis that it was a violation of the law of war." Hamdan I, 548 U.S. at 700 (Thomas, J., dissenting). And the conspiracy specifications in both the Wirz and Grenfel cases alleged that the offenses were committed "in violation of the laws of war," indicating, contra Bahlul's argument, that they were triable by a tribunal exercising

law-of-war jurisdiction. See Winthrop at 842 (noting that, in cases where the offense is charged as a violation of the law of war rather than as a "civil crime," the charging instrument will allege it as such).[4]

Bahlul's contention (Br. 13) that conspiracy jurisdiction was confined to cases where the specification alleged a completed crime fares no better. The fact that the Grenfel conspiracy to release prisoners and to burn Chicago was neither consummated nor involved overt acts that were themselves crimes belies Bahlul's argument that Winthrop's illustrations all involved completed offenses. And Bahlul's quotation from Winthrop that cases cognizable by a law-of-war military commission must consist in "'*overt acts*, *i.e.*, in unlawful commissions or actual attempts . . . and not intentions merely,'" Bahlul Br. 13 (quoting Winthrop at 841), lends no force to his argument. The topic of this passage was the "jurisdiction of the military commission" and not the requirements for a conspiracy charge. See Hamdan I, 548 U.S. at 703 (Thomas, J., dissenting). Consummation of the object

[4] Amicus Glazier's similar attempt to dismiss the Lincoln precedent (Br. 12) fails for the same reason. The fact that Winthrop suggested that the conspiracy offense in that case could constitute either a martial law offense or a violation of the law of war, see Winthrop at 839 n.5, in no way indicates that military jurisdiction could not have rested on law-of-war jurisdiction alone. Moreover, Attorney General Speed described the proceedings as involving "persons charged [with] hav[ing] offended against the laws of war." 11 Op. Att'y Gen. 297, 317 (1865); see also Ex parte Mudd, 17 F. Cas. 954, 954 (S.D. Fla. 1868) (holding that conspiring to assassinate "the Commander in Chief of the Army for military reasons" was a violation of the law of war).

offense is not now, nor has it ever been, an element of conspiracy in either common-law or military jurisprudence. See, e.g., Hampton L. Carson, The Law of Criminal Conspiracies and Agreements 124-25 (1887); DoD Law of War Manual ¶ 18.23.5 (noting that Winthrop's requirement is satisfied in conspiracy prosecutions "in which an overt act has been committed") (Supp. App. 131). Winthrop's overt act requirement was satisfied in this case, in which the military commission specifically found that Bahlul personally committed ten separate overt acts, including acting as personal secretary to bin Laden and arranging the loyalty oaths of two men who piloted aircraft in the September 11 attacks.[5]

Far from rejecting conspiracy, Winthrop included "[c]onspiracy by two or more to violate the laws of war" as an "offense[] against the laws and usages of war" in his Digest of Opinions of the Judge Advocate General of the Army. A Digest of Opinions 328-30 (1880) (Supp. App. 171). See also Charles Roscoe Howland, A Digest of Opinions of the Judge Advocate General of the Army 1071 (1912) (noting that conspiracy "to violate the laws of war" was an offense against

[5] To establish that Bahlul's conduct took place in the context of and associated with an armed conflict, prosecutors introduced testimony and video evidence that the *Cole* bombing and the 9/11 attacks had occurred during Bahlul's active service with al Qaeda, and that thousands had been killed. Tr. 797-99; Prosecution Ex. 14A, at 9-11.

the law of war that was "punished by military commissions" throughout the Civil War) (Supp. App. 175).

5. The Supreme Court's Reliance on Domestic Precedents in *Quirin* and *Hamdan I* Presupposes Congressional Authority To Make Non-International Law Offenses Triable by Military Commission

Bahlul's argument that Congress may only codify offenses that are recognized violations of international law also cannot be squared with the Supreme Court's reliance on domestic precedents in Quirin and Hamdan I.

In Quirin, the Supreme Court considered whether the petitioners could be tried by a military commission for clandestinely entering the United States without uniforms to commit sabotage. Recognizing that Congress had authorized the use of military tribunals to try "offenders or offenses against the law of war," 317 U.S. at 28, the Quirin Court observed that "[t]he spy who secretly and without uniform passes the military lines of a belligerent in time of war" with the intent to commit espionage or sabotage "are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war *subject to trial and punishment by military tribunals*." Id. at 31 (emphasis added). Thus, contrary to Bahlul's submission (Br. 14), the Quirin Court did not conclude that such offenses violated international law.

Indeed, in concluding that the spy was an "offender against the law of war" subject to trial by military commission, the Quirin Court relied on authorities that explicitly rejected the proposition that spying was a violation of international law,[6] and the Court looked to the American common law of war – "the practice of our own military authorities before the adoption of the Constitution, and during the Mexican and Civil Wars" – to establish that the United States had always viewed spying and the kindred offense of sabotage as offenses subject to trial by military commission. 317 U.S. at 31-33 & nn.9-10; 42 & n.14. Although the Quirin Court also considered "[a]uthorities on International Law," it concluded – consistent with our Nation's understanding of the status of spying – that those authorities were unanimous in their view that persons who commit acts of belligerency behind enemy lines in civilian dress are liable to punishment for violating the laws of war. Id. at 35 n.12.

Nothing in Quirin suggests that spying was ever a violation of international law, or that *international law* requires its prohibition and punishment. See Baxter at 331 & n.3. Instead, Quirin interpreted the category of "offense[s] against the law of war" to include offenses that were traditionally triable by military

[6] See 317 U.S. at 30 n.7 (citing, e.g., Hague Convention No. IV, art. 1 (annex), Oct. 18, 1907, 36 Stat. 2295); id. at 31 n.8 (citing Oppenheim).

commission under domestic precedents but that were not viewed as violations of international law. 317 U.S. at 31 n.9 (summarizing offenses). In sum, "Quirin's approval of spying, a non-international-law-of-war offense, as an offense triable by military commission," as well as its reliance on domestic precedents, "confirms that Congress has authority under the Constitution to make [such] crimes triable by military commission." Bahlul I, 767 F.3d at 73 (opinion of Kavanaugh, J.).

Nor does Hamdan I support Bahlul's claim that international law alone governs the scope of our nation's law of war. In that case, a plurality of the Supreme Court considered whether conspiracy was an offense subject to trial by military commission under 10 U.S.C. § 821. While the seven justices who addressed that question were divided in their views, compare Hamdan I, 548 U.S. at 595-612 (opinion of Stevens, J.) with id. at 697-706 (Thomas, J., dissenting), all agreed that resolution of the question did not turn solely on whether conspiracy was a violation of international law. See Bahlul I, 767 F.3d at 23 (noting that "both the Hamdan plurality and dissent relied primarily on *domestic* precedent to ascertain whether conspiracy could be tried"). Only after canvassing domestic precedents, 548 U.S. at 604-09, did Justice Stevens conclude that the government had failed to make a "substantial showing" that conspiracy has been tried "in this country by any law-of-war military commission." Id. at 603-04 (opinion of

Stevens, J.). In turn, Justice Thomas observed that "[t]he common law of war as it pertains to offenses triable by military commission is derived from the 'experience of our wars' and our wartime tribunals." Id. at 689 (quoting Winthrop at 839). Analyzing domestic precedents from the Civil War through World War II, Justice Thomas concluded that "[t]he experience of our wars is rife with evidence that establishes beyond any doubt that conspiracy to violate the laws of war" is triable by military commission. Id. at 698 (internal quotation marks and citation omitted).

Finally, the en banc Court in this case considered domestic precedent, not solely international law, in determining whether Bahlul was properly tried by military commission for conspiracy. See Bahlul I, 767 F.3d at 23-24 (noting that "domestic precedent is an important part of our inquiry" and concluding that it "provides sufficient historical pedigree to sustain Bahlul's conviction [against an ex post facto challenge] on plain-error review"). There is no indication that the courts in these cases examined domestic precedents merely to illustrate the reach of international law. Rather, these decisions looked to domestic precedents to ascertain the scope of the authority Congress and the President have traditionally exercised under their war powers.

6. Congress's Creation of Military Commission Jurisdiction over Conspiracy To Commit War Crimes Does Not Usurp the Jurisdiction of Article III Courts

Bahlul contends (Br. 26) that permitting military commissions to assert jurisdiction over offenses cognizable by federal courts, including conspiracy, impermissibly erodes the jurisdiction of Article III courts. That sweeping assertion cannot be squared with Quirin, which noted that the fact that the Espionage Act of 1917 authorized trial in federal court for similar conduct did not limit the concurrent jurisdiction of the military commission. 317 U.S. at 27. Nothing in Quirin suggests that federal jurisdiction over an offense that is otherwise cognizable as a war crime divests a military commission of jurisdiction. If that were so, the federal war crimes act, 18 U.S.C. § 2441, would largely foreclose law-of-war military commission jurisdiction over most of the offenses enumerated in the 2006 and 2009 MCAs. More importantly, the offense at issue in this case is not common law conspiracy – an offense that has traditionally been tried in civilian courts – but *conspiracy to violate the law of war* by an unlawful enemy combatant. Article III courts have never exercised *exclusive* jurisdiction over such conduct.

Neither Jecker v. Montgomery, 54 U.S. (13 How.) 498 (1851), nor Ex parte Milligan, 71 U.S. (4 Wall.) 2, 110 (1866), supports Bahlul's argument (Br. 27) that trying conspiracy in military commissions usurps judicial power. Jecker involved

a military tribunal that improperly exercised admiralty jurisdiction, which the Supreme Court held was beyond the jurisdiction traditionally exercised by military courts. Here, by contrast, conspiracy to commit war crimes has traditionally been tried in U.S. military commissions.

Milligan is also inapposite. That case involved the military prosecution of an American citizen "in civil life, in nowise connected with the military service." 71 U.S. at 121-22. In Quirin, the Supreme Court "construe[d]" the "inapplicability of the law of war to [defendant's] case as having particular reference to the facts": namely, that the defendant in Milligan, as a person who was not "a part of or associated with the armed forces of the enemy," was a "non-belligerent." 317 U.S. at 45; see also Hamdi, 542 U.S. at 523 (plurality opinion) (rejecting invocation of Milligan and noting that Quirin "both postdates and clarifies Milligan, providing us with the most apposite precedent that we have"). As the Quirin Court explained, Milligan is "inapplicable" where, as here, the defendant was a confirmed enemy belligerent. 317 U.S. at 45-46.

Bahlul maintains (Br. 30-34) that the 2006 MCA impermissibly extends military commission jurisdiction beyond its traditional military purpose on the grounds that the 2006 MCA permits (1) proceedings conducted far away from any battlefield; and (2) jurisdiction over "purely domestic law crimes." But Bahlul's

contention that military commission proceedings were historically confined to the battlefield is unsound. The commissions in Quirin and Colepaugh were conducted in Washington, D.C., and New York, respectively. Quirin, 317 U.S. at 23; Supp. App. 111. The Yamashita commission was held in the Philippines, then a U.S. territory, and the Supreme Court rejected the argument that the Executive lacked authority to convene a military commission after hostilities in the Pacific Theater had ended. 327 U.S. at 12-13.

Nor is there a basis for Bahlul's argument that the 2006 MCA dilutes the federal judiciary's jurisdiction over purely domestic crimes. First, the class of individuals subject to trial by a law-of-war military commission is confined to "enemy belligerents." Quirin, 317 U.S. at 41; see also 10 U.S.C. §§ 948a(1)(A)(i), 948b(a) (2006) (limiting military commission jurisdiction to "alien unlawful enemy combatants" who have "engaged in . . . or . . . materially supported hostilities against the United States"). Moreover, because the MCA's conspiracy provision requires that the accused must personally, and knowingly, commit an "overt act to effect the object of the conspiracy," 10 U.S.C. § 950v(b)(28) (2006), the Act does not, as amici erroneously contend (Int'l Law Scholars Br. 15-19), punish alien enemy belligerents for mere membership in terrorist organizations. See 152 Cong. Rec. S10411 (daily ed. Sept. 28, 2006) (letter of Rear Adm. Bruce

MacDonald, JAGC, U.S. Navy) ("Conspiracy should be included" in the MCA, but "there must be a requirement to prove the defendant committed an overt act in furtherance of the conspiracy," which ensures that "affiliation with a terrorist organization, standing alone, would not be cognizable."). Finally, the 2006 MCA circumscribes the class of offenses subject to such jurisdiction to "violations of the law of war," 10 U.S.C. § 948b(a), or offenses – like conspiracy to commit war crimes – that Congress has found to have "traditionally been triable by military commissions." Id. § 950p(a). The federal courts have never exercised exclusive jurisdiction over that class of offenses.

7. The Define and Punish Clause Also Permits Congress To Proscribe Conspiracy To Commit War Crimes as an Offense Triable by Military Commission

The Define and Punish Clause, U.S. Const. art. I, § 8, cl. 10, also permits Congress to make conspiracy to commit war crimes an offense triable before military tribunals. That provision was not designed to restrict Congress to any particular formulation of the law of nations. See Bahlul II, 792 F.3d at 44 (Henderson, J., dissenting). During the Constitutional Convention, the framers rejected language that would have confined Congress's authority only to "punish" offenses against the law of nations. Delegate Gouverneur Morris explained that Congress also needed authority to "define" offenses because "the law of nations

[is] often too vague and deficient to be a rule." Id. (citing 2 The Records of the Federal Convention of 1787, 614 (Farrand ed. 1937) (Madison's notes)). That approach "carried the day, establishing that Congress was not reflexively to follow other nations' lead in formulating offenses but instead to contribute to their formulation" by empowering Congress to "define." Bahlul II, 792 F.3d at 44-45 (Henderson, J., dissenting); see also Hamdan II, 696 F.3d at 1250 ("It is often difficult to determine what constitutes customary international law, who defines customary international law, and how firmly established a norm has to be to qualify as a customary international law norm."); Eugene Kontorovich, Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause, 106 Nw. U.L. Rev. 1675, 1705 (2012) ("[I]nternational Customary Law will require elaboration by Congress because it is vague and incompletely specified.").

The process of translating the law of nations from a mixture of international agreements, customs, and practices of states into a precise penal code requires the judiciary to "give Congress extraordinary deference when it acts under its Define and Punish Clause powers." Bahlul I, 767 F.3d at 59 (opinion of Brown, J.); see Finzer v. Barry, 798 F.2d 1450, 1458 (D.C. Cir. 1986) ("[d]efining and enforcing the United States' obligations under international law require[s] the making of extremely sensitive policy decisions . . . for which the Judiciary has neither

aptitude, facilities, nor responsibility") (internal quotation marks and citation omitted), aff'd in part sub nom. Boos v. Barry, 485 U.S. 312 (1988); United States v. Bin Ladin, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000) ("Clause 10 does not merely give Congress the authority to punish offenses against the law of nations; it also gives Congress the power to 'define' such offenses.").

In Hamdan I, four justices of the Supreme Court recognized Congress's important role in defining the jurisdiction of military commissions. See 548 U.S. at 655 (Kennedy, J., concurring) ("Congress, not the Court, is the branch in the better position" to conduct the "sensitive task" of determining whether conspiracy may be tried in a law-of-war military commission); id. at 636 (Breyer, Kennedy, Souter, Ginsburg, JJ., concurring) (noting that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary" and that "[t]he Constitution places its faith in those democratic means"). These branches, which are charged with the conduct of war, are the branches best situated to determine the forms of liability needed to address war crimes perpetrated by terrorist groups such as al Qaeda, whose structure bears little resemblance to that of traditional state actors confronted in prior armed conflicts. Two Congresses and two Presidents have now positively identified conspiracy to commit certain war crimes, coupled with an overt act personally committed by the defendant, as an

offense appropriately tried by military tribunal in this conflict. In the absence of an explicit constitutional command to the contrary, that determination should prevail. See Quirin, 317 U.S. at 25 (President's wartime decisions involving military commissions "are not to be set aside . . . without the clear conviction that they are in conflict with the Constitution"); see also Weiss v. United States, 510 U.S. 163, 177 (1994) ("Judicial deference . . . is at its apogee" when reviewing congressional decisionmaking related to military justice); Sawyer, 343 U.S. at 635-37 (Jackson, J., concurring) (conduct undertaken by the President "pursuant to an express . . . authorization of Congress . . . would be supported by the strongest of presumptions and the widest latitude of judicial interpretation").[7]

There is ample justification for deferring to Congress here. See H.R. Rep. No. 109-664, pt. 2, at 15 (2006) (citing both the war powers and the Define and Punish Clause as authority for enacting the 2006 MCA). First, the longstanding practice of trying conspiracy in military commissions, discussed above in the context of Congress's war powers, also confirms that Congress has authority under the Define and Punish Clause to define conspiracy as an offense triable by military commission.

[7] As these precedents make clear, these principles of deference apply regardless of whether Congress's authority in this area arises solely from the Define and Punish Clause or whether such authority also comes from Congress's Article I war powers, as the government contends.

In addition, Congress's determination is not inconsistent with principles of criminal liability recognized and applied within the international community. As Judge Henderson noted, although civil law countries view conspiracy as a mode of liability for a substantive offense, conspiracy as an independent offense has been internationally recognized in connection with certain international-law crimes, including waging an aggressive war and genocide. Bahlul II, 792 F.3d at 47 (Henderson, J., dissenting); see Bahlul I, 767 F.3d at 59 (opinion of Brown, J.) ("[i]nternational law recognizes analogues to conspiracy"). In addition, international tribunals have applied the doctrine of "joint criminal enterprise" as a mode of liability to prosecute individuals who join together and participate in a common plan that results in the commission of a war crime. See Bahlul II, 792 F.3d at 47 (Henderson, J., dissenting). And, in conducting their own war crimes prosecutions after World War II, some States' military tribunals adopted offenses or theories of criminal responsibility similar to conspiracy. See 11 L. Rep. Trials of War Criminals 98 (1949) (in Dutch military commissions, conspiracy to commit a war crime was subject to punishment "equally . . . with the crime") (Supp. App. 177); 15 L. Rep. Trials of War Criminals 90-91 (1949) (noting that French military tribunals convicted various persons of engaging in an "association de malfaiteurs," i.e., an association formed for a criminal purpose) (Supp. App. 179).

This is not a case where Congress has created a new war crime out of whole cloth or adopted a principle of criminal liability wholly unknown to international law. When conspiracy is used as a mode of liability under international law, there is generally a requirement that the object offense be completed or attempted. Although the requirement that the defendant personally commit an overt act (10 U.S.C. § 950v(b)(28) (2006)) is not the same as the requirement that the object crime be completed, Congress's adaption of the offense to conform to common-law notions of criminal responsibility is an exercise of "precisely the kind of discretion and flexibility the Define and Punish Clause envisions" when Congress "adapt[s] recognized international law to fit the country's particular needs and legal system." Bahlul I, 767 F.3d at 60 (opinion of Brown, J.); see also Bahlul II, 792 F.3d at 49 (Henderson, J., dissenting).

Indeed, in Yamashita, 327 U.S. at 14-16, the Supreme Court sanctioned a significant extension of the international law of war, extrapolating from broad treaty-based principles of command responsibility the capital offense of failing to control the conduct of subordinates. The Court did so even in "the absence of international authority outlawing a commander's failure to . . . prevent those under his command from committing war crimes." Bahlul II, 792 F.3d at 46 (Henderson, J., dissenting). See Yamashita, 327 U.S. at 35 (Murphy, J., dissenting) ("Nothing

in all history or in international law . . . justifies such a charge against a fallen commander.").[8]

Moreover, the scope of Congress's power to define and punish must be construed in light of its power under the Necessary and Proper Clause. U.S. Const. art. I, § 8, cl. 18. That clause vests Congress with "broad power to enact laws that are 'convenient, or useful' or 'conducive to the . . . beneficial exercise'" of its specific legislative powers. United States v. Comstock, 560 U.S. 126, 133-34 (2010) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413, 417-18 (1819)). The Necessary and Proper Clause provides Congress with broad authority to implement its power to define offenses against the law of nations by enacting legislation necessary for the United States to carry out its international obligation to prevent terrorism as a mode of warfare.

In United States v. Arjona, 120 U.S. 479, 487-89 (1887), the Supreme Court held that Congress had authority under the Define and Punish Clause, coupled with the Necessary and Proper Clause, to prohibit counterfeiting foreign securities. The

[8] Bahlul also relies (Br. 51-52) on cases construing the Treason Clause and the Counterfeiting Clause to support his argument that the courts must "strictly construe" Congress's authority under the Define and Punish Clause. In contrast to the fluid and imprecise range of conduct embraced by the law of nations, both treason and counterfeiting possessed fixed definitions at the time of the founding, from which Congress was not permitted to depart. See Ex parte Bollman, 8 U.S. (4 Cranch) 75, 126 (1807) (treason); United States v. Marigold, 50 U.S. (9 How.) 560, 567 (1850) (counterfeiting).

Court found that international law recognizes the obligation of nations to punish those who counterfeit the *currency* of another nation. The Court held that, although counterfeiting foreign securities (as opposed to currency) was not a violation of international law, prohibiting such activity was "necessary and proper to afford th[e] protection" against counterfeiting foreign currency. Id. at 487. The Court concluded that, "if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offense against the law of nations." Id. at 488. Similarly, in enacting legislation to implement its obligations as a treaty signatory, Congress is not limited to the four corners of the treaty but may enact additional legislation reasonably related to the fulfillment of its international responsibilities. See United States v. Belfast, 611 F.3d 783, 803-04 (11th Cir. 2010); United States v. Lue, 134 F.3d 79, 84 (2d Cir. 1998).

By the same token, "international law establishes at least some forms of terrorism, including the targeting of civilian populations, as war crimes." Hamdan II, 696 F.3d at 1249-50. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Geneva Civilian Convention"), 6 U.S.T. 3516, T.I.A.S. No. 3365 (Aug. 12, 1949), art. 33 (prohibiting terrorism against civilians as a mode of warfare). Article 146 of the Geneva Civilian Convention requires the

signatories (including the United States) to enact domestic legislation sanctioning grave breaches, including willfully killing civilians. Because "[c]oncerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality," Callanan v. United States, 364 U.S. 587, 593-94 (1961), Congress reasonably exercised its authority under the Define and Punish Clause (and the war powers) not only to subject acts of terrorism and other war crimes to the jurisdiction of military commissions, but also conspiracy to engage in such conduct as a "necessary and proper" adjunct of those authorities. When such an offense is committed by an enemy belligerent in the context of hostilities, Congress may assign the case to a military commission without transgressing Article III. See Quirin, 317 U.S. at 28, 41.

Toth v. Quarles, 350 U.S. 11 (1955), and its progeny are not to the contrary. In Toth, the Court held that Congress's constitutional authority "[t]o make Rules for the Government and Regulation of the land and naval Forces" (U.S. Const. art. I, § 8, cl. 14) could not be expanded, via the Necessary and Proper Clause, to permit the trial by court-martial of discharged servicemembers because such persons did not fall within that expressly defined class of persons subject to court-martial. 350 U.S. at 22; see also Reid v. Covert, 354 U.S. 1, 20-21 (1957)

(plurality opinion) (Necessary and Proper Clause "cannot operate to extend military jurisdiction to persons beyond th[e] class described in Clause 14 – 'the land and naval Forces'"). However, neither Congress's war powers nor the Define and Punish Clause contain similar proscriptive language. And nothing in Toth and its progeny cast doubt on the principle that the Necessary and Proper Clause affords Congress discretion to enact legislation that is reasonably related to the fulfillment of international obligations to prevent and punish war crimes, including terrorist attacks against innocent civilians.

II. BAHLUL'S ATTEMPT TO RESERVE HIS FIRST AMENDMENT AND EQUAL PROTECTION CLAIMS SHOULD BE REJECTED

Bahlul attempts (Br. 8) to "reserve[]" his First Amendment and equal protection (Fifth Amendment) arguments "without prejudice to making them on remand." The en banc Court should not remand this case for yet another round of briefing. Instead, the Court should reject these insubstantial claims – which were forfeited below and are therefore reviewable only for plain error – and affirm Bahlul's conspiracy conviction.

The three judges on this Court who have already considered Bahlul's First Amendment and equal protection claims summarily rejected them. See Bahlul I, 767 F.3d at 62-63 (opinion of Brown, J.) (finding the claims "clearly meritless");

Bahlul I, 767 F.3d at 76 (opinion of Kavanaugh, J.) (same); Bahul II, 792 F.3d at 72 (Henderson, J., dissenting) (finding the claims "frivolous").

Among other reasons, Bahlul's First Amendment claim fails because, as a non-resident alien overseas engaged in warfare against the United States, he cannot claim the protections of the First Amendment. See United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990); Eisentrager, 339 U.S. at 784. Even if the First Amendment extended to Bahlul's conduct, his rights were not violated because the First Amendment permits punishing the production of recruiting propaganda on behalf of a foreign terrorist organization, see Holder v. Humanitarian Law Project, 561 U.S. 1, 26-39 (2010), or speech that is an integral part of a criminal conspiracy, see New York v. Ferber, 458 U.S. 747, 762 (1982). Bahlul's equal protection challenge likewise fails. Even assuming that the Due Process Clause applies to a military commission trial of an alien detained at Guantánamo, but see Bahlul I, 767 F.3d at 33 (Henderson, J., concurring), the 2006 MCA easily satisfies the applicable "rational basis" test because Congress has a vital national security interest in establishing a military forum in which to bring to justice alien unlawful belligerents whose purpose it is to terrorize U.S. civilians and to murder U.S. military personnel. See Bahlul I, 767 F.3d at 75 (opinion of Kavanaugh, J.).

If the en banc Court requires further briefing on these issues, it can review the parties' panel briefs or order supplemental briefing. The Court should reject these claims without remanding this case to yet another panel and affirm Bahlul's conspiracy conviction.

CONCLUSION

For the foregoing reasons, Bahlul's conspiracy conviction should be affirmed.

Respectfully submitted,

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DATED: November 2, 2015

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CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number 11-1324

I hereby certify that I electronically filed the foregoing Brief for the United States with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on November 2, 2015.

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DATED: November 2, 2015

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STATUTORY ADDENDUM

Except for the following, all applicable statutes, etc., are contained in the Brief for Petitioner.

CONTENTS

Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006)

§ 948a. Definitions

In this chapter:

(1) UNLAWFUL ENEMY COMBATANT.-(A) The term "unlawful enemy combatant" means-

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

§ 948b(a). Purpose

(a) Purpose.-This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.

§ 950p. 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.

§ 950v. Crimes triable by military commissions

. . .

(b) OFFENSES.-The following offenses shall be triable by military

commission under this chapter at any time without limitation:

(1) Murder of protected persons.--Any person subject to this chapter who intentionally kills one or more protected persons shall be punished by death or such other punishment as a military commission under this chapter may direct.

(2) Attacking civilians.--Any person subject to this chapter who intentionally engages in an attack upon a civilian population as such, or individual civilians not taking active part in hostilities, 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.

. . .

(24) TERRORISM.-Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, 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.

. . .

(26) WRONGFULLY AIDING THE ENEMY.-Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.

(27) SPYING.-Any person subject to this chapter who with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.

(28) CONSPIRACY.-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.

Military Commissions Act of 2009, Pub. L. No. 111-84, div. A, tit. XVIII, 123 Stat. 2574 (Oct. 28, 2009)

§ 950f. Review by United States Court of Military Commission Review

. . .

(d) Standard and scope of review. - 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.

§ 950p. Definitions; construction of certain offenses; common circumstances

. . .

(d) EFFECT.-The provisions of this subchapter codify offenses that have traditionally been triable by military commission. This chapter does not establish new crimes that did not exist before the date of the enactment of this subchapter, as amended by the National Defense Authorization Act for Fiscal Year 2010, but rather codifies those crimes for trial by military commission. Because the provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of the enactment of this subchapter, as so amended.

§ 950t. Crimes triable by military commission

The following offenses shall be triable by military commission under this chapter at any time without limitation:

. . .

(26) WRONGFULLY AIDING THE ENEMY.-Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.

(27) SPYING.-Any person subject to this chapter who, in violation of the

law of war and with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.

. . .

(29) CONSPIRACY.-Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this subchapter, 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.

Uniform Code of Military Justice:

10 U.S.C. § 904. Art. 104.

§ 904. Art. 104. Aiding the enemy

Any person who-

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;

shall suffer death or such other punishment as a court-martial or military commission may direct. This section does not apply to a military commission established under chapter 47A of this title.

10 U.S.C. § 906. Art. 106.

§ 906. Art. 106. Spies

Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death. This section does not apply to a military commission established under chapter 47A of this title.

Title 18 U.S. Code:

18 U.S.C. § 2441

(a) OFFENSE.-Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) CIRCUMSTANCES.-The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) DEFINITION.-As used in this section the term "war crime" means any conduct-

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party.

18 U.S.C. § 3231

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.