No. 16-1307

In the Supreme Court of the United States

ALI HAMZA AHMAD SULIMAN AL BAHLUL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the military commission plainly erred in not sua sponte dismissing the charge against petitioner of conspiracy to commit war crimes on the ground that Congress violated Article III by making that offense triable by military commission.

2. Whether the Military Commissions Act of 2006 (2006 MCA), 10 U.S.C. 948a *et seq.* (2006), authorizes prosecutions for conspiracy to commit war crimes based on conduct committed before its enactment.

3. Whether petitioner's conspiracy conviction based on conduct that pre-dated enactment of the 2006 MCA plainly violated the Ex Post Facto Clause.

4. Whether the 2006 MCA plainly violated the equal protection component of the Due Process Clause because it limited the jurisdiction of military commissions to offenses committed by alien unlawful enemy combatants.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-163) is reported at 840 F.3d 757. Prior opinions of the court of appeals (Pet. App. 165-301, 303-452) are reported at 792 F.3d 1 and 767 F.3d 1. The opinion of the United States Court of Military Commission Review (Pet. App. 455-680) is reported at 820 F. Supp. 2d 1141.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2016. A petition for rehearing was denied on November 28, 2016 (Pet. App. 681). On February 2, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 28, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 10 U.S.C. 950g(e) and 28 U.S.C. 1254(1).

STATEMENT

Following a trial by military commission at Guantánamo Bay, Cuba, petitioner was convicted of conspiracy to commit offenses triable by military commission, in violation of 10 U.S.C. 950v(b)(28) (2006); solicitation of others to commit offenses triable by military commission, in violation of 10 U.S.C. 950u (2006); and providing material support for terrorism, in violation of 10 U.S.C. 950v(b)(25) (2006). Pet. App. 461-462. Petitioner was sentenced to life imprisonment. *Id.* at 461. The United States Court of Military Commission Review (USCMCR) affirmed. *Id.* at 455-680. The court of appeals affirmed petitioner's conspiracy conviction and reversed petitioner's convictions for solicitation and providing material support for terrorism. *Id.* at 1-163, 165-301, 303-452.

1. On September 11, 2001, the al Qaeda terrorist organization attacked the United States and killed nearly 3000 people. Pet. App. 472; 11/2/15 Gov't C.A. Br. 4. 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. The President issued a military order authorizing military commissions to try non-citizens for certain offenses. Pet. App. 307.

In *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006), this Court held that the military commission system the President established contravened statutory restrictions on military commission procedures in the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq*. 548 U.S. at 613-633, 635. The Court divided over whether 10 U.S.C. 821,

which creates military commission jurisdiction over offenses that "by statute or by the law of war may be tried by military commissions," *ibid.*, authorized military commissions to try conspiracy to violate the law of war, see *Hamdan*, 548 U.S. at 595-613 (opinion of Stevens, J.) (concluding that Section 821 did not authorize trial for conspiracy); *id.* at 697-706 (Thomas, J., dissenting) (concluding that Section 821 authorized trial for conspiracy); see also *id.* at 655 (Kennedy, J., concurring in part) (declining to address the question).

Four Justices joined opinions inviting Congress to clarify the authority of military commissions. See *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring) (joined by Kennedy, Souter, and Ginsburg, JJ.) ("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 in part) (stating that "Congress may choose to provide further guidance" regarding the "validity of the conspiracy charge" and that "Congress, not the Court, is the branch in the better position to undertake the 'sensitive task of establishing a principle not inconsistent with the national interest or with international justice'") (citation omitted).

In response, Congress enacted the Military Commissions Act of 2006 (2006 MCA), 10 U.S.C. 948a *et seq.* (2006). 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." 10 U.S.C. 948b(a) (2006). It codifies a number of specific war crimes, including murder of protected persons, attacking civilians, and terrorism. See 10 U.S.C. 950v(b)(1), (2), and (24) (2006). The 2006

MCA also prohibits conspiring to commit one or more of the codified substantive offenses, by making it unlawful to "conspire[] to commit one or more substantive offenses triable by military commission under this chapter" if the person charged "knowingly does any overt act to effect the object of the conspiracy." 10 U.S.C. 950v(b)(28) (2006).[1]

2. Petitioner, a native of Yemen, went to Afghanistan in the late 1990s to join al Qaeda. Pet. App. 305. He swore an oath of loyalty to Osama bin Laden and received paramilitary training at an al Qaeda camp. *Id.* at 305-306. Bin Laden assigned petitioner to work in al Qaeda's media office and later appointed petitioner as his personal secretary. *Id.* at 306. Petitioner assisted bin Laden in preparing public statements and operated bin Laden's communications equipment. *Ibid.*; 11/2/15 Gov't C.A. Br. 6.

Bin Laden directed petitioner to create an al Qaeda recruitment video highlighting the October 2000 attack on the USS *Cole* that killed 17 American sailors. Pet. App. 306. Petitioner's video, which called on viewers to execute terrorist attacks against the United States and to come to Afghanistan for training, was used in al Qaeda camps to motivate recruits and was distributed widely outside Afghanistan. *Ibid.*; see 11/2/15 Gov't C.A. Br. 6.

In Afghanistan, petitioner lived in the same house as Muhamed Atta and Ziad al Jarrah, both of whom later piloted aircraft in the 9/11 attacks. Pet. App. 306; 11/2/15 Gov't C.A. Br. 6-7. Petitioner arranged for the two hijackers' oaths of loyalty to bin Laden. Pet. App. 306.

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[1] Congress replaced the 2006 MCA with the Military Commissions Act of 2009, 10 U.S.C. 948a *et seq.*, but left the conspiracy provision and other provisions relevant here substantively intact. See Pet. App. 307 n.1.

Petitioner volunteered to participate in the 9/11 attacks himself, but bin Laden refused permission because he considered petitioner's media activities too important. *Ibid.* Just before the 9/11 attacks, petitioner traveled to a remote region of Afghanistan with bin Laden, where he operated the radio that bin Laden used to track news of the attacks. *Ibid.*

Petitioner then fled to Pakistan, where he was captured in December 2001. Pet. App. 306. Petitioner was turned over to U.S. custody, and was later detained at the U.S. naval base at Guantánamo Bay, Cuba. *Ibid.*

3. In 2008, military authorities charged petitioner under the 2006 MCA with conspiracy to commit war crimes, solicitation of others to commit war crimes, and providing material support for terrorism. Pet. App. 309. The substantive offenses underlying the conspiracy charge were murder of protected persons, attacking civilians, attacking civilian objects, murder in violation of the law of war, destruction of property in violation of the law of war, terrorism, and providing material support for terrorism. *Ibid.* Military prosecutors alleged that petitioner committed 11 overt acts in furtherance of the conspiracy. *Id.* at 309-310. These included undergoing military-type training at an al Qaeda camp, swearing loyalty to bin Laden and performing personal services for bin Laden, preparing the USS *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, "prepar[ing] the propaganda declarations styled as martyr wills of Atta and 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," and operating data-processing and communications equipment for bin Laden and others. *Id.* at 310 n.2; see *id.* at 309.

During pretrial hearings, petitioner declared that he would boycott the proceedings. Pet. App. 309. Petitioner's appointed counsel, following petitioner's instructions, explicitly waived all pretrial motions. *Ibid.*; see 11/2/15 Gov't C.A. Br. 8. Petitioner pleaded not guilty but admitted all of the factual allegations against him, except for the allegation that he wore a suicide belt to protect bin Laden. Pet. App. 309.

At trial, petitioner instructed his counsel not to present a defense. Pet. App. 309; 11/2/15 Gov't C.A. Br. 9. Petitioner did not cross-examine government witnesses, object to the prosecution's evidence, or make opening or closing arguments. *Ibid.* Petitioner did not argue that Congress lacked authority under the Constitution to try him for conspiracy in a military commission, nor did he claim that his military commission trial violated the Ex Post Facto Clause, Article III, or the equal protection component of the Due Process Clause. Pet. App. 311, 314-315, 664, 668; see 11/2/15 Gov't C.A. Br. 9.

The military commission convicted petitioner of all the charges. Using a detailed worksheet of findings, the commission specifically found that petitioner conspired to commit each of the seven object offenses, including murder of protected persons and attacking civilians. Pet. App. 309. The commission also found that petitioner committed each of the alleged overt acts, except for wearing a suicide belt to protect bin Laden. *Id.* at 309-310 & n.2.

The military commission sentenced petitioner to life imprisonment, and the convening authority approved

the findings and sentence. Pet. App. 310. The USCMCR affirmed. *Id.* at 455-679.

4. Petitioner's appellate counsel filed a petition for review in the court of appeals, arguing, *inter alia*, that petitioner's military commission convictions violated Article I and Article III of the Constitution, the Ex Post Facto Clause, and the equal protection component of the Due Process Clause.[2] Pet. App. 311, 354. While petitioner's appeal was pending, the D.C. Circuit held in *Hamdan* v. *United States*, 696 F.3d 1238 (2012) (*Hamdan II*), that the 2006 MCA did not authorize prosecution "for conduct committed before enactment of that Act unless the conduct was already prohibited under existing U.S. law as a war crime triable by military commission." *Id.* at 1248; see Pet. App. 311. The government conceded that the panel was required to vacate petitioner's convictions under the 2006 MCA in light of *Hamdan II*. Pet. App. 311. Based on that concession, the panel vacated petitioner's convictions. *Ibid.*[3]

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[2] While petitioner's appeal was pending in the court of appeals, petitioner wrote a letter to the court stating that he had never authorized the appeal and that he wanted it withdrawn. C.A. Doc. No. 1434449 (May 2, 2013). The court ordered petitioner's counsel to obtain written authorization for the appeal. C.A. Doc. No. 1436058 (May 14, 2013). Counsel was unable to obtain written authorization, but represented that petitioner had orally authorized the appeal. As described by counsel, that authorization was limited to litigation in the court of appeals and did not extend to seeking this Court's review. See C.A. Doc. No. 1443565, at 3-5 (June 26, 2013).

[3] Petitioner is mistaken in stating (Pet. 10) that the government "notified the Circuit of its intention to seek certiorari in petitioner's case to have *Hamdan II* overturned" but then sought rehearing en banc instead. In conceding that *Hamdan II* required vacatur of petitioner's convictions, the government stated more generally that it

5. The court of appeals granted rehearing en banc, vacated petitioner's solicitation and material support convictions, rejected petitioner's statutory and ex post facto challenges to his conspiracy conviction, and remanded the case to the panel for consideration of petitioner's remaining challenges to his conspiracy conviction. Pet. App. 303-355. The en banc court overruled *Hamdan II*, holding that the 2006 MCA unambiguously provided military commission jurisdiction to adjudicate charges arising out of conduct forbidden under the statute regardless of whether the conduct took place before or after the statute was enacted. *Id.* at 317-323.

The court of appeals then turned to petitioner's constitutional ex post facto claim, which it held was subject to plain-error review. Pet. App. 311-315. The court explained that petitioner had "forfeited the arguments" he raised under the Ex Post Facto Clause 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 314-315. The court acknowledged that petitioner "objected to the commission's authority to try him" but held that petitioner's blanket objections, which were "couched entirely in political and religious terms," were "too general" to preserve his legal claims. *Id.* at 315 (citation omitted).

The court of appeals rejected petitioner's ex post facto challenge to his conspiracy conviction on the ground that it was not "plain" that conspiracy was "not already triable" at the time of petitioner's conduct under the "law of war" as incorporated in 10 U.S.C. 821. Pet. App. 330; see *id.* at 328-346. The court noted that this Court

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was "preserv[ing] [its] arguments for further review," without specifying whether it intended to seek en banc review or a writ of certiorari. 1/9/13 Gov't C.A. Supp. Br. 1.

in *Hamdan* "debated * * * at length" whether conspiracy was an offense under the "law of war" as incorporated in Section 821, without ultimately resolving the question. *Id.* at 338. It further observed that there was domestic precedent for treating conspiracy as a law-of-war offense triable by military commission and that decisions of this Court indicated "that domestic precedent is an important part of" the law-of-war inquiry. *Id.* at 340; see *id.* at 344-346. The court of appeals therefore concluded that, at a minimum, it was not plain that conspiracy was not triable by military commission at the time of petitioner's conduct. In contrast, the court found a plain Ex Post Facto Clause violation in trying petitioner under the 2006 MCA for providing material support for terrorism and solicitation. *Id.* at 346-354. The en banc court remanded the case to the panel to consider, *inter alia*, petitioner's Article I, Article III, and equal protection claims. *Id.* at 354-355.

Judge Henderson concurred, writing that she would have affirmed petitioner's conspiracy conviction against his ex post facto challenge for the additional reason that it is not plain that the Ex Post Facto Clause applies to alien unlawful enemy combatants detained at Guantánamo Bay. Pet. App. 356-360.

Judge Rogers concurred in the judgment in part and dissented in part. Pet. App. 361-393. She applied de novo review to petitioner's claims, concluded that the 2006 MCA did not authorize petitioner's trial for conspiracy, and concluded that if the 2006 MCA did authorize trying petitioner on conspiracy charges, it violated the Ex Post Facto Clause. *Id.* at 386-393.

Judge Brown and Judge Kavanaugh each authored opinions concurring in the judgment in part and dis-

senting from the decision to remand the Article I, Article III, and equal protection claims to the panel. Pet. App. 394-417, 418-452. They would have rejected all of petitioner's challenges to his conspiracy conviction, applying de novo review. *Ibid.*

6. On remand, a divided panel vacated petitioner's conspiracy conviction, concluding that a military tribunal could not try petitioner for conspiring to violate the law of war without "violat[ing] the separation of powers enshrined in Article III." Pet. App. 205; see *id.* at 165-205. Judge Rogers, joined by Judge Tatel, applied de novo review to petitioner's Article III claim on the ground that an Article III challenge was "a structural objection" that "cannot be forfeited." *Id.* at 167; see *id.* at 168-174. The panel majority reasoned that Article III generally requires judicial power to be exercised in Article III courts. *Id.* at 175. It acknowledged that military tribunal prosecutions are an exception. *Id.* at 175-176. But the panel held that the exception extended only to offenses that are internationally recognized as violations of the law of war—a category that the government had conceded did not presently reach inchoate conspiracy to commit war crimes. *Id.* at 176-180.

Judge Tatel concurred. Pet. App. 206-215. He noted that he joined both the en banc opinion affirming petitioner's conspiracy conviction against statutory and ex post facto challenges on plain-error review, and the panel opinion concluding that petitioner's conspiracy violated Article III based on de novo review. He wrote that his decisions were explained by the different standards of review. *Ibid.*

Judge Henderson dissented. Pet. App. 216-301. She argued that petitioner's claims were subject to plain-error review and that petitioner's challenges lacked

merit under both plain-error and de novo standards. *Ibid.*

7. The court of appeals granted rehearing en banc, vacated the panel opinion and affirmed petitioner's conspiracy conviction by a 6-3 vote in a per curiam order. Pet. App. 1-4. The order explained that four judges "would affirm because they conclude that, consistent with Articles I and III of the Constitution, Congress may make conspiracy to commit war crimes an offense triable by military commission." *Id.* at 3. It explained that Judge Millett "would apply plain error review and affirm [petitioner's] conviction under that standard" without reaching "whether Congress may make inchoate conspiracy an offense triable by military commission." *Ibid.* Finally, the order explained that Judge Wilkins would also decline to reach petitioner's broad constitutional claim, and would affirm because "particular features of [petitioner's] conviction demonstrate that [petitioner] was not convicted of an inchoate conspiracy offense." *Id.* at 3-4.

a. Members of the majority elaborated on their views in separate opinions.

i. Judge Kavanaugh, joined by Judges Brown and Griffith, wrote in a concurring opinion that Congress has the power under Article I to authorize military tribunals to try conspiracies to commit war crimes, even though conspiracy is not recognized as a violation of international law. Pet. App. 5-35. He wrote that Congress's power to establish military commissions derives not only from its power to "define and punish * * * Offences against the Law of Nations," U.S. Const. Art. I, § 8, Cl. 10, but also from its power to "declare War," U.S. Const. Art. I, § 8, Cl. 11, and from the other war-powers clauses in Article I. Pet. App. 9-11 (Kavanaugh,

J., concurring). The war powers, he explained, "do not refer to international law or otherwise impose international law as a constraint on Congress's authority to make offenses triable by military commission." *Id.* at 11.

Judge Kavanaugh found history and precedent supported the conclusion that Congress could authorize military tribunals to try enemy combatants for conspiracy to commit war crimes, even though inchoate conspiracy is not an offense recognized under international law. Pet. App. 11-23 (Kavanaugh, J., concurring). This Court's "leading constitutional decision regarding military commissions," he explained, had noted in particular that military commissions have long tried the offense of spying, which is not a violation of the international law of war. *Id.* at 13. Judge Kavanaugh also pointed to the "deeply rooted history of U.S. military commission trials of the offense of conspiracy," including the "two most important military commission precedents in U.S. history—the trials of the Lincoln conspirators and the Nazi saboteurs" in *Ex parte Quirin*, 317 U.S. 1 (1942). Pet. App. 18-19 (Kavanaugh, J., concurring). Because military tribunals operate as an exception to the rule that the judicial power must be exercised in Article III courts, Judge Kavanaugh wrote, historical practice confirms that "Article III is not a barrier to U.S. military commission trials" for conspiracy. *Id.* at 25.

Judge Kavanaugh also rejected petitioner's claim that the 2006 MCA violates the equal protection component of the Due Process Clause by authorizing military commission trials of alien enemy combatants but not enemy combatants who are U.S. citizens. Pet. App. 27 n.12 (Kavanaugh, J., concurring). Judge Kavanaugh incorporated the relevant portion of his opinion from the

prior en banc proceeding, *ibid.*, which explained that "federal laws drawing distinctions between U.S. citizens and aliens—particularly in the context of war and national security"—are permissible when "rationally related to a legitimate governmental interest," and that "Congress had a vital national security interest in establishing a military forum in which to bring to justice foreign unlawful belligerents whose purpose it is to terrorize innocent U.S. citizens and to murder U.S. military personnel." *Id.* at 442 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (citation omitted).

ii. Judge Henderson concurred, incorporating by reference her dissent from the panel opinion, in which she concluded that petitioner had forfeited his claims and that, in any event, Congress may constitutionally provide for a trial of conspiracies to commit war crimes before military commissions in light of its powers under the Define and Punish Clause and the war-powers clauses in Article I. Pet. App. 5; see *id.* at 218, 247-284 (Henderson, J., dissenting).

iii. Judge Millett concurred, explaining that she would affirm by applying plain-error review. Pet. App. 36-81. She concluded that petitioner was not convicted of "ordinary inchoate conspiracy," but of a "carefully crafted form of statutory conspiracy that, on the record of this case, resembles in important ways * * * forms of conspiracy or collective action" recognized under international law. *Id.* at 73. Judge Millett emphasized that petitioner's conviction involved completed object offenses that were recognized under the international law of war, that the commission found that petitioner personally intended that every element of the object offenses be committed, and that the commission found

that petitioner committed overt acts that were directly tied to "al Qaeda's waging of terrorist aggression against the United States." *Id.* at 68; see *id.* at 65-67. She explained that those elements made petitioner's conspiracy conviction analogous to forms of liability recognized under international law, including liability for joint criminal enterprise and conspiracy to commit aggressive war or genocide. *Id.* at 67-73. Judge Millett concluded that "any delta between [petitioner's] conspiracy offense and those offenses that international law proscribes is too narrow to rise to the level of plain constitutional error." *Id.* at 67. Judge Millett concluded, in the alternative, that the historical practice of trying conspiracy in U.S. military commissions "make[s] it far from plain that conspiracy under the 2006 [MCA] would not be triable by military commission." *Id.* at 76. Judge Millett also rejected petitioner's equal protection challenge on the ground that "no relevant precedent plainly supports the application of equal protection principles" to "foreign enemy combatants." *Id.* at 80.

iv. Judge Wilkins also concurred. Pet. App. 82-96. He reasoned that the military commission's findings regarding petitioner's role were sufficient to establish liability for the war crimes of petitioner's co-conspirators on 9/11 under *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Pet. App. 89-93 (Wilkins, J., concurring). Judge Wilkins concluded that because the internationally recognized offense of joint criminal enterprise has essentially the same requirements as *Pinkerton* liability, "the factual elements that were proven during [petitioner's] prosecution were indistinguishable from a theory recognized under international law." *Id.* at 94. He thus saw no occasion to determine whether Congress could make inchoate conspiracy an offense triable by military

tribunal. Judge Wilkins also rejected petitioner's equal protection argument for the reasons in Judge Millett's opinion. *Id.* at 96.

b. Judges Rogers, Tatel, and Pillard filed a joint dissent. Pet. App. 97-163. They would have applied de novo review because, in their view, the court at least had discretion to consider a structural Article III claim not raised below and should do so in this case. *Id.* at 98-106. The dissenting judges acknowledged that Article III does not bar military commissions from exercising jurisdiction over law-of-war offenses, but they argued that such jurisdiction may extend only to offenses that are recognized under customary international law. *Id.* at 106-140. Rejecting the views of Judges Millett and Wilkins, they concluded that the military commission findings in petitioner's case did not suffice to establish liability for an internationally recognized law-of-war offense. *Id.* at 146-157. Finally, the dissenting judges noted that, because the votes of judges applying plain-error review or relying on case-specific grounds were necessary for affirmance, the court of appeals' decision "provides no precedential value" for trying inchoate conspiracy in a military commission. *Id.* at 162.

ARGUMENT

Petitioner renews (Pet. 14-29) his contentions that his conviction by a military commission for conspiracy to commit war crimes should be vacated based on Article I, Article III, the Ex Post Facto Clause, and the equal protection component of the Due Process Clause of the Constitution. The court of appeals correctly rejected these challenges, and its judgment on each constitutional claim rested on case-specific grounds, application of plain-error review, or both. The court of appeals also correctly rejected petitioner's statutory claim

(Pet. 22) that the 2006 MCA was not intended to have retroactive application. The decision below does not conflict with any decision of this Court or any other court of appeals. And petitioner's case would be a poor vehicle for considering petitioner's broad challenges because each of petitioner's constitutional claims falters on the narrow, case-specific grounds on which the judgment rests. Further review is unwarranted.

1. Petitioner first contends (Pet. 14-20) that this Court should vacate his conviction on the ground that Congress may not, under its Article I war powers and consistent with Article III, codify conspiracy to commit war crimes as an offense triable by military commission. This claim lacks merit and does not warrant further review.

a. i. Petitioner's challenge under Article I and Article III is properly reviewed for plain error, because petitioner did not raise his claim before the military commission. While petitioner objected to the commission proceedings, his remarks were "couched entirely in political and religious terms" and were "unquestionably too general to have alerted the trial court to the substance" of the claims later raised on appeal. Pet. App. 315 (citation and internal quotation marks omitted); see *id.* at 46 (Millett, J., concurring). Petitioner's claim is therefore subject to the well-established principle "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) (citation and internal quotation marks omitted).

Petitioner contends (Pet. 30) that plain-error review should not apply because it serves no purpose in the

context of "pure questions of law." But this Court has repeatedly held that important purposes underlie the plain-error rule, including promoting finality and diminishing opportunities and incentives for gamesmanship. See, *e.g.*, *Puckett* v. *United States*, 556 U.S. 129, 134 (2009); see also Pet. App. 44-45 (Millett, J., concurring).

Petitioner is also mistaken in contending (Pet. 30-31) that the plain-error rule does not apply in military commissions. Military courts, including the USCMCR in this case, have held that "principles of 'waiver' and 'forfeiture'" are "applied in U.S. Courts and Courts-Martial." Pet. App. 666; see *United States* v. *Harcrow*, 66 M.J. 154, 157-159 (C.A.A.F. 2008); cf. *Manual for Military Commissions* R. 801(g), at II-70 (rev. ed. 2016) (failure to timely raise claims constitutes waiver).

Nor are forfeiture principles inapplicable on the ground that petitioner raises structural challenges to the commission's subject-matter jurisdiction. See Pet. App. 7 n.1 (Kavanaugh, J., concurring); *id.* at 82 (Wilkins, J., concurring); *id.* at 100-101 (Rogers, J., dissenting). Nonwaivable jurisdictional limitations are those concerning "the courts' statutory or constitutional power to adjudicate the case." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) (citation and emphasis omitted). Here, there is no dispute that Congress conferred on military commissions the power to try conspiracy offenses. Petitioner instead argues that Congress exceeded its Article I powers by making conspiracy a crime tried by military tribunal. But "the unconstitutionality of the statute under which the proceeding is brought does not oust a court of jurisdiction." *United States* v. *Williams*, 341 U.S. 58, 66 (1951). Courts have accordingly treated claims that Congress lacked authority to create jurisdiction over a particular type of

offense as waivable. See, *e.g.*, *United States* v. *Miranda*, 780 F.3d 1185, 1188-1190 (D.C. Cir. 2015) (challenge to enactment under Define and Punish Clause was not challenge to subject-matter jurisdiction); *United States* v. *Neuci-Peña*, 711 F.3d 191, 197 (1st Cir. 2013) (same); *United States* v. *Baucum*, 80 F.3d 539 (D.C. Cir. 1996) (per curiam); see also Pet. App. 48 (Millett, J., concurring); Pet. App. 219-238 (Henderson, J., dissenting). And this Court has itself twice treated claims that Congress had conferred powers on an Article I tribunal in a manner that violated Article III as subject to forfeiture. See *Wellness Int'l Network, Ltd.* v. *Sharif*, 135 S. Ct. 1932, 1949 (2015) (remanding case to court of appeals for determination of whether petitioner had forfeited an Article III claim); *B&B Hardware, Inc.* v. *Hargis Indus., Inc.*, 135 S. Ct. 1293, 1304 (2015) (declining to consider Article III objection because the argument had been abandoned by petitioner and therefore "is not before us"); see also Pet. App. 49-52 (Millett, J., concurring).

Even if the Court would have discretion to disregard petitioner's forfeiture of his Article I and Article III claims, that course would not be warranted. Equitable principles do not support that result: Petitioner, who was represented by counsel, has never suggested he faced any obstacle to pressing before the tribunal the claims that he forfeited there. Instead, petitioner made a deliberate choice to forgo any legal challenges in service of a self-styled boycott. And here as in other cases, the requirement that a litigant raise his claim at trial is important because it permits the adverse party and the tribunal to respond with steps to ensure that the alleged error "cannot possibly affect the ultimate outcome," Pet. App. 45 (Millett, J., concurring) (quoting *Puckett*, 556 U.S. at 134). Here, for instance, prosecutors would

have had the opportunity to reassess whether to seek an amendment of the charges to also allege substantive offenses based on *Pinkerton* principles.

Moreover, as Judge Millett observed, "[t]he separation of powers should counsel the greatest judicial hesitation" regarding undertaking review of a forfeited claim "when the Political Branches are jointly exercising their judgment in areas of national security, the conduct of war, and foreign relations." Pet. App. 62 (Millett, J., concurring). That is particularly so when there is no structural impediment to any future litigant raising a challenge of the type that petitioner forfeited, see *id.* at 53 (contrasting criminal cases with civil cases, which "can pose the risk of parties colluding and consenting to a non-Article III forum for resolution of their dispute"), and where it is unclear whether a decision on petitioner's forfeited claims would in fact provide controlling guidance for future proceedings, because of case-specific findings as to liability in petitioner's case, see *id.* at 72-73; *id.* at 90-93 (Wilkins, J., concurring); pp. 23-24, *infra*, and because it is not clear to what extent future prosecutions under the 2006 MCA would rest on pure inchoate conspiracy, see pp. 25-26, *infra*.

ii. Petitioner cannot demonstrate error under Article I and Article III, let alone plain error, in his trial before a military commission for conspiracy to commit war crimes. See *Olano*, 507 U.S. at 732-735 (explaining that a defendant may obtain relief for a forfeited claim only by demonstrating that an error was "plain," "affect[ed his] substantial rights," and "seriously affects the fairness, integrity, or public reputation of judicial proceedings") (brackets and citations omitted).

When Congress codified conspiracy to commit war crimes as an offense in the 2006 MCA, it responded in a

manner that is consistent with the constitutional structure to this Court's invitation that the political Branches clarify military commission jurisdiction over conspiracy offenses, see *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring); *id.* at 655 (Kennedy, J., concurring in part). While Article III vests the federal courts with "[t]he judicial Power of the United States," U.S. Const. Art. III, § 1, that Article is "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) (opinion of Brennan, J.). Applying those principles, this Court has upheld Article I tribunals in a variety of areas, including in the context of military tribunals established as an exercise of Congress's war powers and its powers under the Define and Punish Clause. See *Ex parte Quirin*, 317 U.S. 1, 40 (1942).

Under those principles, Congress acted permissibly when—acting in concert with the President, see *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring in the judgment and opinion of the Court)—it made the offense of conspiracy to commit war crimes triable by military commission. The Constitution confers on Congress war powers that include not only the power to define and punish offenses against the law of nations, but also the power to declare war and other war powers, U.S. Const. Art. I, § 8, Cls. 1, 11-14, and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," U.S. Const. Art. I, § 8, Cl. 18. Those grants of power support Congress's authority to confer jurisdiction on military commissions to try alien unlawful enemy combatants for conspiracy to commit war crimes.

See *Hamdan*, 548 U.S. at 592 n.21 ("'[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.'") (citation and emphasis omitted; brackets in original); *Quirin*, 317 U.S. at 25-26 (enumerating Congress's war powers as sources of authority to establish military commissions); see also Pet. App. 11 (Kavanaugh, J., concurring). And, notably, the Declare War Clause, the other war-powers clauses, and the Necessary and Proper Clause do not even arguably "refer to international law" or suggest that the powers they describe may be exercised only in a manner supported by an international consensus. See Pet. App. 10 (Kavanaugh, J., concurring).

Historical practice confirms that Congress may validly confer on military tribunals the authority to try conspiracies to commit war crimes, even though conspiracy itself has not attained international recognition at this time as an offense under customary international law. Since the Founding, Congress and the President have given military tribunals jurisdiction to try offenses that were not violations of international law—including spying and aiding the enemy. See Pet. App. 16-17 (Kavanaugh, J., concurring). And of particular relevance, military commissions have long charged defendants with conspiracy to commit war crimes. Far from reflecting only "isolated episodes" that do not "deserve to be given any precedential value" (Pet. 19), these precedents include "the two most important military commission precedents in U.S. history"—those involving the Lincoln conspirators and the Nazi saboteurs in *Quirin*.

Pet. App. 19 (Kavanaugh, J., concurring); see *Hamdan*, 548 U.S. at 699 (Thomas, J., dissenting); see also *Colepaugh* v. *Looney*, 235 F.2d 429, 431 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957).[4]

Petitioner argues (Pet. 17) that *Quirin* actually required that an offense be internationally recognized as a law-of-war offense in order to be tried by a U.S. military tribunal. But in determining that the defendants could be tried in Article I tribunals, *Quirin* cited authorities that expressly rejected the proposition that spying was a violation of international law, see 317 U.S. at 30-31 nn.7-8; see Pet. App. 15 (Kavanaugh, J., concurring), before determining, based on "the practice of our own military authorities before the adoption of the Constitution, and during the Mexican and Civil Wars," that in the United States, spying and sabotage were subject to trial before military commission, *Quirin*, 317 U.S. at at 31 (footnote omitted); see *id.* at 31-33 & nn.9-10, 42 & n.14; Pet. App. 15 (Kavanaugh, J., concurring). *Quirin* thus interpreted the category of "offenses against the law of war" that may be tried by military tribunals as including offenses that were not violations of international law, but were triable by military commissions under domestic practice. 317 U.S. at 32 n.10.

Petitioner also asserts that *Quirin* "strongly suggested, if not implicitly held" that conspiracy cannot be tried by military commission because conspiracy is an

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[4] That history also refutes petitioner's suggestion that military commissions have traditionally been limited to providing "swift justice * * * on the battlefield." Pet. 14 (citation omitted). The commission in *Quirin* was held in Washington, D.C., 317 U.S. at 23, and the proceedings in *Colepaugh* were conducted in New York, 9/17/14 Gov't C.A. Br. 59.

offense that was "traditionally triable by jury at common law." Pet. 18 (citation omitted). In fact, *Quirin* refutes petitioner's contention that there cannot be concurrent jurisdiction between federal courts and military commissions, because it noted that the fact that the Espionage Act, ch. 30, 40 Stat. 217, authorized trials in federal court for similar conduct did not limit the concurrent jurisdiction of the military commission. 317 U.S. at 27. No other portion of *Quirin* suggests that the existence of federal criminal jurisdiction divests a military commission of jurisdiction over an offense that is also cognizable under federal law as a war crime. If that were so, the War Crimes Act of 1996, 18 U.S.C. 2441 *et seq.*, would largely foreclose law-of-war military commission jurisdiction over most of the offenses enumerated in the 2006 MCA. In addition, the offense at issue in this case is not common law conspiracy but conspiracy to violate the law of war by an unlawful enemy combatant. Article III courts have never exercised exclusive jurisdiction over such conduct.[5] Petitioner's arguments fail to establish error, let alone plain error, in the military commissions' exercise of jurisdiction under the 2006 MCA.

iii. Moreover, as the concurrences indicate, petitioner would also be unable to demonstrate plain error in his case because of the 2006 MCA's limitations on

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[5] Petitioner's reliance (Pet. 18) on *Callan* v. *Wilson*, 127 U.S. 540 (1888), is misplaced. *Callan* held that the conspiracy offense in that case was not a petty offense and accordingly required a jury trial. *Id.* at 555, 557. That holding has nothing to do with the scope of military commission jurisdiction. Petitioner contends (Pet. 18) that *Quirin* "placed special emphasis" on *Callan*, but the *Quirin* Court cited *Callan* only for the proposition that the Fifth and Sixth Amendments did not expand the right to a jury trial beyond Article III's jury trial right.

conspiracy and the specific findings of the military commission at his trial. The 2006 MCA requires, at a minimum, that the defendant personally commit an overt act in furtherance of the alleged conspiracy. See Pet. App. 91 (Wilkins, J., concurring). In addition, petitioner was convicted of conspiracy with respect to offenses that were consummated—those in the 9/11 attacks, *id.* at 90-91—with the military commission making detailed findings regarding overt acts that petitioner performed, including findings as to petitioner's "intricate[] involve[ment] in preparing two 9/11 perpetrators for their attacks," *id.* at 72 (Millett, J., concurring); see *id.* at 91-93 (Wilkins, J., concurring). A conspiracy conviction under these circumstances "resembles in important ways those forms of conspiracy or collective action that get the international-law nod of approval." *Id.* at 73 (Millett, J., concurring); see *id.* at 69-70 (explaining that "international law permits conviction for joint criminal enterprise where 'a plurality of persons participat[es] in the criminal plan'; there is 'a common purpose which amounts to or involves the commission of a crime'; and 'the accused[] participat[es] in the common design'") (citation omitted; brackets in original); cf. *id.* at 94 (Wilkins, J., concurring) ("[T]he factual elements that were proven during [petitioner's] prosecution were indistinguishable from a theory recognized under international law."); *id.* at 410 (Brown, J., concurring in the judgment in part and dissenting in part) ("Even if the offense of conspiracy was not recognized under international law in 2001 by the same labels used by Congress in the [2006 MCA], the substance is similar."). At minimum, under these circumstances, petitioner would be unable to demonstrate that his military commission conviction reflected plain error.

b. Petitioner errs in contending (Pet. 14-16) that this Court should grant review of the judgment rejecting his Article I and Article III claims, on the ground that whether Congress may authorize military tribunals to try conspiracies to commit war crimes is an issue of exceptional importance. That question does not warrant review in this case because the court below did not resolve that question. Members of the court whose votes were necessary to the judgment rejected petitioner's challenges based on plain-error principles, Pet. App. 36-81 (Millett, J., concurring), or case-specific features of petitioner's case, *id.* at 82-96 (Wilkins, J., concurring); see *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (the holding of a case that lacks a majority opinion is the "position taken by those [judges] who concurred in the judgment[] on the narrowest grounds") (citation omitted).

Petitioner's suggestion that this Court should grant review to consider a constitutional question not decided below is particularly mistaken because the contours of conspiracy charges in future military commission cases are not apparent. In the military commission prosecution of Khalid Shaikh Mohammad and other alleged perpetrators of the 9/11 attacks, for example, the Chief Prosecutor of Military Commissions has agreed to an instruction that in order to convict the defendant of conspiracy, the panel must also find the defendant guilty of one of the conspiracy's object offenses. See Gov't Second Supp. Resp. to Defense Mot. to Dismiss for Lack of Jurisdiction at 1, *United States* v. *Mohammad*, No. AE 107A (Aug. 27, 2014). This Court need not grant review here

to address an abstract question that was not decided below, and the application of which to future cases is uncertain.[6]

Moreover, as the judgment below illustrates, this case would be an unsuitable vehicle for resolving petitioner's Article I and Article III claims because of the availability of alternative grounds for decision. Because petitioner did not press his constitutional claims before the military tribunal, and because of the particular features of petitioner's conviction that Judges Wilkins and Millett emphasized, this Court could resolve petitioner's case by using a plain-error standard of review, or relying on case-specific grounds, without addressing petitioner's broad constitutional claims. And the multiple alternative grounds for decision that would be available also raise the possibility that this Court, like the court of appeals, would fail to reach a single controlling disposition. Those aspects of petitioner's case make it a poor vehicle for review of his broad Article I and Article III claims.

2. Petitioner briefly contends (Pet. 22) that this Court should grant review to consider whether the 2006 MCA authorizes prosecutions for conduct committed before the statute was enacted. That contention lacks merit. The language of the 2006 MCA unambiguously provides jurisdiction over pre-enactment conduct with

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[6] Petitioner also contends (Pet. 16) that this Court's intervention is necessary to overrule the USCMCR's conclusion that conspiracy is a violation of international law, but the government has for years acknowledged that standalone inchoate conspiracy has not attained international recognition at this time as an offense under customary international law. See 5/16/12 Gov't C.A. Br. 50. Petitioner provides no reason to doubt that military commission judges will accept that concession and treat the court of appeals' decisions, rather than the USCMCR's, as the governing law.

respect to the offenses it codifies. See 10 U.S.C. 950p(b) and (d) ("Because the provisions of [the 2006 MCA]" are declarative of existing law, they do "not preclude trial for offenses that occurred before the date of the enactment of this subchapter."); 10 U.S.C. 948d(a) (2006) (providing that military commissions "shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001"). Moreover, the 2006 MCA's specific references to al Qaeda and to the September 11 attacks make clear that Congress intended the military commission system to exercise jurisdiction over conduct related to those attacks. 10 U.S.C. 948a (2006); see 152 Cong. Rec. 20,727 (2006) (statement of Rep. Hunter). In addition, petitioner's statutory claim implicates no conflict, and its importance is diminishing because it has no bearing on cases that involve conduct after 2006. Further review is unwarranted.

3. Petitioner next contends (Pet. 22-24) that this Court should vacate his conviction based on the Ex Post Facto Clause. The court of appeals correctly rejected petitioner's claim under a plain-error standard, and no further review is warranted.

a. As the court of appeals concluded, petitioner's ex post facto claim is properly reviewed for plain error because petitioner failed to raise it before the military tribunal. Pet. App. 311-316. Petitioner suggests (Pet. 31-32) that plain-error review should not apply because his ex post facto claim presents a "pure question[] of law respecting the constitutionality of a statute," but this Court has held that constitutional claims can be forfeited without recognizing any such exception for legal questions. *Olano*, 507 U.S. at 731 ("'No procedural

principle is more familiar to this Court than that a constitutional right' * * * '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.'") (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)).[7]

Petitioner cannot show any violation of the Ex Post Facto Clause, let alone a violation that amounts to plain error. The 2006 MCA's provision of jurisdiction over conspiracy does not implicate the Ex Post Facto Clause because conspiracy has been traditionally charged in U.S. military commissions, including in the most highly publicized military commission trials this Nation has seen. See pp. 21-22, *supra.* The 2006 MCA's codification of that crime therefore creates no ex post facto problem. Petitioner's ex post facto challenge lacks merit for the additional reason that petitioner's conduct was illegal under criminal statutes when petitioner engaged in the

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[7] Petitioner suggests in closing (Pet. 32), that the application of plain-error review to a "pure question of law regarding the constitutionality of a statute" may itself be an issue warranting certiorari, but the questions presented do not fairly encompass that issue, Pet. i; see *Wood* v. *Allen*, 558 U.S. 290, 304 (2010). Nor is petitioner correct (see Pet. 32) that *United States* v. *Haddock*, 956 F.2d 1534 (10th Cir.), cert. denied, 506 U.S. 828 (1992), establishes a conflict on that point. *Haddock* involved a claim that an indictment was defective because it used amended statutory language to charge a defendant for acts before the statute was changed. *Haddock* characterized that as a type of ex post facto claim, but its conclusion that the claim was not forfeitable was based on the fact that petitioner was challenging the language of the indictment. *Id.* at 1542 (stating that "an indictment's failure to state an offense is a defect that may be raised at any time"). Moreover, *United States* v. *Marcus*, 560 U.S. 258 (2010), held that such claims are in fact forfeitable, and also rejected the characterization of such contentions as ex post facto claims. *Id.* at 260-261, 264.

charged conduct. See, *e.g.*, 18 U.S.C. 2332(b) (2000) (criminalizing conspiracy outside the United States to kill a U.S. national). The fact that the 2006 MCA provides a different forum for adjudication does not implicate ex post facto concerns in this case—in which petitioner admitted all relevant factual allegations and offered no defense—because any procedural differences between the military commission system and a prosecution in an Article III court did not affect "matters of substance." *Collins* v. *Youngblood*, 497 U.S. 37, 45 (1990) (citation omitted) (a "change[] in the procedures by which a criminal case is adjudicated" only violates the Ex Post Facto Clause if it "affects matters of substance") (brackets and citation omitted); see Pet. App. 331 ("The right to be tried in a particular forum is not the sort of right the Ex Post Facto Clause protects.") (emphasis omitted).

b. Petitioner's forfeited ex post facto claim does not warrant further review. Petitioner suggests (Pet. 22) that whether the Ex Post Facto Clause bars military tribunals from adjudicating conspiracy claims for pre-2006 conduct is a question sufficiently important to warrant this Court's review because of its implications for other military tribunal cases. But the court of appeals did not decide that question in petitioner's case because it applied plain-error review, and the plain-error posture would make this case a poor case for this Court's consideration because this Court could likewise reject petitioner's claim without deciding the underlying ex post facto question. Moreover, the ex post facto challenge that petitioner asserts is one of diminishing importance because it is relevant only to individuals charged with conspiracy offenses in military tribunals for conduct occurring before 2006.

For similar reasons, this Court's intervention is not warranted on the ground that questions concerning the validity of the 2006 MCA under the Ex Post Facto Clause have implications for the interpretation of other enactments that state that they are "declarative of existing law" (Pet. 23) and because the government's arguments "respecting the meaning of 'law of war'" in the UCMJ before the 2006 MCA would have ramifications in other contexts (Pet. 23-24). The court of appeals did not definitively decide any question regarding statutes that are phrased as "declarative of existing law" or regarding the meaning of "law of war" under the UCMJ because it simply held that petitioner was not entitled to relief under the plain-error rule. Pet. App. 328-346. And the plain-error posture makes petitioner's claim an unsuitable vehicle through which to give guidance on those issues not decided by the court below, because this Court could affirm without deciding those issues.

4. Finally, petitioner's forfeited contention (Pet. 24-29) that the 2006 MCA violates the equal protection component of the Due Process Clause because it provides for military commission trials for alien enemy combatants but not for enemy combatants who are U.S. citizens also lacks merit and does not warrant further review.

a. Because petitioner failed to raise an equal protection claim before the military commission, his claim is reviewable only for plain error. Petitioner contends (Pet. 29) that he preserved this claim when he complained about the government's "discrimination based on nationality" as one of the reasons for his boycott of the trial. But the substance of petitioner's complaint was that the government exempted two British citizens

from military commission prosecutions while prosecuting other foreign nationals. See Gov't Resp. to Pet. for Reh'g 1-2. A challenge to disparities in the treatment of different foreign nationalities does not preserve a claim that the 2006 MCA violates equal protection principles because it does not apply to U.S. citizens. Moreover, petitioner's statements were an explanation for his decision to boycott the proceedings, not a legal claim before the tribunal. Petitioner did not request relief or a ruling from the commission, nor did he identify any legal ground for such relief. And petitioner made especially clear that he was not raising any legal challenge before the tribunal when he subsequently waived all pretrial motions.

Petitioner's equal protection challenge falls far short of plain error. Congress's decision to limit military commission jurisdiction to alien unlawful enemy combatants satisfies the deferential test that applies in this context. See *Mathews* v. *Diaz*, 426 U.S. 67, 81 n.17 (1976) (noting that federal "policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," and that such "matters are so exclusively entrusted to the political branches * * * as to be largely immune from judicial inquiry") (citation omitted); see also *United States* v. *Ferreira*, 275 F.3d 1020, 1025-1026 (11th Cir. 2001) (stating that congressionally enacted distinctions between citizen and aliens "do not violate equal protection so long as they are rationally related to a legitimate government interest").

Congress had a "vital national security interest in establishing a military forum in which to bring to justice

foreign unlawful belligerents" who have launched terrorist attacks against the United States, and Congress reasonably chose to do so in a way that provides for a fundamentally fair proceeding without requiring that such aliens be admitted into the United States. Pet. App. 442 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (citation omitted). Moreover, the 2006 MCA reflects the long-settled understanding that, in time of armed conflict, enemy aliens are permissibly subject to a different legal regime than citizens. See *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587 (1952) (stating that "[w]ar, of course, is the most usual occasion for extensive resort to the power" to treat aliens differently); *Al-Bihani* v. *Obama*, 590 F.3d 866, 877 n.3 (D.C. Cir. 2010) (noting that "the procedures to which Americans are entitled are likely greater than the procedures to which non-citizens seized abroad during the war on terror are entitled"), cert. denied, 563 U.S. 929 (2011).

Petitioner contends (Pet. 26) that some commentators have construed the Geneva Conventions to require procedural parity for enemy aliens, but the procedural protections under the 2006 MCA are very similar to those available in courts-martial. Petitioner cannot claim that any procedural differences had any effect in this case, since he admitted the factual allegations against him and boycotted the proceedings.

b. Petitioner's equal protection claim does not warrant further review. Petitioner does not contend that the court of appeals' rejection of his claim conflicts with any decision of another court of appeals. Although petitioner contends that his equal protection claim presents "a question of exceptional importance," Pet. 24 (capitalization altered), none of the multiple, lengthy

opinions below agreed. Four judges found the claim "frivolous." Pet. App. 27 n.12 (Kavanaugh, J., concurring); *id.* at 441-442 (Kavanaugh, J., concurring in the judgment in part and dissenting in part); see *id.* at 301 (Henderson, J., dissenting); *id.* at 416 (Brown, J., concurring in the judgment in part and dissenting in part) (deeming this claim "clearly meritless"). Judge Millett dismissed the claim on plain-error grounds in a single sentence in her concurrence, *id.* at 80, in an analysis that Judge Wilkins adopted in his concurrence, *id.* at 96, and the dissenters did not address petitioner's equal protection claim at all, see *id.* at 97-163. In any event, because of the plain-error posture, petitioner's case would be a poor vehicle for addressing the equal protection argument that he presses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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