No. 11-1324

[ORAL ARGUMENT NOT SCHEDULED]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALI HAMZA SULIMAN AHMAD AL BAHLUL

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON APPEAL FROM THE COURT OF MILITARY COMMISSION REVIEW (CMCR-09-001)

PETITION FOR PARTIAL REHEARING

MAJ Todd E. Pierce, JA,
U.S. Army (Ret.)
Senior Fellow
Univ. of Minnesota Human Rights
Center Mondale Hall, N-120
229-19th Avenue South
Minneapolis, MN 55455

Michel Paradis
Mary McCormick
1620 Defense Pentagon
Washington, DC 20301-1620
michel.paradis@osd.mil
TEL: 1.703.696.9490 x115
FAX: 1.703.696.9575

Counsel for Petitioner

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SUMMARY OF ARGUMENT

Petitioner, Ali Hamza Suliman Al Bahlul ("Bahlul"), petitions this Court for partial rehearing. In this Court's *en banc* decision of October 20, 2016, Judges Millet and Wilkins cast the deciding votes dismissing Bahlul's Fifth Amendment Equal Protection claim, which challenged the *de jure* segregation of the military commission system as discrimination based upon nationality. Bahlul moves for partial rehearing because these votes were predicated upon a material misreading of the record.

As explained below, Judge Millet, joined by Judge Wilkins, dismissed Bahlul's Equal Protection ground on plain error review. Judge Millet justified plain error review on the ground that Bahlul had failed to raise this claim before the military commission. Bahlul, however, specifically raised his Equal Protection claim before the military commission. He did so in writing. And his written objection was accepted by the military judge into the record as Appellate Exhibit 30. We therefore respectfully request that this case be either remanded to the panel or reheard *en banc* on this issue so that Bahlul may be heard an objection before this Court that he did raise with specificity below.

STATEMENT OF THE CASE

Bahlul was convicted of three offenses before a military commission convened in Guantanamo Bay under the Military Commissions Act of 2006, 120 Stat. 2600 (2006). Before this Court, he has raised five constitutional grounds to reverse his conviction, namely: 1) The Ex Post Facto Clause; 2) The Define & Punish Clause; 3) Article III; 4) The First Amendment; and 5) the Equal Protection component of the Fifth Amendment.

This Court, sitting *en banc*, vacated Bahlul's conviction on two offenses for violating the Ex Post Facto Clause and remanded the conspiracy charge back to the merits panel on the remaining four grounds. *Al-Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) ("*Al-Bahlul I*"). On June 12, 2015, the panel vacated Bahlul's conviction on the Define & Punish Clause and Article III grounds. *Al-Bahlul v. United States*, 792 F.3d 1 (D.C. Cir. 2015) ("*Al-Bahlul II*"). The panel majority did not reach the remaining First Amendment and Equal Protection grounds, although Judge Henderson opined in dissent that these grounds lacked merit.

On October 20, 2016, the *en banc* Court reversed the panel's decision. While no single holding earned a majority, five members of this Court voted to uphold Bahlul's conviction for conspiracy, applying *de novo* review to his Define & Punish Clause and Article III challenges. Judge Millet concurred in the result, but only because she deemed plain error review appropriate.

Judge Millet faulted Bahlul for seeking "to overturn his conviction on the basis of constitutional arguments that he could have made before the military commission, but did not." Millet Concurring Op. at 8. In evaluating whether Bahlul adequately raised the Define & Punish and Article III objections below, counsel for Bahlul as well as members of this Court focused on oral objections Bahlul made at a pre-trial hearing before the military commission on September 24, 2008. *See* Kavanaugh Concurring Op. at 3 n.1. Judge Millet concluded that these objections were too generic to "preserve the specific constitutional challenges that Bahlul now presses." Millet Concurring Op. at 10 (citing Pet. App. 109–112). While Judge Millet did "not believe a defendant must cite to any particular case or style arguments in a particular way to sufficiently preserve them," she concluded that Bahlul's objections at the September 2008 hearing were nothing more than a "generic diatribe." Millet Concurring Op. at 11.

Six members of this Court also voted to deny Bahlul's First Amendment and Equal Protection claims. Judge Kavanaugh, joined by Judges Griffith, Henderson, and Brown, relied upon Judge Kavanaugh's separate opinion in *Bahlul I*. Kavanaugh Concurring Op. at 24 n.12. Judge Millet, joined by Judge Wilkins, did not join Judge Kavanaugh's opinion, but instead dismissed both claims on plain error review, citing Bahlul's purported failure to preserve them before the military commission. Millet Concurring Op. at 45.

ARGUMENT

Bahlul petitions this Court for a meaningful opportunity to be heard on his Equal Protection challenge to the segregation of the military commission system as discrimination based upon nationality. 10 U.S.C. § 948c. This issue was neither briefed nor argued in either rehearing *en banc*. And Judges Millet and Wilkens decision to rule against Bahlul on this ground under plain error review was based upon a misreading of the record, which led them to wrongly assume that he failed to raise this claim below.

Judge Millet based her conclusion on the absence of any discussion of Equal Protection during a lengthy colloquy Bahlul had with the military judge at the September 2008 pre-trial hearing. Judge Millet concluded that Bahlul's objections were just a "generic diatribe" and given that they were largely political rather than legal in nature, they were too general to preserve the specific legal claims Bahlul raised on appeal.

Even assuming *arguendo* that Bahlul's oral objections at the September 2008 hearing were insufficiently specific to raise his Equal Protection claim, he does not rely – and has not relied – upon those parts of the record. Rather, Bahlul continues to rely, as he did before the panel upon a written pleading that he personally prepared, which is variously referred to in the record as the "nine points of the boycott" or "nine points." The Nine Points were first entered into the record

on January 11, 2006 and then again, in substance, on August 15, 2008 as Appellate Exhibit 30, when Bahlul was still *pro se*. (Attachment A). Bahlul described this document as his "nine political and legal reasons" that he objected to the proceedings, (Attachment B at 16), and Objection #7 squarely contests the military commissions' "racial discrimination based on nationality." (Attachment A at 4).[1]

To put the Nine Points in context, Bahlul prepared this document in Arabic as a formal written pleading, which he read into the record at a pre-trial hearing on January 11, 2006. However one characterizes the objections he orally raised at the September 2008 hearing, Bahlul's Nine Points are highly specific and legal in nature. For example, Bahlul objects to being denied "the right of free choice of a non-U.S. lawyer and a noncombatant lawyer, a mutual lawyer" and "because of the secret evidence issue," in addition to challenging the military commissions discrimination on the basis of nationality. (Attachment A at 4-5).

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[1] Furthermore, insofar as the Equal Protection challenge implicates personal jurisdiction, longstanding military law holds that constitutional or statutory defects in a military tribunal's "jurisdiction over the person, as well as jurisdiction over the subject matter, may not be the subject of waiver." *United States v. Garcia*, 5 C.M.A. 88, 94 (C.M.A. 1954); *see also United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000) ("When an accused contests personal jurisdiction on appeal, we review that question of law *de novo*[.]").

Lest there be any doubt, Bahlul insisted that these Nine Points were not a political diatribe, but a legal argument that he deemed crucial to his ability to mount his defense. Bahlul stated that "I think there is a misconception or misunderstanding with respect to the meaning of 'boycott.' I would like clarify the meaning of boycotting. It doesn't mean that I'm going to be totally silent." (Attachment B at 2). Bahlul further explained that "the boycott from my perspective was based on nine points, which all have a legal nature – of a legal nature, and that they have been detailed in the past time." (Attachment B at 3).

On August 7, 2008, Salim Hamdan was convicted by a military commission and sentenced to an additional 4.5 months of confinement. This corresponded with the replacement of COL Peter Brownback, USA, who had served as the military judge in Bahlul's case since 2004, with Col Ronald Gregory, USAF. During Col. Gregory's first pre-trial hearing in Bahlul's case on August 15, 2008, Bahlul sought to reiterate his Nine Points on the record to, as he put it, "make it easier for the Judge and for myself to explain my position and to do some kind of settlement today, especially after the sentence to Salim Hamdan." (Attachment B at 16).

For reasons that have never been clarified, counsel for the government retained custody over Bahlul's legal documents and apparently misplaced the Nine Points in advance of the August 2008 hearing. (Attachment B at 17). In their place, trial counsel provided an excerpt of transcript containing an English-language

translation of Bahlul's reading the Nine Points into the record in January 2006, which was entered into the record as Appellate Exhibit 30.

Emphasizing the legal significance that Bahlul placed on the Nine Points, he objected that "the translated copy is not considered a legal document, like the document I written by my own handwriting … I don't consider this a legal document unless it is in my own handwriting and my signature. So I don't accuse the prosecution that they have mistranslated; it is just being fair on my part, and I want what I have written in my own hands." (Attachment B at 19).

Indeed, the discussion of the Nine Points spans nearly twenty pages of the record of trial, in which it is clear that Bahlul found the loss of this "legal document" extremely distressing:

> ACC [MR. AL BAHLUL]: … If such a legal document like this is lost, what kind of court is this? There's going to be a lot of exhibits and objections. If such legal document is missing – I hope that you don't consider me – this kind of sarcasm and disrespect to Your Honor.
>
> MJ [COL GREGORY]: Oh no, no, I don't.
>
> ACC [MR. AL BAHLUL]: It's just that I feel I know – it's just a comment about all of these confused management. I just want one document. How do you ask me to accept a lawyer when we have so many contradictions in this court?

(Attachment B at 21). Indeed, Bahlul complained that the loss of the Nine Points caused him legal prejudice, stating that "it's to the prosecution's benefit to hide these nine points." (Attachment B at 26).

The deciding votes in this Court against Bahlul's Equal Protection claim were predicated upon the mistaken belief that he failed to raise his claim with sufficient specificity to warrant *de novo* review. The record shows otherwise. While the translation quality is extremely poor, Bahlul's written objection to the military commission's "discrimination based on nationality" unambiguously asserted "the arguments advanced on appeal." *United States v. Sheehan*, 512 F.3d 621, 627 (D.C. Cir. 2008).

Furthermore, based on the record in this case, any doubts about the adequacy of Bahlul's Nine Points in raising this claim must be resolved against the government. It alone was the custodian of his legal papers, it is responsible for providing this Court with the record on appeal, and as it stipulated in August 2008, it lost the only copy of Bahlul's Nine Points. Making matters worse, the excerpt of transcript that was substituted in its place is repleate with translation errors and inexplicably omits any reference to his fourth objection altogether. This corrupted fragment of transcript makes any critique the legal precision of Bahlul's Nine Points, and Objection #7 in particular, nothing more than "an exercise in creative

imagination," *United States v. Workcuff*, 422 F.2d 700, 702 (D.C. Cir. 1970), for which Bahlul deserves at least the benefit of the doubt.

While counsel empathizes with this Court's probable fatigue with this case, this Court's decision to affirm a life sentence in a criminal case ought to be based on the actual record. Especially given the significance of the constitutional issue at stake, "the interests of justice also require, in a case such as this, that we not 'shield ourselves from the knowledge of what transpired below.'" *Chavez v. United States*, 656 F.3d 512, 514 (9th Cir. 1981) (quoting *United States v. Aulet*, 618 F.2d 182, 187 (2d Cir. 1980)).[2] Bahlul has a statutory right to meaningful appellate review of issues he raised before the military commission. 10 U.S.C. § 950g(a). In fact, this Court has rebuffed every effort by a military commission defendant to seek interlocutory review, in part, because of the robustness of this Court's post-trial review, such that "if [a defendant] is convicted, the convening authority and the CMCR affirm that conviction, [the defendant] appeals to this Court and convinces

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[2] *See also Allen v. Alabama*, 732 F.2d 858 (11th Cir. 1984) (granting rehearing where Court had overlooked that certain issues raised were not procedurally foreclosed); *United States v. Long*, 304 Fed.Appx. 982 (3d Cir. 2008) (granting rehearing when the panel mistakenly concluded that the appellant had forfeited his claim for appellate review); *Mark Andy v. Hartford Fire Ins.*, 233 F.3d 1090 (2000) (reconsidering an opinion that had been predicated upon a misreading of the record that a party had conceded a dispositive fact); *United States v. Zanzucchi*, 892 F.2d 56 (9th Cir. 1989) (granting rehearing when the Court's opinion was "based on a misreading of the record as it relates to the bill of particulars").

us his constitutional arguments are correct, we can then vacate the CMCR's decision." *In re Al-Nashiri*, 791 F.3d 71, 80 (D.C. Cir. 2015).

Furthermore, it is not in the public's interest to evade a challenge that Bahlul unambiguously raised by imposing code pleading requirements on this *pro se* defendant. While Bahlul cast his legal arguments in terms of fundamental fairness as opposed to the nuances of Fifth Amendment doctrine, he identified the most troubling aspect of the tribunal in which he was prosecuted. For the first time in history, the United States has segregated the criminal justice system.

As Bahlul well understood, this separation was not – and was not intended to be – equal. Instead, he correctly saw that he was being tried in a system that was designed to deprive non-citizens of substantive and procedural rights that would otherwise be available to them in Article III courts, courts-martial, and military commissions convened under the Uniform Code of Military Justice. Indeed, it is telling that a man who is roundly condemned for his un-American values nevertheless thought to protest – in writing – the fact that he was being treated as an exception to the foundational principle of the American legal system: equal justice under law.

While some members of this Court have dismissed this issue as "frivolous," the former acting Solicitor General had no trouble concluding that "such rank discrimination is constitutionally suspect." Neal Katyal, *Equality in the War on*

Terror, 59 Stan. L. Rev. 1365, 1367 (2007) ("The result is not only that the legislation runs afoul of the Constitution's guarantee of equal protection, it also eliminates that legislation from the zone of deference traditionally due to the political branches. To make matters worse, such line drawing on the basis of alienage also undermines effective fighting in the war on terror."). Prosecutors in Guantanamo have even filed anticipatory motions seeking to obtain pre-emptive rulings on this issue because "[t]he question of whether the 2009 MCA violates equal protection is a foundational legal question that should, in the interest of judicial economy, be resolved early in the litigation." (Attachment C at 2).

Judge Kavanaugh dismissed this claim because he concluded that discrimination by the federal government on the basis of alienage is ordinarily permissible and "many federal laws that draw distinctions between U.S. citizens and aliens." *Al-Bahlul I*, 767 F.3d at 75 (Kavanaugh, dissenting in part). Crediting the government's "vital national security interest in establishing a military forum in which to bring to justice foreign unlawful belligerents," Judge Kavanaugh concluded that Congress had a rational basis for discriminating. *Id*.

As an initial matter, Judge Kavanaugh is incorrect that discrimination against non-citizens is presumptively permissible so long as it is the federal government doing the discriminating. Bahlul is within the exclusive jurisdiction and control of the United States. *Boumediene v. Bush*, 553 U.S. 723, 769 (2008).

The Supreme Court has consistently held that the Fifth Amendment protects him "from invidious discrimination by the Federal Government," regardless of his citizenship or legal status. *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

Moreover, the issue here is not whether the government has a rational interest in establishing a "military forum" to try war criminals. It is what goal Congress could have rationally believed it would achieve by legislating apartheid into the criminal justice system for the first time in our nation's history. If one reviews the legislative history, that goal is clear. Congress feared the political accountability that would result if the military commissions' rump procedures were applied to citizens. That is the very definition of invidious discrimination and the 2006 Act is by design a law that "lays an unequal hand on those who have committed intrinsically the same quality of offense," which is no less "invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964).

Even during World War II, where national security was used as a rationale for discrimination, *Korematsu v. United States*, 323 U.S. 214, 219 (1944), the United States did not establish special tribunals to try aliens apart from citizens. *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942); *see also* I.C.R.C., Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War 623 (1960). ("Nationals, friends, enemies, all should be subject to the same rules of procedure and judged

by the same courts. There is therefore no question of setting up special tribunals to try war criminals of enemy nationality."). Every time military commissions have been used throughout our history, citizen war criminals have faced justice alongside non-citizens. And as the Supreme Court held in *Quirin*, American citizens are subject to the jurisdiction of law-of-war military commissions to the same extent as non-citizens because all enemy war criminals pose the same threat. This rationale is even more compelling today. Citizens are just as capable of joining al Qaeda, have been responsible for most of the terrorist attacks to occur in this country over the past fifteen years, and "if released, would pose the same threat of returning to the front during the ongoing conflict." *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality op.).

In fact, the only example of a similarly discriminatory law in U.S. history was the Chinese Exclusion Act, 27 Stat. 25 (1892). It created special commissions in which to prosecute violations of the immigration laws. More than century ago (the very same year in which "separate but equal" was upheld, *Plessy v. Ferguson*, 163 U.S. 537 (1896)), the Supreme Court unanimously struck down this law because it imposed criminal penalties on "persons," in the language of the Fifth Amendment, in a discriminatory manner and without the benefit of judicial trial. *Wong Wing v. United States*, 163 U.S. 228 (1896). Neither Judge Kavanaugh nor the government has addressed or distinguished *Wong Wing*.

In a political climate in which non-citizens are increasingly vilified as rapists and murderers, this Court's summary endorsement of a legal system that invidiously segregates and discriminates against them is as dangerous as it is unjust to the petitioner in this case. This is a serious issue. The prosecutors in Guantanamo have recognized it as such. Legal scholars and government officials have recognized it as such. And most importantly, Bahlul recognized it as such and duly objected. As deplorable as Bahlul may be to members of this Court, "in undertaking to try [him] and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction." *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006). This issue deserves to be reviewed *de novo* on the basis of full briefing and argument, not summarily dismissed because of a misreading of the record.

CONCLUSION

For the foregoing reasons, this Court should rehear Petitioner's Equal Protection challenge on the merits, either by remanding it to the panel or via rehearing *en banc*.

Respectfully submitted,

/s/ Michel Paradis
Michel Paradis
Mary McCormick
1620 Defense Pentagon
Washington, DC 20301-1620
michel.paradis@osd.mil
TEL: 1.703.696.9490 x115
FAX: 1.703.696.9575

MAJ Todd E. Pierce, JA, U.S. Army
(Ret.) Senior Fellow
Univ. of Minnesota Human Rights
Center Mondale Hall, N-120
229-19th Avenue South
Minneapolis, MN 55455

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016 a copy of the foregoing was filed electronically with the Court. Notice of this filing will be sent to all parties by operation of this Court's electronic filing system. Parties may access this filing through the Court's system.

Dated: October 24, 2016

Respectfully submitted,

/s/ Michel Paradis
Michel Paradis
1620 Defense Pentagon
Washington, DC 20301-1620
michel.paradis@osd.mil
TEL: 1.703.696.9490 x115
FAX: 1.703.696.9575

Counsel for Petitioner