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Time's Up, Councilman: Why Military Commissions Warrant Exemption from Abstention Doctrine

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TIME'S UP, COUNCILMAN: WHY MILITARY COMMISSIONS WARRANT EXEMPTION FROM ABSTENTION DOCTRINE

*Alex W. S. Lilly**

In 2017, two Guantánamo Bay detainees filed writs of certiorari with the Supreme Court of the United States. Through different claims, both men argued that the military commissions convened to prosecute them lacked subject matter jurisdiction to do so. The first man, Ali Hamza Ahmad Suliman al Bahlul, challenged his conspiracy conviction on the basis that it is unconstitutional to try purely domestic offenses in a non-Article III tribunal. The second, Abd al Rahim al-Nashiri, has not yet been tried. As such, he raised pretrial objections to his military commission's competence to try him for crimes committed pre-9/11. In October 2017, the Supreme Court denied both petitions for certiorari.

The Court's denial of both petitions had a devastating impact on each defendant individually. For Bahlul, it upheld both a life sentence and the lower D.C. Circuit Court of Appeals' questionable determination that military commissions may try purely domestic offenses—like conspiracy—without violating Article III. In Nashiri, the D.C. Circuit determined that Councilman abstention—the doctrine that generally prevents federal habeas review of military proceedings until post-conviction appeal—applies to Nashiri's case. By declining to grant his writ, the Court foreclosed Nashiri's opportunity to raise a basic jurisdictional challenge until after his eventual conviction years down the road.

Refusing to hear these cases also contributed to a larger public policy problem looming over the military commissions. Both natural justice and rational terrorism policy require judicial processes that can efficiently and definitively prosecute those who commit horrendous crimes. Still, despite an American justice system that purports to be a beacon of the rule of law in the world, our courts display continued and outright aversion to resolving important questions posed by foreign defendants. In their current form, the military commissions

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system and corresponding appeals process provide minimal due process while leaving basic constitutional and statutory questions unanswered. This sad state of affairs contributes to animosity toward the “war on terror” abroad, forces victims to wait years for uncertain outcomes, and undermines the basic assumption that American justice is grounded in the rule of law.

Bahlul and Nashiri, together, are illustrative of this problem. The Nashiri court’s broadening of Councilman abstention now bars every Guantánamo detainee from raising collateral jurisdictional challenges to the military commissions. Such foreseeable challenges include—but are not limited to—the same paramount constitutional question previously raised in Bahlul.

In short, the Supreme Court’s refusal to hear both cases allows Article III courts to duck the responsibility to reach the merits on these questions anytime soon. I propose that Congress amend the 2009 Military Commissions Act to create an exception to Councilman abstention for military commissions—forcing federal courts to confront these cases on their merits, and providing the certainty and finality of process that terrorist prosecutions so badly need.

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INTRODUCTION

On October 12, 2000, the U.S.S. Cole, a U.S. navy destroyer, was on its way to join a fleet of warships tasked with enforcing American trade sanctions against Iraq.¹ It stopped to refuel in Aden, Yemen, and was scheduled to remain at port for a short four hours before re-embarking on its mission.² At 12:15PM local time, however, an explosion erupted, tearing through the ship’s port side and into the engine room, the mess, and the living quarters.³ Seventeen U.S. sailors were killed and 38 more were injured.⁴ The culprit was a small, motorized rubber dinghy manned by two suicide bombers and alleged

1. *This Day in History: October 12*, HISTORY (last updated Aug. 21, 2018), <http://www.history.com/this-day-in-history/uss-cole-attacked-by-terrorists> [<http://perma.cc/FT5K-ZZ82>].

2. *Id.*

3. *Id.*

4. *Id.*

al Qaeda affiliates.⁵ The attack's success brought its mastermind—Abd al Rahim al-Nashiri—immediate status within al Qaeda and led to Nashiri's subsequent appointment as chief of the terrorist network's operations for the Arabian Peninsula.⁶

After the attack, a man named Ali Hamza Ahmad Suliman al Bahlul created what became a popular propaganda video celebrating the bombing of the Cole and encouraging jihad targeting the United States.⁷ Impressed with the video and its popularity, then-Saudi exile Osama bin Laden⁸ appointed Bahlul as one of his top aides and public relations secretary.⁹ Bahlul quickly became the indispensable brainchild of al Qaeda's propaganda and recruitment machine, leading one United States federal appeals court judge to liken him to Joseph Goebbels¹⁰—Hitler's infamous propaganda minister in 1930s Nazi Germany. He wrote public statements for bin Laden, maintained al Qaeda databases, and arranged two of the 9/11 hijacker's loyalty oaths and “martyr wills.”¹¹ Bahlul even attempted to participate in the commission of the 9/11 attacks himself, but bin Laden refused. As

5. *Id.*

6. *Al Qaeda Aims at the American Homeland*, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U. S. (last visited Jan. 2, 2018), https://9-11commission.gov/report/911Report_Ch5.htm [<http://perma.cc/54G8-RJS9>].

7. *Al Bahlul v. United States: D.C. Circuit Reinterprets Military Commissions Act of 2006 to Allow Retroactive Prosecution of Conspiracy to Commit War Crimes*, 128 HARV. L. REV. 2040 (May 10, 2015) (citing *Al Bahlul v. United States*, 767 F.3d 1, 5-6 (D.C. Cir. 2014)).

8. *Osama Bin Laden: Timeline* (last visited Jan. 1, 2019) <http://www.cnn.com/CNN/Programs/people/shows/binladen/timeline.html> [<https://perma.cc/LT75-X7SU>].

9. HARV. L. REV. *supra* note 7 (citing *Al Bahlul v. United States*, 767 F.3d 1, 6 (D.C. Cir. 2014)).

10. *Ali Hamza Ahmad Suliman Al Bahlul v. United States*, 416 U.S. App. D.C. 340, 792 F.3d 1, 367 (2015) (Henderson, J., dissenting) (citing *Bahlul v. United States*, 767 F.3d 1, 33-34, 412 U.S. App. D.C. 372 (D.C. Cir. 2014) (en banc) (Sliney, J., concurring)).

11. Samantha Arrington Sliney, *U.S. v. Al Bahlul: Where It's Been and Where It's Going*, HARVARD L. SCHOOL NAT'L SEC. J. (March 22, 2016), available at <http://harvardnsj.org/2016/03/us-v-al-bahlul/> [<http://perma.cc/9MHH-G2W6>] (citing *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1162 (2011)); see also Lydia Wheeler, *Appeals court upholds conspiracy conviction for al Qaeda publicist*, THE HILL (Oct. 20, 2016), <http://thehill.com/regulation/court-battles/302004-federal-appeals-court-upholds-conspiracy-conviction-for-al-qaeda> (A martyr will is a “propaganda [declaration] documenting al Qaeda's role in the attacks.”).

the terrorist network's resident "media man," Bahlul was too valuable to lose.¹²

In the context of the post-9/11 American political landscape, Bahlul and Nashiri are decidedly unsympathetic defendants. Both men were eventually captured;¹³ both were charged in military commission trials with various crimes related to the "war on terror,"¹⁴ and both are currently held at the United States military stronghold in Guantánamo Bay, Cuba.¹⁵

Neither is a stranger to the federal appeals system. In different capacities, both men have made their rounds through the United States Court of Military Commission Review (CMCR) and the D.C. Circuit Court of Appeals (D.C. Circuit)—the designated appellate tribunals for trials conducted by military commission—for the greater part of the last decade.¹⁶ After the Supreme Court denied both of

12. Sliney, *supra* note 11 (citing *Bahlul*, 767 F.3d at 6).

13. Bahlul was captured in December 2001. In 2002, Bahlul was sent from Pakistan to Guantánamo Bay, Cuba and Nashiri was captured and held at CIA "black sites" for several years. Harry Graver, *Military Commissions Loom Large at Supreme Court*, LAWFARE (Oct. 3, 2017), <https://www.lawfareblog.com/military-commissions-loom-large-supreme-court> [<http://perma.cc/EF6M-U84X>].

14. See, e.g., Matthew Bloom, "I Did Not Come Here To Defend Myself": Responding to War on Terror Detainees' Attempts To Dismiss Counsel and Boycott the Trial, 117 YALE L. J. 70 (2007) (describing Bahlul and other Guantánamo defendants as "war on terror detainees" who were tried pursuant to George W. Bush's 2001 military order sanctioning terrorist prosecutions in military commissions). See also Carol Rosenberg, *Conviction of Guantánamo's Lone Lifer Won't Be Reviewed by Supreme Court*, MIAMI HERALD (Oct. 10, 2017), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article178042466.html> [<http://perma.cc/8MFX-MW8B>] (noting that the merits of Nashiri's claims largely pivot on when the United States' "War on Terror" began).

15. Bahlul is currently serving a life sentence at Guanántamo. See Rosenberg, *supra* note 14. As of March 2018, Nashiri is still in custody at Guantánamo. He will remain through the conclusion of his military commission prosecution, which has been delayed following significant controversy since October 2017. Charlie Savage, *Guantánamo Lawyers Challenge Government's Explanation for Hidden Microphone*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/us/politics/guantanamo-hidden-microphone.html> [<http://perma.cc/6DKT-XKFC>].

16. See Graver, *supra* note 13 (outlining the progression of the cases). See also *USS Cole Bombing Fast Facts*, CNN (last updated Oct. 15, 2018), <https://www.cnn.com/2013/09/18/world/meast/uss-cole-bombing-fast-facts/index.html> [<https://perma.cc/FZ9N-QF9M>] (providing a timeline of events following the USS Cole bombing).

their writs of certiorari in October 2017,¹⁷ Bahlul will serve out the rest of his life in detention and¹⁸ Nashiri's trial and appeals process will continue indefinitely,¹⁹ consuming an outrageous amount of federal resources over the coming decade.²⁰

This Note does not attempt to evaluate the claims Bahlul and Nashiri raise on their merits. Instead, I propose a practical, legislative mechanism to ensure that constitutional questions hanging over the military commissions are resolved in a timely manner.

Part I of this Note provides a brief history of the military commissions system in the United States. Moreover, it describes how commissions at Guantánamo came to be pursuant to the Military Commissions Acts of 2006 and 2009.

Part II reviews the procedural history of *Bahlul v. United States*, describes the charge of "conspiracy" as it is traditionally applied in U.S. domestic and international law, and discusses the Supreme Court's denial of certiorari in *Bahlul*.

Part III discusses *Nashiri v. Trump* and the Court's decision to deny certiorari in that case less than a week after declining to hear *Bahlul*.

In Part IV, I analyze the Councilman abstention doctrine and discuss why the D.C. Circuit should not have abstained in *Nashiri*.

Part V analyzes the detrimental effects of the Supreme Court's refusal to hear *Bahlul* and *Nashiri*.

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17. *Bahlul v. United States*, 138 S.Ct. 313 (Mem) (2017); *Al-Nashiri v. Trump*, 138 S.Ct. 354 (Mem) (2017).
 18. Robert Barnes, *Supreme Court Turns Down Guantanamo Detainee's Appeal*, WASH. POST (Oct. 10, 2017), https://www.washingtonpost.com/politics/courts_law/supreme-court-turns-down-guantanamo-detainees-appeal/2017/10/10/ fdc3fe06-ade8-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.ceada5968a24 [<http://perma.cc/NKL3-W8YF>].
 19. *See* Steven Vladeck (@steve_vladeck), TWITTER (Oct. 13, 2017, 8:08 AM), https://twitter.com/steve_vladeck/status/918810730215899137 [<https://perma.cc/2PA8-7NNB>] ("Even optimistically, Al-Nashiri's post-conviction appeal would not return to the D.C. Circuit before 2024."); *see also* Brief of the National Institute of Military Justice as *Amicus Curiae* in Support of the Petitioner, *Abd al-Rahim al-Nashiri v. Donald J. Trump, President of the United States, et al.* at 3 (May 31, 2017) (No. 16-8966), *available at* <https://www.justsecurity.org/wp-content/uploads/2017/05/Nashiri-NIMJ-Amicus.pdf> [<https://perma.cc/X2TW-BWEG>] (noting that al-Nashiri's case would not be resolved until after his appeal returns to the courts in 2024).
 20. *See Guantánamo by the Numbers*, HUMAN RIGHTS FIRST (Oct. 10, 2018), <https://www.humanrightsfirst.org/resource/guantanamo-numbers> [<http://perma.cc/8B2N-MSPJ>] ("Yearly cost to hold each detainee at Guantánamo: More than \$10 million. Annual cost to operate Guantánamo: Approximately \$445 million.").

Finally, in Part VI, I propose that Congress should carve out an exception to the Councilman abstention doctrine by adding a provision to the 2009 MCA that would require federal courts to exercise collateral review over jurisdictional challenges to the military commissions.

PART I: MILITARY COMMISSIONS IN THE UNITED STATES

In the United States, military commissions are military tribunals convened to prosecute individuals for “unlawful conduct associated with war.”²¹ On November 13, 2001, President George W. Bush issued a military order authorizing the establishment of a military commission to try those individuals responsible for the 9/11 terrorist attacks.²² Unlike traditional Article III courts, current military commissions at Guantánamo Bay are a variety of specialized Article I trial courts sanctioned pursuant to the Military Commissions Act (MCA) of 2009²³ (and, previously, the MCA of 2006).²⁴ The tribunals may try “alien unprivileged enemy belligerent[s]” that have engaged in—or “purposefully and materially supported”—hostilities against the United States or its coalition partners.²⁵ The commissions may also try such enemy combatants that were members of al Qaeda before their capture.²⁶ The MCA expressly enumerates 32 offenses that may be tried by a military commission, as long as they were “committed in the context of and associated with hostilities.”²⁷

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21. *Military Commissions History, Snapshot: Military Commissions in the United States*, OFF. OF MIL. COMMISSIONS, <http://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx> [<http://perma.cc/DYU8-GELD>] (last visited Dec. 27, 2017).
 22. *Id.*; Military Order of Nov. 13, 2001, 3 C.F.R. 918 (2002), reprinted as amended in 10 U.S.C. § 801 (2012), available at <http://www.mc.mil/Portals/0/MilitaryOrderNov2001.pdf> [<https://perma.cc/AYU6-CJD5>].
 23. Military Commissions Act of 2009, Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574–614 (2009).
 24. Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2623–24 (formerly codified at 10 U.S.C. § 950j(b)).
 25. How Military Commissions Work, OFF. OF MIL. COMMISSIONS <http://www.mc.mil/ABOUTUS.aspx>. [<https://perma.cc/W3F4-7WMJ>] (last visited Dec. 27, 2017).
 26. *Id.*
 27. Graver, *supra* note 13 (citing Military Commissions Act). See also Recent Case, *In re Al-Nashiri: D.C. Circuit Abstains from Adjudicating Habeas Petition of Guantanamo Detainee Tried by Military Commission*, 130 HARV. L. REV. 1249 (Febr. 10, 2017), available at <https://harvardlawreview.org/2017/02/in-re-al-nashiri-2/> [<https://perma.cc/H7JP-KMY5>] (citing 10 U.S.C. § 950p(c) (2012) (“Hostilities” are ‘any conflict subject to the laws of war.’” (citing 10 U.S.C. § 948a(9))).

In the military order, President Bush argued that it would be impractical to extend the legal and evidentiary principles traditionally applied in federal criminal trials to military commissions.²⁸ Despite the Bush Administration's loud support for its policy of denying accused terrorists access to federal courts²⁹—and although enemy combatants may be tried by military commission for international war crimes³⁰—an enemy combatant is not precluded from prosecution in an Article III court.³¹ President Barack Obama had more faith than his predecessor in the competence of Article III courts to try accused terrorists, stating that “in contrast to the commission process, our Article III federal courts have proven to have an outstanding record of

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28. *Military Commissions History*, *supra* note 21 (quoting Military Order of Nov. 13, 2001, 3 C.F.R. 918 (2002), reprinted as amended in 10 U.S.C. § 801 (2012), available at <http://www.mc.mil/Portals/0/MilitaryOrderNov2001.pdf> [<https://perma.cc/AYU6-CJD5>]).
29. Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 434-35 (2002).
30. Stephen I. Vladeck, *The Long Reach of Guantánamo Bay Military Commissions*, N.Y. TIMES (Oct. 4, 2017), <https://www.nytimes.com/2017/10/04/opinion/the-long-reach-of-guantanamo-bay-military-commissions.html> [<https://perma.cc/9L39-4XWT>] (“[T]he Supreme Court concluded during World War II that [international war crimes] committed by enemy belligerents fell outside of the Constitution’s jury-trial protections — which otherwise require that all serious crimes be tried in civilian court.”) (referring to *Ex Parte Quirin*, 317 U.S. 1, 28 (1942)) (“Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.”). “[The U.S. Constitution] 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.” *Id.* at 40.
31. In fact, far more terrorists have been successfully convicted in U.S. federal civilian courts than in military commissions. Between September 11, 2001 and December 31, 2016, Article III courts prosecuted and convicted at least 549 people for terror-related charges, while military commissions have secured only 8 convictions—three of which have since been overturned or dismissed. David Kris, *Law Enforcement as a Counterintelligence Tool*, LAWFARE (Mar. 6, 2018, 1:00 PM), <https://www.lawfareblog.com/law-enforcement-counterintelligence-tool> [<http://perma.cc/43KE-8NUZ>] (citing U.S. DEP’T OF HOMELAND SECURITY and U.S. DEP’T OF JUST., EXECUTIVE ORDER 13780: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES INITIAL SECTION 11 REPORT, 2 (2018), available at <https://www.justice.gov/opa/press-release/file/1026436/download> [<https://perma.cc/L5MA-PMPV>]).

convicting some of the most hardened terrorists.”³² The commissions have been the subject of widespread criticism, and are largely considered to be a “failed experiment”³³ and an “almost-unmitigated catastrophe.”³⁴ Still, more than sixteen years after President Bush first established them, military commissions at Guantánamo remain operational—and the doors do not appear to be closing anytime soon.³⁵

PART II: BAHLUL V. UNITED STATES

Broadly, *Bahlul* is illustrative of a judicial system built to shunt detainee structural challenges to its authority. More narrowly, *Bahlul* matters to our inquiry because the case challenged the commissions’ constitutional authority to charge non-law-of-war offenses. Because the government has become disturbingly comfortable bringing such

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32. President Barrack H. Obama, *Remarks by the President on Plan to Close the Prison at Guantanamo Bay*, The White House Office of the Press Secretary (Feb. 23, 2016, 10:30 AM), <https://www.whitehouse.gov/the-press-office/2016/02/23/remarks-president-plan-close-prison-guantanamo-bay> [<https://perma.cc/MDD3-53N7>]).
33. Amy Davidson Sorkin, *At Guantánamo, Are Even the Judges Giving Up?*, THE NEW YORKER (Feb. 20, 2018), <https://www.newyorker.com/news/daily-comment/at-guantanamo-are-even-the-judges-giving-up> [<https://perma.cc/7HMD-DJTV>] (quoting Rick Kammen, former “learned counsel” of Nashiri’s defense team).
34. Kris, *supra* note 31.
35. In his first State of the Union address, President Donald Trump announced his commitment to keeping the Guantánamo military detention facility open indefinitely. He subsequently signed an Executive Order codifying that commitment. Julian Borger, *Donald Trump Signs Executive Order to Keep Guantánamo Bay Open*, THE GUARDIAN (Jan. 30, 2018), <https://www.theguardian.com/us-news/2018/jan/30/guantanamo-bay-trump-signs-executive-order-to-keep-prison-open> [<https://perma.cc/DKD4-N9WC>]. Military commissions at Guantánamo show no signs of slowing themselves. Khalid Shaikh Mohammed and other defendants charged with crimes connected to the 9/11 terrorist attacks are slated to be tried in 2019 at the earliest. Carol Rosenberg, *9/11 Prosecutors Propose 2019 Trial Date, But Judge Says Not So Fast*, MIAMI HERALD (Aug. 24, 2017, 8:38 AM), <http://www.miamiherald.com/news/world/world/americas/guantanamo/article169047262.html> [<https://perma.cc/272B-V5X7>]. In February 2018, the Pentagon fired the commissions’ convening authority Henry Rishikof, who was reportedly engaged in negotiations for plea deals—which would have eliminated the prospect of a protracted trial—with the 9/11 defendants. Charlie Savage, *Before Firing, Tribunal Official Was Exploring Plea Deal to End 9/11 Case*, N.Y. TIMES (Feb. 11, 2018), <https://www.nytimes.com/2018/02/10/us/politics/guantanamo-sept-11-rishikof.html> [<https://perma.cc/GM32-63BD>].

charges against military commission defendants, the claims Bahlul raised will almost certainly be recycled by future defendants—and will almost certainly be delayed by the abstention precedent established in *Nashiri*.

A. *Bahlul Procedural History*

In 2001, Ali Hamza Ahmad Suliman al Bahlul was found and captured in Pakistan.³⁶ In 2002, United States forces brought Bahlul to Guantánamo Bay, Cuba.³⁷ The *Bahlul* case slowly snaked its way up and down the military tribunal and federal appeals court processes for more than thirteen years in the period from 2004—when Bahlul was first charged by military commission at Guantánamo³⁸—to 2017, when the Supreme Court denied his writ of certiorari and concluded his case at long last.³⁹

Initially, in February 2008, Bahlul was charged for three offenses under the 2006 MCA: conspiracy to commit war crimes, providing material support for terrorism, and solicitation of others to commit war crimes.⁴⁰ The prosecution alleged that through his work for al Qaeda, Bahlul had conspired and solicited others to commit seven object crimes enumerated in the 2006 MCA: murder of protected persons, murder in violation of the law of war, attacking civilians, attacking civilian objects, terrorism, providing material support for terrorism, and destruction of property in violation of the law of war.⁴¹

Bahlul boycotted his commission's proceedings and ordered his counsel not to participate—not even to present a defense.⁴² The commission convicted him on all three counts in November of that year,⁴³ finding that he had conspired to commit and solicited all seven alleged object offenses, and actually committed ten additional prohibited overt acts.⁴⁴ Bahlul was sentenced to serve the rest of his

36. Graver, *supra* note 13.

37. *Id.*

38. *Id.*

39. *Bahlul v. United States*, 138 S.Ct. 313 (Mem) (2017). *See also* Ram Eachambadi, *Supreme Court denies review in conviction of Bin Laden's personal assistant*, JURIST (Oct. 10, 2017), <http://www.jurist.org/paperchase/2017/10/supreme-court-denies-review-in-conviction-of-bin-ladens-personal-assistant.php> [<https://perma.cc/67LP-SSLU>].

40. *Al Bahlul v. United States*, 767 F.3d 1, 7 (D.C. Cir. 2014)).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

life in prison.⁴⁵ While the case may seem uncomplicated on its face,⁴⁶ it raised a serious legal question for both his military commission and subsequent federal appellate court panels to grapple with: whether there are constitutional requirements, arising out of Article III, imposed on military commissions.⁴⁷

Bahlul pushed this question as far as the federal appeals process would allow. After losing at trial, he appealed his three-charge conviction to the Court of Military Commission Review in January 2010.⁴⁸ That chamber affirmed his conviction on all counts in September 2011.⁴⁹ From there, Bahlul took his case to federal court in accordance with the 2006 MCA.⁵⁰

In 2012, Bahlul appealed the CMCR decision to the D.C. Circuit⁵¹ in a case that would come to be known as *Al Bahlul I*.⁵² Among other claims, Bahlul asserted that his conviction violated a number of constitutional guarantees.⁵³ First, he argued that his conviction violated the Constitution's Articles I and III because the government had charged him with offenses that could only be heard by an Article III court.⁵⁴ Second, Bahlul asserted that the *Ex Post Facto* clause protected him from being charged under the 2006 MCA because that statute came into force after his capture.⁵⁵ Finally, he contended that his conviction violated the equal protection guarantees of the Due Process Clause because the commissions are themselves "a segregated form of justice in violation of the Fifth Amendment."⁵⁶

While *Bahlul I* was pending in the D.C. Circuit, a panel of that same court issued an opinion in *Hamdan v. United States (Hamdan II)*.⁵⁷ In that case, the court found that the 2006 MCA did not allow

45. *Id.*

46. Sliney, *supra* note 11.

47. Peter Margulies, *Justice at War: Military Tribunals and Article III*, 49 U.C. DAVIS. L. REV. 305, 362 (2015).

48. Graver, *supra* note 13.

49. *Id.*

50. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2622 (formerly codified at 10 U.S.C. § 950(g) ("[T]he [D.C. Circuit] shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission.")).

51. Graver, *supra* note 13.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

the commissions to prosecute offenses committed before the statute was enacted unless the offenses charged already constituted war crimes triable by military commission under existing domestic law.⁵⁸ The government subsequently appealed *Bahlul I* to the full D.C. Circuit, conceding that the court would have to vacate Bahlul's convictions if the *Hamdan II* holding stayed in force.⁵⁹

In July 2014, the government got its wish. A full panel of the D.C. Circuit, sitting en banc, overruled the previous three-judge panel's *Hamdan II* decision in a case known as *Bahlul II*.⁶⁰ The en banc panel then turned its attention to the merits of Bahlul's case. The court applied a plain error standard of review⁶¹ because Bahlul had forfeited a number of claims by refusing to raise them while boycotting his trial.⁶² On plain error review, the panel did away with two of Bahlul's three convictions.⁶³ First, the court found that providing material support for terrorism was not a violation of the laws of war triable by military commission at the time Bahlul committed that act.⁶⁴ Second, the panel determined that soliciting others to commit war crimes was simply not an offense triable by military commission at all.⁶⁵

After the panel overturned his solicitation and material support convictions, the only thing keeping Bahlul on the hook was his

58. *Id.*

59. *Id.*

60. *Id.*

61. Typically, a party who fails to preserve an argument before a lower tribunal is barred from raising it on appeal "absent plain error or exceptional circumstances." *Al Bahlul v. United States*, 767 F.3d 1, 9 (D.C. Cir. 2014) (en banc) (citing *United States v. Atkinson*, 297 U.S. 157, 159 (1936)) (also citing *Salazar ex rel. Salazar v. Dist. of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010)). "A plain error is "[1] an 'error' [2] that is 'plain' and [3] that 'affect[s] substantial rights.'" *Id.* at 9-10 (citing *United States v. Olano*, 507 U.S. 725, 732 (1993) (quoting *Fed. R. Crim. P.* 52(b)). "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.* at 9 (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997)). The 2009 MCA further restricts the exercise of plain error review of military commissions, stating that the court of appeals may only correct an error that "materially prejudices the substantial rights of the accused." 10 U.S.C. § 950a.

62. Graver, *supra* note 13.

63. *Episode 35: Will This Be the Year of Military Courts at the Supreme Court?*, THE NATIONAL SECURITY LAW PODCAST (Sept. 12, 2017) (downloaded using iTunes); Graver, *supra* note 13.

64. *Bahlul*, 767 F.3d at 29.

65. *Id.* at 30-31.

conviction for conspiracy to commit war crimes. The problem? Inchoate conspiracy to violate the law of war is not, by itself, a traditional violation of the law of war triable by military commission.⁶⁶ As such, the conspiracy charge presented the stickiest legal question before the court: Can military commissions prosecute domestic, non-international war crimes—such as inchoate conspiracy—without violating the Constitution?⁶⁷ The answer to that question depended—and continues to depend—not on a reading of the MCA or any other statute, but on the federal courts' basic constitutional authority to try domestic offenses that are not also violations of the laws of war.⁶⁸

The D.C. Circuit en banc panel remanded the question of whether the government may charge conspiracy—without violating either Article I or Article III of the Constitution—to a traditional three-judge panel of that court.⁶⁹ In June 2015—in *Bahlul III*⁷⁰—those three judges took the question under de novo review because the claim constituted a “structural” challenge to the commissions “that [could] not be forfeited.”⁷¹ Bahlul argued that as a criminal defendant, he had an Article III right to be prosecuted before a civilian jury in federal court.⁷² Certainly, inchoate conspiracy to commit a war crime charges can be brought in an Article III trial court.⁷³ In fact, as Chief Judge Merrick Garland pointed out at oral argument, such charges are brought every day.⁷⁴ What then, he asked, is the justification “for using a military commission rather than an Article III court?”⁷⁵

66. Martin S. Lederman, *Of Spies, Saboteurs, and Enemy Accomplices: History's Lessons for the Constitutionality of Wartime Military Tribunals*, 105 GEO. L.J. 1529, 1536 (2017).

67. *Episode 35: Will This Be the Year of Military Courts at the Supreme Court?*, *supra* note 63.

68. *Id.*

69. Graver, *supra* note 13.

70. *Al Bahlul v. United States*, 792 F.3d 1 (D.C. Cir. 2015).

71. *Id.* at 3.

72. Helen Klein Murillo and Alex Loomis, *A Summary of the Al Bahlul Decision*, LAWFARE (Oct. 21, 2016), <https://www.lawfareblog.com/summary-al-bahlul-decision> [<https://perma.cc/5GM2-76QX>].

73. Marty Lederman, *Reflections from the En Banc Al Bahlul Oral Argument*, JUST SECURITY (Dec. 1, 2015), <https://www.justsecurity.org/28037/reflections-en-banc-al-bahlul-oral-argument/> [<https://perma.cc/EDZ6-YHGY>].

74. *Id.*

75. *Id.*

The panel divided, but ultimately vacated Bahlul's conspiracy charge on the basis that it did, in fact, violate Article III of the Constitution.⁷⁶ The judges determined that the scope of offenses triable by military commission "does not extend to the trial of domestic crimes in general, or inchoate conspiracy in particular,"⁷⁷ and overturned Bahlul's conviction on the grounds that "Congress cannot encroach upon the Article III judicial power by authorizing military commissions to try unlawful enemy combatants for conspiracy."⁷⁸ Moving forward, commissions would be limited to trying international law of war violations,⁷⁹ and conspiracy only falls within that category when committed in the context of genocide.⁸⁰

The government petitioned the D.C. Circuit for a rehearing en banc of the issues presented in *Bahlul III*.⁸¹ The court agreed, and the full court heard Bahlul's case one final time (this time, as *Bahlul IV*).⁸² In October 2016, the en banc panel vacated the three-judge panel's 2015 holding that Bahlul's conspiracy charge violated Article III of the Constitution.⁸³ In doing so, they upheld Bahlul's conviction for inchoate conspiracy and corresponding life sentence.⁸⁴ The judges published a number of opinions, and no particular opinion received the backing of a majority of the court.⁸⁵ The court divided with regard to what constituted the proper standard of review,⁸⁶ and also as to whether Congress has Article I power to make conspiracy triable

76. Graver, *supra* note 13. See also Michael Doyle, *Federal Appeals Court Sets Aside Conviction of Bin Laden Assistant*, MIAMI HERALD, <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article-23853043.html#storylink=cpy> [https://perma.cc/Z2HJ-XSKS] (last updated June 12, 2015 at 9:06 PM).

77. Doyle, *supra* note 76.

78. Murillo & Loomis, *supra* note 72; *Al Bahlul v. United States*, 792 F.3d 1, 3-4 (D.C. Cir. 2015).

79. Murillo & Loomis, *supra* note 72.

80. *Id.*

81. Wells Bennett, *The United States Seeks En Banc Rehearing in Al-Bahlul*, LAWFARE (July 27, 2015, 2:25 PM), <https://lawfareblog.com/united-states-seeks-en-banc-rehearing-al-bahlul> [https://perma.cc/PH8X-H2K8].

82. Graver, *supra* note 13.

83. *Id.*

84. See *id.*

85. *Episode 35: Will This Be the Year of Military Courts at the Supreme Court?*, *supra* note 63; see also Graver, *supra* note 13.

86. Graver, *supra* note 13.

by military commission.⁸⁷ Of the six-judge majority, only four judges agreed that it does.⁸⁸ A fifth judge affirmed the conviction on the basis of plain error review but declined to reach the constitutional question.⁸⁹ The sixth and final judge to join the majority concluded that, in practice, Bahlul was convicted of substantive war crimes in connection with the 9/11 attacks; conspiracy was only the theory of liability of the crime.⁹⁰ Therefore, he concluded, the constitutional question was not invoked. Three judges dissented; two others recused.⁹¹ Bahlul's only remaining recourse was a writ of certiorari to the Supreme Court, which was denied in October 2017.⁹² His conviction had survived his weighty challenges, and his life sentence was ultimately upheld.

B. International vs. Domestic Offenses: What is Conspiracy?

Fairly quickly into Bahlul's post-conviction appeals process, conspiracy became the charge of interest for courts and legal spectators alike.⁹³ Two different scenarios can give rise to a conspiracy charge, and the circumstances differ greatly under domestic versus international law.⁹⁴ First, under United States domestic law, if an individual agrees—with others—to commit a crime, and then takes even a small step toward the completion of that agreement or crime, then that individual can be charged with conspiracy.⁹⁵ This was the charge levied against Bahlul.

Charging a person with conspiracy under international law is more complicated.⁹⁶ International law only permits conspiracy charges against people who engage in plots that result in completed and

87. *Id.*

88. Murillo & Loomis, *supra* note 72.

89. *Id.*

90. *Id.*

91. *Id.*

92. Bahlul v. United States, 138 S.Ct. 313 (Mem) (2017).

93. See, e.g., Wells C. Bennett, *Oral Argument in Al Bahlul: Judge Tatel and Quirin Dicta*, LAWFARE (Oct. 22, 2014, 7:24 PM), <https://lawfareblog.com/oral-argument-al-bahlul-judge-tatel-and-quirin-dicta> [<https://perma.cc/EV8F-LSUP>] (discussing Judge Tatel's discussion of the holding in *Ex Parte Quirin* and what it means for "whether the jurisdiction of a Guantanamo military commission constitutionally may include only international offenses, or both international as well as domestic ones").

94. Margulies, *supra* note 47, at 368.

95. *Id.* at 368-69.

96. *Id.*

unlawful acts of violence—such as murder.⁹⁷ An international tribunal will not consider a plot (or even an agreement) as a war crime in the absence of a completed act.⁹⁸ Further, international criminal tribunals will not charge a person with conspiracy for only plotting to kill civilians unless the defendant's plan facilitates or otherwise aids another person committing that murder.⁹⁹ Thus, under international law, "conspiracy is not a crime in and of itself."¹⁰⁰ Instead, it is simply the theory of responsibility that supports a murder charge.¹⁰¹ This theory is grounded in the idea that a person who plans a murder is just as guilty of the killing as the person who actually commits the crime.¹⁰²

C. Upholding Bahlul's Conviction on the Merits

As noted above, the appellate court's decision to uphold Bahlul's conspiracy conviction was not a clean one.¹⁰³ In response to his final appeal to that court in *Bahlul IV*, the D.C. Circuit—sitting en banc—splintered in its October 2016 decision regarding his Article III claim.¹⁰⁴ Although a six-judge majority of the court upheld Bahlul's conviction for standalone conspiracy, those in the majority varied in their reasoning.¹⁰⁵ Despite the court's inability to sign onto a majority decision, little doubt remained about the importance of answering the most important question at bar: whether it is constitutional for military commissions at Guantánamo to try defendants for domestic defenses like inchoate conspiracy.¹⁰⁶

In the first footnote of the principle concurring opinion, then Judge Brett Kavanaugh emphasized the need for a final judgement on the merits of Bahlul's claim. "The question of whether conspiracy may constitutionally be tried by military commission," he wrote, "is

97. *Id.* at 368.

98. *Id.* at 369.

99. *Id.*

100. *Id.* at 368.

101. *Id.*

102. *Id.*

103. *See generally Episode 35: Will This Be the Year of Military Courts at the Supreme Court?*, *supra* note 63.

104. *Ali Hamza Ahmad Suliman Al Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016).

105. *Id.*

106. Steve Vladeck, *Why the Supreme Court Should Take the Two New Guantánamo Military Commission Appeals*, JUST SECURITY (May 31, 2017), <https://www.justsecurity.org/41548/supreme-court-guantanamo-military-commission-appeals/> [https://perma.cc/HBR7-5BJF].

extraordinarily important and deserves a 'definitive answer.'"¹⁰⁷ Not only does it "[implicate] an important part of the U.S. Government's war strategy," it implicates other cases that challenge convictions for standalone domestic offenses by military commission.¹⁰⁸ Bahlul's case, Kavanaugh penned, "unfortunately has been pending in this Court for more than five years. It is long past time for us to resolve the issue squarely and definitively."¹⁰⁹ Prominent scholars, including the University of Texas at Austin School of Law professor and national security law scholar Stephen Vladeck, agreed. "At some point, wouldn't resolution of the Article III question actually be useful for the military commissions (and not just for we who write about them)?" If not, Vladeck asks, "is this all just an elaborate game to play out the string — and, as such, a waste of a whole lot of time, energy, and judicial resources?"¹¹⁰

Writing the principal concurrence for the full D.C. Circuit, then Judge Kavanaugh espoused a number of justifications for upholding Bahlul's conviction on the merits.¹¹¹ He noted that Congress's war powers give it vast authority to establish military commissions¹¹² without "impos[ing] international law as a constraint on Congress's authority to make offenses triable by [those commissions]."¹¹³ Doing so, he rejected Bahlul's argument that "Congress and the President [are] subject to the dictates of the international community" as a matter of U.S. constitutional law.¹¹⁴

Next, Kavanaugh pointed to the holding of *Ex parte Quirin*, in which the Supreme Court upheld military commission convictions for espionage.¹¹⁵ In *Quirin*, the Court did not expressly limit commissions to trying international law offenses.¹¹⁶ Kavanaugh drew a connection between Bahlul's conspiracy conviction and the *Quirin* espionage convictions on the basis that—similar to inchoate conspiracy—

107. *Bahlul*, 840 F.3d at 760 n.1 (Kavanaugh, J., concurring) (citing *Al Bahlul v. United States*, 767 F.3d 1, 62, 412 U.S. App. D.C. 372 (D.C. Cir. 2014) (en banc) (separate opinion of Brown, J.)).

108. *Id.*

109. *Id.*

110. Stephen Vladeck, *Counting to Six in Al Bahlul IX*, JUST SECURITY (Dec. 1, 2015), <https://www.justsecurity.org/28042/counting-al-bahlul-iv/> [<https://perma.cc/YPD4-FAAT>].

111. Murillo & Loomis, *supra* note 72.

112. *Bahlul*, 840 F.3d at 761.

113. *Id.*

114. *Id.* at 763.

115. 317 U.S. 1 (1942).

116. *Ali Hamza Ahmad Suliman Al Bahlul v. United States*, 840 F.3d 757, 770 (D.C. Cir. 2016).

espionage is not “an offense under the international law of war.”¹¹⁷ Further, he claimed that Quirin itself was a valid military commission prosecution for conspiracy, asserting that “[t]he two most important military commission precedents in U.S. history—the trials of the Lincoln conspirators and the Nazi saboteurs [Quirin]—were [themselves] trials for the offense of conspiracy.”¹¹⁸

Finally, Kavanaugh made two historical arguments to support the plurality’s position. He wrote that historically, international law did not constrain Congress’s ability to make certain offenses triable by military commission, pointing out that U.S. military tribunals have prosecuted non-international law crimes (such as espionage and aiding the enemy) since 1776.¹¹⁹ Finally, Kavanaugh argued that Bahlul’s conviction does not violate Article III because jury trials were not guaranteed in military commissions as a matter of historical practice.¹²⁰

D. The End of the Road: The Supreme Court Denies Certiorari in Bahlul

In 2017, after the full en banc D.C. Circuit reinstated Bahlul’s conspiracy conviction, he filed a petition for a writ of certiorari with the Supreme Court of the United States.¹²¹ In his petition, Bahlul articulated three claims.¹²² First, Bahlul asked, “May Congress vest these military commissions with federal courts’ jurisdiction over wholly domestic crimes?”¹²³

Second, Bahlul raised two ex post facto claims.¹²⁴ The first was statutory; the second, constitutional. The statutory question he presented was: “Does the text of the 2006 MCA overcome the presumption against retroactivity to authorize prosecutions for conduct committed before its enactment?”¹²⁵ The constitutional question regarding the ex post facto claims was more important.¹²⁶

117. *Id.* at 763.

118. *Id.* at 766.

119. *Id.* at 765.

120. Murillo & Loomis, *supra* note 72.

121. Petition for Writ of Certiorari, Ali Hamza Ahmad Suliman Al Bahlul v. U.S., 840 F.3d 757 (2016) (No. 16-1307).

122. *Id.* at ii.

123. *Id.* at 14.

124. Graver, *supra* note 13.

125. *Id.*

126. *Id.*

Bahlul asked: “Assuming the 2006 MCA authorizes such prosecutions, is this kind of arrangement constitutional?”¹²⁷

Third, Bahlul wrapped up his certiorari petition with an equal protection claim.¹²⁸ He asserted that by limiting the commissions’ jurisdiction to non-citizens, Congress had effectively created a “segregated justice system in violation of the Fifth Amendment.”¹²⁹

Ultimately, the Supreme Court declined to answer the call to resolve the statutory and constitutional questions Bahlul presented it.¹³⁰ This denial of certiorari—when combined with the D.C. Circuit’s fractured rejection of Bahlul’s constitutional challenges in *Bahlul IV*—leaves the Article III puzzle largely unsolved.¹³¹ Technically, due to the D.C. Circuit’s inability to reach an authoritative conclusion, the 2011 Court of Military Commission Review merits decision remains controlling on the issues,¹³² notwithstanding the fact that none of the D.C. Circuit opinions issued affirmed on the basis of the CMCR’s reasoning.¹³³

On October 16, 2017—six days after the Supreme Court denied certiorari to Bahlul¹³⁴—it denied certiorari to Nashiri, too.¹³⁵ The Court’s denial in each case is individually unfortunate. In confluence, however, both denials together brewed a perfect storm that will have detrimental effects on the military commissions system for years—if not decades—to come.

PART III: NASHIRI V. TRUMP

Abd al-Rahim Al-Nashiri is a Saudi Arabian citizen who has been charged with planning the bombing of the U.S.S. Cole off the coast of Yemen in October 2000¹³⁶—approximately eleven months before the 9/11 attacks on the World Trade Center in New York City. He is also suspected of planning the attack on the French supertanker M/V

127. *Id.*

128. *Id.*

129. *Id.*

130. JENNIFER K. ELSEA, CONG. RESEARCH SERV., LSB10043, SUPREME COURT DECLINES TO TAKE UP MILITARY COMMISSION CHALLENGES – AL BAHUL AND AL-NASHIRI 1 (2017).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Bahlul v. United States*, 138 S.Ct. 313 (Mem) (2017).

135. *Al-Nashiri v. Trump*, 138 S.Ct. 354 (Mem) (2017).

136. Recent Case, *supra* note 27, at 1250 (citing *In re Al-Nashiri*, 835 F.3d 110, 113-14 (D.C. Cir. 2016)).

Limburg in 2002.¹³⁷ Nashiri was captured in 2002,¹³⁸ and a military commission was convened at Guantánamo Bay in 2011 to try him for his role in the attack on the U.S.S. Cole.¹³⁹

It is important to note that although his commission has been constituted, Nashiri has not yet been tried.¹⁴⁰ As such, his attempts to challenge his tribunal's jurisdiction over him were executed exclusively through pretrial motions.¹⁴¹ Both the substance and the pretrial nature of Nashiri's claims will ultimately impact our analysis here. More importantly, they underline the significance of the Supreme Court's denial of his claims.

Nashiri's coordinated bombing of the U.S.S. Cole and other vessels more closely resembles an international war crime triable by military commission than Bahlul's work as bin Laden's media man.¹⁴² Although the commissions charged both men with conspiracy, the case against Nashiri is stronger than it was against Bahlul for two reasons.

First, Nashiri's conspiracy charge is connected to the commission of overt acts—including his attacks on the U.S.S. Cole and French supertanker M/V Limburg. Therefore, it qualifies as an international law of war offense under the MCA and is triable by military commission.¹⁴³ Bahlul, on the other hand, was charged with inchoate conspiracy not connected to a completed act.¹⁴⁴ Traditionally, inchoate conspiracy was not considered an international law of war offense triable by military commission (D.C. Circuit 2015 en banc decision notwithstanding).¹⁴⁵

137. Graver, *supra* note 13.

138. *Id.*

139. Recent Case, *supra* note 27, at 1250 (citing *In re Al-Nashiri*, 835 F.3d at 113-4); *see also* Graver, *supra* note 13 (describing the prosecution proceedings of Nashiri).

140. *Episode 35: Will This Be the Year of Military Courts at the Supreme Court?*, *supra* note 63.

141. *Id.*

142. Vladeck, *Why the Supreme Court Should Take the Two New Guantánamo Military Commission Appeals*, *supra* note 106.

143. Robert Chesney, *Military Commission Charges Referred Against Al-Nashiri*, LAWFARE (Sept. 28, 2011, 2:19 PM), <https://www.lawfareblog.com/military-commission-charges-referred-against-al-nashiri> [<https://perma.cc/22WD-VU9E>]; 10 U.S.C. § 950t(29) (2006).

144. *See generally* Lederman, *supra* note 66 (discussing convictions and justifications of inchoate conspiracies within the law of war).

145. *Id.* at 1536-1540.

Second, Nashiri is also charged with additional law-of-war offenses enumerated in the MCA.¹⁴⁶ His additional charges include using treachery or perfidy,¹⁴⁷ murder in violation of the law of war,¹⁴⁸ terrorism,¹⁴⁹ intentionally causing serious bodily injury,¹⁵⁰ attacking civilians,¹⁵¹ attacking civilian objects,¹⁵² and hazarding a vessel.¹⁵³ Because Nashiri's tribunal has clear jurisdiction over these additional offenses, the constitutionality of a commission prosecuting him for conspiracy will not make or break his case the way it did for Bahlul.

Perhaps because his conviction does not hang on the validity of a conspiracy charge, Nashiri raises a different subject-matter jurisdictional challenge than Bahlul did. The substantive question in *Nashiri* is whether the MCA empowers—and the Constitution allows—military commissions to try war crimes not committed within the context of armed conflict with the United States.¹⁵⁴ Stated otherwise, “at the time that [Nashiri] was involved in the bombing of the U.S.S. Cole in October 2000,” was the United States “at war with al Qaeda such that the laws of war applied and a military commission was authorized?”¹⁵⁵

After his arrest, Nashiri filed a motion with his commission, arguing that the tribunal lacked jurisdiction to try him under this framework.¹⁵⁶ The bombing of the U.S.S. Cole, he submitted, was not committed “in the context of and associated with hostilities”¹⁵⁷ between the United States and al Qaeda¹⁵⁸ because it occurred before

146. Chesney, *supra* note 143; 10 U.S.C. § 950t.

147. Chesney, *supra* note 143; 10 U.S.C. § 950t(17).

148. Chesney, *supra* note 143; 10 U.S.C. § 950t(15).

149. Chesney, *supra* note 143; 10 U.S.C. § 950t(24).

150. Chesney, *supra* note 143; 10 U.S.C. § 950t(13).

151. This charge arises from Nashiri's attack on French tanker the *Limburg*. Chesney, *supra* note 143; 10 U.S.C. § 950t(2).

152. This charge also arises from the *Limburg* attack. Chesney, *supra* note 143; 10 U.S.C. § 950t(3).

153. This charge arises from the *Limburg* attack as well. Chesney, *supra* note 143; 10 U.S.C. § 950t(23).

154. *Episode 35: Will This Be the Year of Military Courts at the Supreme Court?*, *supra* note 63.

155. *Id.*

156. Graver, *supra* note 13.

157. Recent Case, *supra* note 27, at 1249-50; *see also* 10 U.S.C. § 948a(9) (defining “hostilities” as “any conflict subject to the laws of war.”).

158. Graver, *supra* note 13 (“[Nashiri's counsel] peg the start of hostilities to operations in Yemen in September 2003, arguing that was the first time and place the president ‘extend[ed] the AUMF’s war-making authorities’

the 9/11 attacks in New York. Since the United States was not engaged with al Qaeda before 9/11, Nashiri contends his tribunal lacks jurisdiction to charge him under the MCA for acts committed in that timeframe.¹⁵⁹

Nashiri then went above his commission to contest its jurisdiction to try him based on these arguments. He filed a writ of habeas corpus with the United States District Court for the District of Columbia¹⁶⁰ and a petition for a writ of mandamus with the D.C. Circuit.¹⁶¹ The mandamus petition challenged the way judges are assigned to the Court of Military Commission Review, which will be the first court to hear Nashiri's appeal if his military commission convicts him.¹⁶² The panel denied mandamus relief,¹⁶³ largely on the basis that Nashiri retains the right to challenge the CMCR's panel composition on post-

as recognized in a War Powers Resolution report. If this date is correct, Nashiri would have been in custody for roughly a year before 'hostilities' started and the commission would lack jurisdiction over him under the MCA.").

159. Graver, *supra* note 13; *see also* Recent Case, *supra* note 27 (discussing the jurisdiction of military commissions under the MCA in the aftermath of 9/11).

160. *Episode 35: Will This Be the Year of Military Courts at the Supreme Court?*, *supra* note 63.

161. *Id.*

162. Stephen Vladeck, *The D.C. Circuit's Thoroughly Convincing Decision in al-Nashiri*, LAWFARE (June 23, 2015, 12:20 PM), <https://www.lawfareblog.com/dc-circuits-thoroughly-convincing-decision-al-nashiri> [<https://perma.cc/9DCT-K7PY>].

163. It is worth noting that the bar for mandamus is unusually high in the D.C. Circuit. *See* Stephen Vladeck, *The D.C. Circuit's Passive-Aggressive Approach to Military Commission Mandamus*, LAWFARE (July 31, 2017, 10:30 AM), <https://lawfareblog.com/dc-circuits-passive-aggressive-approach-military-commission-mandamus> [<https://perma.cc/R2TX-UA2R>] ("Indeed, one of the questions presented in the pending cert. petition in *al-Nashiri II* is whether the mandamus standard is inappropriately high."); *See also* Steven Vladeck (@steve_vladeck), TWITTER (Feb. 21, 2018, 10:12 AM), https://twitter.com/steve_vladeck/status/966375180258938882 [<https://perma.cc/PC6S-UBF5>] ("[T]he D.C. Circuit has imposed a ridiculously (and unjustifiably) high bar for the issuance of [mandamus] relief to the military commissions . . ."). Petitioners must satisfy all three prongs of the D.C. Circuit's mandamus test in order to receive the writ. *In re Al-Nashiri*, 791 F.3d 71, 78 (D.C. Cir. 2015) ("Mandamus is proper only if three conditions are satisfied: First, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires... Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.").

conviction appeal,¹⁶⁴ and because his claim for relief was not “clear and indisputable.”¹⁶⁵ More importantly, Nashiri’s habeas petition was rejected¹⁶⁶ on the basis that Councilman abstention¹⁶⁷—an abstention doctrine unique to military tribunals—militates against federal court review of Nashiri’s claims until he brings them on post-conviction appeal.¹⁶⁸

Less than a week after it denied certiorari in *Bahlul*, the Supreme Court declined to hear Nashiri’s case. As a result, Nashiri’s proceedings have continued in anticipation of his eventual trial at Guantánamo, and he is barred from re-challenging his commission’s jurisdiction until after he is—presumably—convicted.¹⁶⁹

PART IV: COUNCILMAN ABSTENTION

A. *So, What is Councilman Abstention?*

Abstention doctrines are Supreme Court doctrines that permit—or in some cases, require—federal courts to decline to hear a case if doing so would encroach upon another court’s power to resolve it.¹⁷⁰ These doctrines are typically named after the Supreme Court cases in which they were conceived.¹⁷¹

The Supreme Court developed the Councilman abstention doctrine in the 1975 case *Councilman v. Schlesinger*.¹⁷² In *Councilman*, an Army captain was court-martialed for possessing marijuana.¹⁷³ The Court determined that it was proper for the federal courts system to abstain from hearing the captain’s collateral challenges until after the court-martial proceedings had run their

164. Vladeck, *supra* note 162.

165. *Id.* (quoting *In re Al-Nashiri*, 791 F.3d at 85-86).

166. *Episode 35: Will This Be the Year of Military Courts at the Supreme Court?*, *supra* note 63.

167. *See generally* *Schlesinger v. Councilman*, 420 U.S. 738 (1975) (discussing the jurisdiction of military courts and court-martial proceedings).

168. *Id.* *See also* *Episode 35: Will This Be the Year of Military Courts at the Supreme Court?*, *supra* note 63. (discussing Nashiri’s claims and potential appeal).

169. *Episode 35: Will This Be the Year of Military Courts at the Supreme Court?*, *supra* note 63.

170. *See generally* JOSEPH G. COOK & JOHN L. SOBIESKI, JR., CIVIL RIGHTS ACTIONS ¶ 3.02 (2018), available at [https://advance.lexis.com/api/permalink /7642f39c-983d-4528-b240-3b6dc9bd2ae6/?context=1000516](https://advance.lexis.com/api/permalink/?context=1000516) (discussing the various doctrines, requirements, and defenses of abstention).

171. *Id.*

172. 420 U.S. 738.

173. *Id.* at 739.

course.¹⁷⁴ As a broader doctrine, Councilman stands for the mandate that civilian courts should not review habeas petitions until a military proceeding concludes its inquiry.¹⁷⁵ Conceptually, it is based on “two considerations of comity that together favor abstention,”¹⁷⁶ which the Court addressed in depth in *Hamdan v. Rumsfeld*.

In defining the first comity consideration, the *Hamdan* Court noted that military discipline—as it contributes to the smooth operation of the Armed Services overall—is best served when civilian courts refrain from interfering in the military justice system.¹⁷⁷

The second consideration stems from the Court’s observation that the military justice system already includes civilian judges removed from military control and influence.¹⁷⁸ By designing the system in this way, the Court thought Congress had struck an appropriate balance between institutional military interests and those of individual service members.¹⁷⁹ Federal courts, the Supreme Court concluded, should respect this balance.¹⁸⁰ The Court was confident that the procedural safeguards Congress wrote into the military justice system would protect servicemen’s constitutional rights,¹⁸¹ and would justify abstention for the duration of ongoing courts-martial proceedings.

B. Councilman Abstention Should Not Extend to Military Commissions

The D.C. Circuit determined that the Councilman abstention doctrine prevented Nashiri from bringing pretrial challenges to his

174. *Id.* at 759-60.

175. Brief of Amicus Curiae American Bar Association in Support of Petitioner at 6, *al-Nashiri v. Trump, et al.*, 138 S.Ct. 354 (2017) (No. 16-8966) (citing *Councilman*, 420 U.S. at 759).

176. *Hamdan v. Rumsfeld*, 548 U.S. 557, 586 (2006); *see also* *Obaydullah v. Obama*, 609 F.3d 444, 448 (D.C. Cir. 2010) (discussing the two considerations as mentioned in *Hamdan v. Rumsfeld*).

177. *Hamdan*, 548 U.S. at 586 (citing *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975)) (“[M]ilitary discipline and, therefore, the efficient operation of the Armed Forces are best served if the military justice system acts without regular interference from civilian courts.”).

178. *Id.*

179. *Id.*

180. *Id.* (quoting *Councilman*, 420 U.S. at 758) (“[F]ederal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created ‘an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges completely removed from all military influence or persuasion’”).

181. *Id.* (quoting *Councilman*, 420 U.S. at 758).

commission's jurisdiction over him.¹⁸² In other words, the court elected not to exercise its power of review over Nashiri's claims until he raises them on post-conviction appeal. This decision was misguided at best. Broadening Councilman abstention to apply to military commissions is not just detrimental as a matter of social policy; it is unjustified in light of the Court's own basis for establishing and upholding the doctrine in the first place.

In *Nashiri*, the D.C. Circuit conceded that Councilman requires federal courts to have confidence in both "the adequacy of the alternative system in protecting the rights of defendants" and "the importance of the interests served by allowing that system to proceed uninterrupted by federal courts" in order to abstain.¹⁸³ That they found this confidence in the military commissions is remarkable. Certainly, abstention makes sense in the context of trials by courts-martial, which invoke both of Councilman's mandatory "considerations of comity."¹⁸⁴ Unlike courts-martial, however, collateral pre-trial review of the Guantánamo commissions does not implicate either comity considerations underlying Councilman.¹⁸⁵

i. The First "Consideration of Comity" Does Not Apply to Military Commissions

The first "consideration of comity"—that military justice is best served when federal courts do not get involved—does not apply in military commission cases because concerns about military discipline are irrelevant when the defendant is not a member of the Armed Services.¹⁸⁶ None of the Guantánamo military commission defendants, including Nashiri and Bahlul, are members of the U.S. Armed Services. As such, the first comity consideration is plainly not invoked in their cases.

182. *Episode 35: Will This Be the Year of Military Courts at the Supreme Court?*, *supra* note 63.

183. *In re Al-Nashiri*, 835 F.3d 110, 121 (D.C. Cir. 2016).

184. See Brief of the National Institute of Military Justice as *Amicus Curiae* in Support of the Petitioner at 5-15, *al-Nashiri v. Trump, et al.* (2017) (No. 16-8966) (quoting *Hamdan*, 548 at 586) (discussing the *Councilman* abstention doctrine) [hereinafter Brief 16-8966]; see also Brief of the National Institute of Military Justice as *Amicus Curiae* in Support of the Petitioner at 3-8, *In re al-Nashiri*, 835 F.3d 110 (D.C. Cir. 2016) (Nos. 15-1023, 15-5020) (quoting *Hamdan*, 548 at 586) (discussing *Councilman* abstention doctrine) [hereinafter Brief 15-1023].

185. Brief 15-1023, *supra* note 184, at 3-4

186. *Hamdan v. Rumsfeld*, 548 U.S. 557, 587 (2006) ("[The detainee] is not a member of our Nation's Armed Forces, so concerns about military discipline do not apply."); see also *Obaydullah v. Obama*, 609 F.3d 444, 448 (D.C. Cir. 2010) (noting that circumstances are entirely different between an ongoing court-martial of a military service member and a potential future military commission trial of an alien detainee).

ii. The Second “Consideration of Comity” Does Not Apply to Military Commissions

The second “consideration of comity”—that federal courts should respect the balance Congress created between military institutional interests and service member individual interests—does not apply for two reasons.

First, unlike the court-martial at issue in *Councilman*, military commissions are subservient to, and not separate from, Article III federal courts.¹⁸⁷ The MCA gives Article III courts direct review over questions of law arising out of military commissions.¹⁸⁸ Abstention achieves nothing in this context because both the military commissions and the Court of Military Commission Review ultimately answer to the D.C. Circuit anyway.¹⁸⁹ And, unlike other commonly-applied abstention doctrines—many of which allow State courts to reach an initial conclusion despite ultimately being subject to Supreme Court review—abstention in the military commission context cannot be justified on the basis of federalism.

When the Court decided *Councilman v. Schlesinger*, federal courts did not have jurisdiction to review courts-martial decisions.¹⁹⁰ The court-martial decision at issue was only reviewable by higher military tribunals; as a civilian court, the Supreme Court lacked the power of review it maintains over modern commissions.¹⁹¹ By abstaining from courts-martial cases, civilian courts of the *Councilman* era rightfully declined to intervene in an entirely separate trial and appellate court structure from the Article III court system.¹⁹²

Modern military commissions are not separate from civilian courts in the way courts-martial were in *Councilman*'s time.¹⁹³ The commissions are therefore “directly subservient” to civilian federal courts,¹⁹⁴ and the D.C. Circuit has mandatory, supervisory jurisdiction over appeals arising out of them.¹⁹⁵ This jurisdiction includes the right

187. Brief 15-1023, *supra* note 184, at 3-8.

188. *Id.* at 4-5.

189. *Id.* at 4-5 (citing 10 U.S.C. § 950g (2006)).

190. *Schlesinger v. Councilman*, 420 U.S. 738, 746 (1975) (“Congress [has not] conferred on any Art. III court jurisdiction directly to review court-martial determinations. The valid, final judgments of military courts, like those of any court of competent jurisdiction not subject to direct review for errors of fact or law, have *res judicata* effect and preclude further litigation of the merits.”).

191. Brief 16-8966, *supra* note 184, at 10.

192. *Id.* at 11.

193. *Id.*

194. *Id.*

195. *Id.* at 10.

to review any and all questions of law that emerge on appeal from the Court of Military Commission Review.¹⁹⁶ As such, unlike the court-martial at issue in *Councilman v. Schlesinger*, the D.C. Circuit's determinations in military commission cases are expressly binding upon the commissions themselves.¹⁹⁷

Second, one could dispute how well Congress actually struck a balance between fairness and military preparedness when it enacted the MCA.¹⁹⁸ This is largely due to lingering questions about whether Guantánamo defendants receive Bill of Rights protections, the D.C. Circuit's inability to reach a consensus on the legal questions in *Bahlul*,¹⁹⁹ and the commissions' reluctance to self-correct in accordance with Supreme Court expectations of the military justice system.²⁰⁰

iii. Additional Reasons Councilman Should Not Apply to Military Commissions

Perhaps because the first comity consideration is so blatantly inapplicable to military commission trials of non-service members, the D.C. Circuit relied heavily on the 2009 MCA—and how it changed the Court's analysis of the second comity consideration—to justify abstaining in *Nashiri*.²⁰¹ Even if the D.C. Circuit is correct that the post-Hamdan 2009 MCA sufficiently tips the scales in favor of abstention, other countervailing factors still render the application of Councilman to military commissions seriously improper.²⁰²

The D.C. Circuit decided to abstain in *Nashiri* after concluding that the MCA implicitly instructs Article III courts not to review a military commission case until the military system has itself wrapped up its inquiry.²⁰³ While this inference may have held water when Congress enacted the original 2006 MCA, the statutory language giving rise to this conclusion is no longer in force today. In passing

196. *Id.*

197. *Id.* at 12.

198. Brief 15-1023, *supra* note 184, at 5.

199. *Id.* (citing *Al Bahlul v. United States*, 767 F.3d 1, 27–31 (D.C. Cir. 2014) (en banc)).

200. *Id.* (citing *United States v. Denedo*, 556 U.S. 904 (2009)).

201. *See In re Al-Nashiri*, 835 F.3d 110, 125 (D.C. Cir. 2016) (“Heeding the political branches’ instruction as to the timing of Article III review qualifies as an ‘important countervailing interest’ warranting abstention, at least where that instruction is based on those branches’ assessment of national security needs.”).

202. Brief 16-8966, *supra* note 184, at 10.

203. *Id.* at 12 (quoting *In re Al-Nashiri*, 835 F.3d at 124 (emphasis added)).

the 2009 MCA, Congress removed the provision of the original act²⁰⁴ that expressly denied Article III courts collateral review of claims challenging military commissions.²⁰⁵ Basic canons of statutory interpretation instruct courts to interpret laws and their provisions consistent with any subsequent amendments,²⁰⁶ and when two statutes (or two versions of one statute) conflict, the more recently-enacted statute controls.²⁰⁷ As such, federal courts should consider the 2009 MCA—which does not expressly ban collateral review by civilian courts—much more probative of Congressional intent on this issue than the 2006 MCA, which could have been read as encouraging abstention until that provision was repealed three years later.²⁰⁸

Further, longstanding Supreme Court doctrine dictates that requiring defendants to exhaust military remedies before challenging the military's right to try them in the first place is markedly unfair.²⁰⁹ The Supreme Court has stated that it would be improper to force a

204. 10 U.S.C. § 950j(b) (2006) (previously enacted as Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2623–24) (“Except as otherwise provided in this chapter and notwithstanding any other provision of law . . . no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action. . . relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.”); *see also* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 950j, 123 Stat. 2190, 2605 (demonstrating the removal of 10 U.S.C. § 950j(b)).

205. Brief 16-8966, *supra* note 184, at 12.

206. Judge Russell E. Carparelli, *The Rehnquist Court's Canons of Statutory Construction*, NCSL.ORG, n. 38 (2005), available at http://www.ncsl.org/documents/lss/2013pds/rehnquist_court_canons_citations.pdf [<https://perma.cc/JA3U-T8YD>] (outline derived from William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994)). (citing *Bowen v. Yuckert*, 482 U.S. 137, 149-51 (1987)).

207. Often referred to as the “later in time” rule, the Colorado Office of Legislative Legal Services describes this canon using the following hypothetical: “If [there is] a conflict between two statutory provisions and one of the provisions took effect July 1, 2013, and the other took effect July 1, 2014, the court will apply the one that took effect in 2014.” Colorado General Assembly, *Commonly Applied Rules of Statutory Construction*, LEG.COLORADO.GOV, <https://leg.colorado.gov/agencies/office-legislative-legal-services/commonly-applied-rules-statutory-construction> [<https://perma.cc/P7SV-5USZ>] (last visited Mar. 3, 2018).

208. Brief 16-8966, *supra* note 184, at 13.

209. *Id.* at 3 (quoting *Noyd v. Bond*, 395 U.S. 683, n.8 (1969)) (“[It is] especially unfair to require exhaustion of military remedies when the complainants raise[] substantial arguments denying the right of the military to try them at all.”).

defendant who contests the “very authority of the Government to hale him into court to face trial on the charge against him” to wait to bring those claims on post-conviction appeal.²¹⁰ In such cases, even a future acquittal or reversal cannot adequately remedy the injury a defendant suffers by enduring not just a voidable, but a void trial.²¹¹ This injustice is exacerbated for defendants like Nashiri and others tried in military commissions for capital crimes.²¹² If Nashiri is correct on the merits of his jurisdictional challenge, he could ultimately be put to death following invalid proceedings. The D.C. Circuit’s decision to abstain in *Nashiri* is directly contrary to—and threatens to undermine—this equity principle, and it is safe to say that the D.C. Circuit seriously missed the point of the questions Councilman instructed them to ask.²¹³

PART V: THE EFFECTS OF SUPREME COURT ABDICATION IN NASHIRI AND BAHLUL

Supreme Court review of military commission cases is unique because the Court is not pressured to grant certiorari in order to remedy a circuit split.²¹⁴ This is because all military commission appeals are necessarily processed, heard, and decided by the D.C. Circuit alone.²¹⁵ Military commission appeals, therefore, necessarily bypass the Rules of the Supreme Court of the United States’ first consideration governing review of certiorari petitions: that the Court looks to remedy circuit splits among the lower courts.²¹⁶ A statutory system that sends all military commission appeals through one circuit alone makes it easier for the Court to duck the questions those appeals raise—even in cases where that single circuit fractures in its reasoning.

The nature of the D.C. Circuit’s en banc fracture over the *Bahlul* constitutional question makes it the most compelling analogy to a circuit split that military commission cases have manifested thus far. Still, both *Bahlul* and *Nashiri* failed to make it onto the Supreme Court’s docket, leaving *Boumediene v. Bush*²¹⁷ the most recent

210. Brief 16-8966, *supra* note 184, at 3. (quoting *Abney v. United States*, 431 U.S. 651, 659–60 (1977)).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 6 (citing *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)).

215. *Id.*

216. Rules of the Supreme Court of the United States, U.S. Sup. Ct. Rule 10(a).

217. 551 U.S. 1160 (2007).

military Guantánamo appeal the Court picked up—a hefty ten years ago.²¹⁸ By refusing to entertain the questions raised in these cases, the Supreme Court has abdicated its historical responsibility to clarify the law of the land in cases where lower authorities reach divergent conclusions. It is a technical loophole to avoid addressing substantive problems that will have lasting consequences on the military justice system.

The Supreme Court's refusal to hear Nashiri's pretrial claims, for example, has already had deleterious effects on his case.²¹⁹ Military commission trials conducted pursuant to the 2006 and subsequent 2009 MCAs are notoriously inexpedient,²²⁰ and forcing Nashiri to wait and bring his jurisdictional challenge after his expected conviction means civilian court review of his case is years away.²²¹ The most generous estimates predict the D.C. Circuit will not again hear Nashiri's claims—next time brought post-conviction in accordance with Councilman abstention doctrine²²²—until 2024.²²³ At that time, if a future D.C. Circuit or Supreme Court composed of new and different judges and justices determines that Nashiri is correct on the

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218. Lawrence Hurley, *U.S. top court leaves Guantanamo detainee's conviction intact*, REUTERS (Oct. 10, 2017, 9:47 AM), <https://www.reuters.com/article/us-usa-court-guantanamo/u-s-top-court-leaves-guantanamo-detainees-conviction-intact-idUSKBN1CF1T5> [<https://perma.cc/7NN2-9QDD>].
219. Carol Rosenberg, *Now We Know Why Defense Attorneys Quit the USS Cole Case. They Found a Microphone.*, MIAMI HERALD (Mar. 07, 2018, 1:05 PM), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article203916094.html> [<https://perma.cc/K68G-CG8T>].
220. No official trial date has been set for Khalid Sheik Mohammad and the other four defendants charged with conspiring to commit the 9/11 terror attacks on the World Trade Center in New York City. The trial is not expected to begin until January 2019—more than seventeen years after they committed their alleged crimes and more than ten years after their first arraignment in 2008. See José Iglesias, *About the 9/11 War Crimes Trial*, MIAMI HERALD (Jan. 13, 2018 at 8:46 PM), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1928877.html> [<https://perma.cc/9E6E-CM4M>].
221. Steven Vladeck (@steve_vladeck), TWITTER (Oct. 13, 2017, 8:08 AM), https://twitter.com/steve_vladeck/status/918810730215899137 [<https://perma.cc/ZEY4-ZD96>]; see also Brief 16-8966, *supra* note 184, at 3.
222. Steven Vladeck (@steve_vladeck), TWITTER (Oct. 13, 2017, 8:07 AM), https://twitter.com/steve_vladeck/status/918810525236125696 [<https://perma.cc/ZB37-E6E4>].
223. Steven Vladeck (@steve_vladeck), TWITTER (Oct. 13, 2017, 8:08 AM), https://twitter.com/steve_vladeck/status/918810730215899137 [<https://perma.cc/2FJ3-TJG7>]; See also Brief 16-8966, *supra* note 184 at 3 (quoting *In re Al-Nashiri*, 835 F.3d 110, 135 (2016)).

merits of his claims, then all the time, money, manpower, and other resources expended to see his trial through to verdict will ultimately have been wasted.²²⁴

Even more important than the effects that denying certiorari will have on Nashiri individually are those that will percolate through the entire military justice system.²²⁵ Although Nashiri's substantive claims are specific to his own case, the procedural challenge he raised implicates all military trials.²²⁶ The now-controlling D.C. Circuit ruling in his case broadens the Councilman abstention doctrine to apply to all trials by military commission.²²⁷

The denials of certiorari in *Bahlul* and *Nashiri* are particularly devastating in the aggregate.²²⁸ Because the D.C. Circuit's holding in *Nashiri* means Councilman abstention now applies to all military commission cases going forward, it therefore applies to any future detainee who recycles Bahlul's Article III constitutional challenges. Put simply, the next defendant who wants to contest the commissions' jurisdiction over purely domestic offenses will have to wait to raise the issue on post-conviction appeal.

This is a real problem given the protracted nature of military commission trials—which often last for years—and the commissions' apparent comfort with charging non-international law of war offenses. Since they were established in 2002, the Guantánamo commissions have relied heavily on domestic charges to convict defendants.²²⁹ Of the eleven military commission trials conducted since 2006, seven of those defendants—including Bahlul—have been charged with at least one purely domestic offense.²³⁰ The government shows no signs of abating their charging practice in this regard,²³¹ and someone is bound

224. Steven Vladeck (@steve_vladeck), TWITTER (Oct. 13, 2017, 8:09 AM), https://twitter.com/steve_vladeck/status/918810922596163584 [<https://perma.cc/L7QM-N96N>]. See also Brief 16-8966, *supra* note 184, at 4.

225. Steven Vladeck (@steve_vladeck), TWITTER (Oct. 13, 2017, 8:11 AM), https://twitter.com/steve_vladeck/status/918811308941824000 [<https://perma.cc/7RFL-RFCF>].

226. *Id.*

227. Steven Vladeck (@steve_vladeck), TWITTER (Oct. 13, 2017, 8:10 AM), https://twitter.com/steve_vladeck/status/91881111675301888 [<https://perma.cc/4HKY-BYBZ>]; See also Brief 16-8966, *supra* note 184, at 4 (discussing extending the *Councilman* doctrine to Guantanamo commissions).

228. *Episode 35: Will This Be the Year of Military Courts at the Supreme Court?*, *supra* note 63.

229. Vladeck, *supra* note 30.

230. *Id.*

231. While delivering his first State of the Union address, President Donald Trump stated, "I just signed an order directing Secretary Mattis to

to re-raise the *Bahlul* Article III question that fractured the D.C. Circuit. In other words, in light of the government's charging practice, a future habeas petition asserting Bahlul's Article III challenge could bring down the military commissions as the government currently conducts them. Unfortunately, because Councilman abstention now extends to military commissions after *Nashiri*, this inevitable challenge will not be re-raised for a long, long time.

When that happens, a future makeup of the D.C. Circuit or the Supreme Court could decide that Bahlul was correct on the merits, and that military commissions lack constitutional authority to charge domestic offenses like inchoate conspiracy. Leaving this outcome to chance risks vacating a yet-unknown number of terrorist convictions for non-international law of war offenses. In the meantime, the American taxpayer will foot an exorbitant bill for resources invested litigating these questions indefinitely.

PART VI: PROPOSAL FOR AMENDMENT TO THE 2009 MCA CREATING AN EXCEPTION TO COUNCILMAN ABSTENTION FOR MILITARY COMMISSIONS

On January 30, 2018, in his first State of the Union address, President Donald Trump committed to keeping Guantánamo open indefinitely as a military detention facility for "unlawful enemy combatants."²³² Although expected, this announcement dampened hopes that the military commissions would wind down anytime soon in light of looming questions about their constitutional authority.²³³ Because judicial resolution of these questions is currently foreclosed, Congress should consider enacting a legislative solution to this problem. I propose that Congress revise the MCA to override the D.C. Circuit's extension of Councilman to military commissions.

reexamine our military detention policy and to keep open the detention facilities at Guantánamo Bay." Writing for *The New York Times*, Nicholas Fandos commented that "[t]his announcement was expected. Essentially a symbolic act, it brings executive branch policy into line with reality: The prison remains open for business, at least for those detainees who are already there." *Trump's First State of the Union Speech, Annotated*, N.Y. TIMES (Jan. 30, 2018), <https://www.nytimes.com/interactive/2018/01/30/us/politics/state-of-the-union-2018-transcript.html> [<https://perma.cc/MC9T-BGRW>].

232. *Id.*; see also W.J. Hennigan, *President Trump's Keeping Guantánamo on the Political Radar*, TIME (Jan. 31, 2018), <http://time.com/5126446/donald-trump-state-union-guantanamo/> [<https://perma.cc/XUK2-HF3V>] (discussing the implications of President Trump's statements on Guantánamo).

233. See generally *Al Bahlul v. U.S.*, 792 F.3d 1, 2 (D.C. Cir. 2015) (prefacing the statutory and constitutional issues at play in this case).

As a general matter, the Supreme Court has indicated that federal courts should only abstain in narrow, limited, and exceptional circumstances.²³⁴ In other words, abstention is, itself, the exception to the general rule,²³⁵ and exceptions to federal abstention doctrines are not uncommon.²³⁶ Take, for example, the Younger abstention doctrine.²³⁷ Younger bars federal courts from reviewing civil rights tort claims until any state court prosecutions arising from those claims have concluded.²³⁸ Even Younger—one of the broadest abstention doctrines, and one that is least permissive to federal courts—still provides exceptions to its mandate, including allowing federal courts to get involved when the state law in question is blatantly unconstitutional.²³⁹

Although typically judge-made law, Congress has the authority to legislate an exception therein. Article I, § 8, Clause 9 of the U.S. Constitution gives Congress the power “[t]o constitute Tribunals inferior to the supreme Court.”²⁴⁰ Article III, § 1 vests the judicial power of the United States in the Supreme Court and those “inferior Courts as the Congress may from time to time ordain and establish.”²⁴¹ Most importantly, Article III, § 2, clause 2 makes the appellate jurisdiction of the Supreme and lower federal courts subject to Congressional regulation.²⁴² Using this authority, Congress has the power to change the D.C. Circuit’s jurisdiction and require that court to review habeas petitions raising jurisdictional challenges to the military commissions.

As previously discussed, Congress has acted upon this authority before with regard to the 2006 and 2009 MCAs. The 2006 MCA contained a provision that expressly banned Article III court collateral review of military commission cases.²⁴³ At that time, the statute stated:

Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section

234. See COOK & SOBIESKI, JR., *supra* note 170.

235. *Id.*

236. *Id.*

237. *Younger v. Harris*, 401 U.S. 37 (1971).

238. *Id.* at 41.

239. *Id.* at 53-4.

240. U.S. CONST. art. 1 §8, cl. 9.

241. U.S. CONST. art. 3, § 1.

242. U.S. CONST. art. 3, § 2, cl. 2.

243. Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2623-24 (formerly codified at 10 U.S.C. § 950j(b)).

2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action. . . relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.²⁴⁴

The revised 2009 MCA eliminated this entire provision from the statute.²⁴⁵ As noted, the D.C. Circuit in *Nashiri* declined to read this removal as persuasive evidence that Congress intended to allow civilian collateral review of Guantánamo cases. Congress can now override *Nashiri* by adding another provision to the statute that expressly encourages—or preferably, mandates—Article III collateral review of Guantánamo detainees’ jurisdictional challenges. This revision would be compatible with longstanding Supreme Court doctrine that there is something very wrong with courts waiting so long to entertain defendants who challenge the very power of their tribunals to try them in the first place.²⁴⁶

The D.C. Circuit is commonly referred to as the second-most important court in the U.S., trailing only the Supreme Court itself.²⁴⁷ One could raise concerns that Congress exempting military commissions from Councilman doctrine would cause Guantánamo cases to overburden the D.C. Circuit’s docket. These concerns, however, would be misplaced.

Despite its unique stature within the federal court system, the D.C. Circuit consistently boasts the smallest docket for any U.S. circuit court, even when compared to circuits that seat an identical number of judges. For example, the Seventh Circuit recorded 1,637 pending cases through the September 30, 2017 reporting period, while the Eighth Circuit logged 1,875. The D.C. Circuit logged only 1,391

244. *Id.*

245. Brief 16-8966, *supra* note 184, at 12.

246. *Id.* at 3 (quoting *Noyd v. Bond*, 395 U.S. 683, n.8 (1969)) (“[It is] especially unfair to require exhaustion of military remedies when the complainants raise[] substantial arguments denying the right of the military to try them at all.”).

247. Glenn Kessler, *Is the D.C. Circuit Last In ‘Almost Every Category’?*, WASH. POST (Jun. 6, 2013), https://www.washingtonpost.com/blogs/fact-checker/post/is-the-dc-circuit-last-in-almost-every-category/2013/06/05/a589b186-ce22-11e2-8f6b-67f40e176f03_blog.html?utm_term=.78a0be6f8de0 [https://perma.cc/MJ79-K4AW]; Aaron Nielson, *D.C. Circuit Review – Reviewed: The Second Most Important Court?*, Yale L. J. Notice & Comment Blog (Sept. 4, 2015), <http://yalejreg.com/nc/d-c-circuit-review-reviewed-the-second-most-important-court-by-aaron-nielson/> [https://perma.cc/9S6T-7KVC].

pending cases.²⁴⁸ Even more illustrative were the 3,000 new appeals filed with both the Seventh and Eighth Circuit Courts of Appeals during that same reporting period, compared to less than 1,000 in the D.C. Circuit.²⁴⁹ All three courts seat eleven judges.²⁵⁰ If concerns remain that an exemption would overburden the D.C. Circuit, Congress could further limit the number of collateral review petitions filed by narrowing the exception to apply to jurisdictional challenges only.

CONCLUSION

This year, the military commission system at Guantánamo entered its 16th year. Despite tremendous time and resources, the commissions have prosecuted fewer than a dozen people for domestic and international law of war offenses. The Supreme Court has not elected to review a Guantánamo case since 2008, and the Court's denial of *Bahlul* and *Nashiri* in October 2017 came as a disappointment to many. Although questions about their constitutionality hang over the commissions, it is time to elevate the discussion from why the commissions might be unconstitutional to how we can better facilitate judicial resolution to these questions. It is high time for Congress to step up to the plate and legislate an amendment to the 2009 MCA that forces the D.C. Circuit to revisit this issue sooner rather than later.

248. UNITED STATES COURTS CASELOAD STATISTICS DATA TABLES, U.S. COURTS OF APPEALS—CASES COMMENCED, TERMINATED, AND PENDING DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2016 AND 2017 (TABLE B).

249. *Id.*

250. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, <http://www.ca7.uscourts.gov/judges-biographies/biographies7.htm> [<https://perma.cc/3CH4-MHY2>] (last visited Mar. 2, 2018); UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, <https://www.ca8.uscourts.gov/active-and-senior-judges> [<https://perma.cc/XL3J-47WM>] (last visited Mar. 2, 2018); UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT, <https://www.cadc.uscourts.gov/internet/home.nsf/Content/Judges> [<https://perma.cc/6ZC5-P3FV>] (last visited Mar. 2, 2018).