UNITED STATES *v.* IBRAHIM AHMED MAHMOUD AL QOSI, also known as MOHAMMED SALEH AHMED, MOHAMMED SALIH AHMED, MOHAMMED ALI AHMED, MOHAMMED AHMED, ABU KHOBAIB AL SUDANI, ABU KHOBAB AL SUDANI, ABU KHOBAIB, ABU KHOBAB, ABU KHOBEIB, KHOBAIB, KHUBAIB, KHOBEIB, KHUBAYB, KHUBEIB, KHABEEB, KHABIB AL SUDANI, KHUBAYB AL SUDANI, IBRAHIM AHMED MAHMOUD, IBRAHIM AL KOSSI	**IN THE COURT OF MILITARY COMMISSION REVIEW** BRIEF ON BEHALF OF APPELLANT CMCR Case No. _____ Tried at Guantánamo Bay, Cuba, on 7 July 2010 and 9-11 August 2010 Before a Military Commission convened by Hon. Susan J. Crawford Presiding Military Judge: Lieutenant Colonel Nancy J. Paul, USAF

TO THE HONORABLE, THE JUDGES OF THE U.S. COURT OF MILITARY COMMISSION REVIEW

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II. Whether Ibrahim al Qosi's Convictions Should Be Vacated Because the Military Commission Lacked Jurisdiction Over the Offenses.

III. Whether Ibrahim al Qosi's Convictions Should Be Vacated Because the Military Commissions Act of 2009 Violates the Equal Protection Component of the Due Process Clause.

Statement of Statutory Jurisdiction

This case is properly before the Court for plenary review under 10 U.S.C. § 950f. On February 3, 2011, the convening authority approved the conviction and sentence in this case. Prior to the convening authority's action, and thus well before the 10-day period established by statute, Appellant waived his right to appeal "to the extent permitted by law" as he was required to do pursuant to a pre-trial agreement. R. 484; App. Ex. 89 at para. 2h. Being premature, the waiver was not valid. *Hicks v. United States*, 94 F.Supp.3d 1241, 1246 (U.S.Ct.Mil.Comm.Rev. 2015); 10 U.S.C. §§ 950c(a) and 950f(c); *see also In re al Qosi*, 602 Fed.Appx. 542, 543 (D.C.Cir., 2015) (10 U.S.C. 950(c) provides "automatic referral" to this Court); Rules for Military Commissions ("R.M.C.") 1201(d)(1). A case is not final, and jeopardy does not attach, until this Court completes its plenary review. 10 U.S.C. § 949h(b); *see also* R.M.C. 1209; *cf.* 10 U.S.C. § 950j.

Statement of the Case and Facts

Ibrahim Ahmed Mahmoud al Qosi was a cook and occasional driver for al Qaeda in Afghanistan. Pros. Ex. 1 ("Stipulation of Fact") at 2-3; 5. This is the conduct upon which the military commission convicted him of material support to terrorism and conspiracy to provide material support to terrorism in violation of 10 U.S.C. § 950t(25) and § 950t(29). Mr. al Qosi was never involved in any planning or execution of terrorist acts and had no fore-knowledge of any of al Qaeda's operations. Pros. Ex. 1 at 3-5.

In December 2001, Mr. al Qosi was arrested near the Afghanistan/Pakistan border by Pakistani officials and was soon thereafter transferred to the custody of the United States. Pros. Ex. 1 at 5. Eventually, the government filed charges against Mr. al Qosi, consisting of one charge alleging a single specification of providing material support to terrorism and one charge involving a single specification of conspiracy to commit a litany of offenses. App. Ex. 1. The government later reduced the conspiracy charge to include only conspiracy to commit terrorism and to provide material support to terrorism. App. Ex. 85. All of the conduct on which the allegations were based occurred prior to his arrest in December 2001.

Before trial, Mr. al Qosi challenged the charges on several grounds. He objected to the military commission exercising jurisdiction over the material support charge as a violation of the Ex Post Facto Clause, the Define & Punish Clause, and Article III. App. Ex. 63; App. Ex. 45 at 11 (para. 2.c.1), 17-18. The military judge summarily denied that motion to dismiss. R. 291-293. Mr. al Qosi brought a similar jurisdictional motion on the conspiracy charge. App. Ex. 60. In a separate motion to dismiss, Mr. al Qosi argued that the commission lacked jurisdiction because material support to terrorism and conspiracy fall into "other offenses" under the MCA which can only be tried in an Article III court. App. Ex. 59. Mr. al Qosi also moved to dismiss

the charges based on the Constitution's equal protection guarantee. R. 376-382, 386-88; App. Ex. 68 (as amended by App. Ex. 68-B). The military judge did not rule on these last three motions.

On July 7, 2010, Mr. al Qosi entered pleas of guilty before a military judge to one charge of providing material support to terrorism and one charge of conspiracy to provide material support to terrorism.[1] R. 455-472. On August 11, 2010, the commission members sentenced Mr. al Qosi to confinement for 14 years. R. 850; App. Ex. 110.

Mr. al Qosi pled guilty pursuant to a pre-trial agreement in which the convening authority agreed to suspend all adjudged confinement in excess of two years for a period of five years from the date pleas were accepted.[2] In exchange, Mr. al Qosi agreed, *inter alia*, to waive his appellate rights "to the extent permitted by law." R. 484; App. Ex. 89 at para. 2h. Before the military commission adjourned on August 11, 2010, and in accordance with the terms of the pre-trial agreement, Mr. al Qosi signed a government form (MC Form 2330) entitled "Waiver/Withdrawal of Appellate Rights in Military Commissions Trials Subject to Review by the Court of Military Commission Review." App. Ex. 109.

[1] Pursuant to the pre-trial agreement negotiated with the government, the conspiracy charge Mr. al Qosi pled guilty to included only conspiracy to provide material support to terrorism. Pros. Ex. 1 at 5-6; R. 455-472. The government did not present any evidence that Mr. al Qosi conspired to commit terrorism and, thus, Mr. al Qosi's conviction is based solely on his guilty plea and the stipulation of fact, both of which were limited to providing material support to terrorism and conspiracy to provide that support. However, the charge sheet provided to the members for sentencing purposes (App. Ex. 88), and all of the post-trial documents, including the convening authority's action finalizing the judgment, erroneously list his conviction as including conspiracy to commit terrorism.

[2] The pre-trial agreement in this case was sealed at trial and remains sealed. App. Ex. 89, 90. In this pleading, counsel has provided only that information from the pre-trial agreement that is also available publicly; *e.g.*, in the publicly-released transcript and exhibits.

On February 3, 2011, six months after Mr. al Qosi signed MC Form 2330, the Convening Authority issued his action. At no time thereafter did Mr. al Qosi purport to waive or withdraw from appellate review. In July 2012, Mr. al Qosi was repatriated to his native Sudan.

On January 4, 2013, counsel filed a Petition for Writ of Mandamus with this Court. The petition requested, *inter alia*, the Court safeguard Mr. al Qosi's access to his appointed lawyer and the appellate review process by ordering the government to approve counsel's travel and needed interpreter services. Petition for Extraordinary Relief in the Nature of Writs of Mandamus and Prohibition, *Qosi v. United States*, No. 13-001 at 3-4 (U.S.Ct.Mil.Comm.Rev., Jan. 4, 2013). As an alternative to mandamus relief, counsel requested the Court docket Mr. al Qosi's case for review as mandated by 10 U.S.C. § 950f. *Id.*; Brief in Support of Petition for Extraordinary Relief in the Nature of Writs of Mandamus and Prohibition, *Qosi v. United States*, No. 13-001 at 6, 34. In its initial response to this pleading, the Court ordered the government to provide it with a copy of the entire record of trial in this case. *Qosi v. United States*, Case No. 13-001, Order (U.S.Ct.Mil.Comm.Rev., Feb. 12, 2013).

On April 24, 2014, the Court denied all relief. *United States v. Qosi*, 28 F.Supp.3d 1198 (U.S.Ct.Mil.Comm.Rev., 2014). Counsel appealed that decision to the D.C. Circuit pursuant to 10 U.S.C. § 950g and the All Writs Act. The D.C. Circuit declined to exercise jurisdiction over that appeal, expressing that "[s]ection 950c's automatic referral is only to [CMCR], not this court." *In re al Qosi*, 602 Fed. Appx. 542 (D.C. Cir., 2015).

In its 2014 decision in this case, the Court concluded that "express or implied authority" from Mr. al Qosi was required in order for counsel to file any pleading with the Court on his

behalf. *Qosi*, 28 F.Supp.3d at 1204. The Chief Defense Counsel has addressed that concern by detailing Mr. al Qosi's trial defense counsel to this case.[3]

ERRORS AND ARGUMENT

I. NOTHING IN THE FACTS OF THIS CASE ACTS TO RELIEVE THIS COURT OF ITS STATUTORY OBLIGATION TO CONDUCT A PLENARY REVIEW OF MR. AL QOSI'S CONVICTIONS AND SENTENCE.

Congress provided for automatic judicial review of all military commission convictions and sentence. 10 U.S.C. § 950c(a). Unlike in courts-martial, where automatic review by the intermediate appellate court is predicated on the severity of the sentence adjudged, Congress subjected *every* military commission judgment approved by the convening authority to judicial review. Only an accused's affirmative, timely waiver or withdrawal of appellate review relieves this Court of its statutory obligation to conduct a plenary review. *Id*.

Congress further provided that military commission judgments are not final, and jeopardy does not attach, until—at a minimum—review by this Court is "fully completed." 10 U.S.C. § 949h(b). This requirement mirrors the first part of the UCMJ's finality requirement, 10 U.S.C. § 844(b), which has long been interpreted to require review by the intermediate court before jeopardy attaches and a case is final. *See, e.g.*, *United States v. Padilla*, 5 C.M.R. 31, 36 (C.M.A. 1952) (accused could not claim former jeopardy at his second trial because his guilty findings at his first trial were never reviewed by appellate authorities). In the absence of review by this

[3] Commander Suzanne Lachelier was detailed military counsel for Mr. Qosi at trial and was designated lead attorney for all post-trial matters. R. 856. She left active service in December 2012. Ms. Lachelier has since returned to the Military Commissions Defense Organization ("MCDO") as a civilian attorney, assigned to assist in the representation of Mr. Mustafa al-Hawsawi. Because she is now available and due to her preexisting relationship with Mr. al Qosi, the Chief Defense Counsel has detailed her as assistant appellate counsel in the case.

Court, the government lacks a final judgment in this case and Mr. al Qosi remains at risk of additional trials and punishment.

This Court is obligated to conduct its § 950f review in this case because no waiver or withdrawal of review was filed after the Convening Authority acted. *Hicks v. United States,* 94 F.Supp.3d 1241, 1244 (U.S.Ct.Mil.Comm.Rev. 2015) (waiver filed outside statutory 10-day window is "invalid and unenforceable and [the] appeal is properly before our Court."); *see also In re al Qosi*, 602 Fed.Appx. 542, 543 (D.C. Cir. 2015) (10 U.S.C. 950c provides "automatic referral" to this Court). The Convening Authority's failure to formally refer this case to the Court was error, *Hicks* 94 F. Supp.3d at 1247, but that error does not relieve the Court of its § 950f obligation. *Id.*; *see also* R.M.C. 1201(d)(1) ("Except in those cases in which appellate review has been waived or withdrawn pursuant to R.M.C. 1110, the findings and sentence of each case as approved by the convening authority *shall be reviewed* by [this Court]." (emphasis added)); *In re al Nashiri*, 835 F.3d. 110, 118 (D.C. Cir. 2016) ("Federal courts generally 'have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.'") (citation omitted).

Congress placed on the Court an independent duty to review Mr. al Qosi's case and ensure that the judgment here is "correct in law and fact and [], on the basis of the entire record, should be approved." 10 U.S.C. § 950f(d). "[I]t is not this Court's role to disregard Congress' clear direction." *Hicks*, 94 F. Supp.3d at 1246; *cf. Central United Ins. Co. v. Burwell*, 827 F.3d 70, 73 (D.C. Cir. 2016) ("Disagreeing with Congress's expressly codified policy choices isn't a luxury [this Court] enjoys.").

Thus, the Court should review Mr. al Qosi's military commission.

II. MR. AL QOSI'S CONVICTIONS FOR PROVIDING MATERIAL SUPPORT TO TERRORISM AND CONSPIRACY TO COMMIT MATERIAL SUPPORT TO TERRORISM FOR PRE-2006 CONDUCT VIOLATE THE *EX POST FACTO* CLAUSE AND SHOULD BE VACATED.

This case presents the same issue on which this Court vacated all charges in *Hicks v. United States*, 94 F.Supp.3d 1241 (U.S.Ct.Mil.Comm.Rev. 2015). The *Hicks* decision compels the same relief be ordered here, to wit a vacatur of Mr. al Qosi's conviction and sentence.

A. Standard of Review.

Mr. al Qosi brought a timely Ex Post Facto Clause challenge to the charges upon which he was ultimately convicted. Therefore, this Court reviews that issue *de novo*. Rules for Military Commission 905 and 907, Manual for Military Commissions, pt. II, at II-89-91 & II-95 (2012) ("R.M.C"); *Bahlul v. United States*, 767 F.3d 1, 29, 11 n. 6 (D.C. Cir. 2014) (en banc); *id*. at 78-79 (Kavanaugh, J., concurring in part and dissenting in part); *see also United States v. Chin*, 75 M.J. 220, 222 (C.A.A.F. 2016).

B. The Military Commission's Judgment in this Case Should be Vacated Pursuant to *Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014).

Sitting *en banc*, the U.S. Court of Appeals for the District of Columbia Circuit unanimously held that it is a clear violation of the Ex Post Facto Clause for a military commission convened pursuant to the MCA to try an accused for providing material support to terrorism for conduct that pre-dates the 2006 Military Commissions Act. *Bahlul v. United States*, 767 F.3d 1, 29 (D.C. Cir. 2014) (en banc) ("*Bahlul I*"); *id*. at 63 (Kavanaugh, J., concurring in part and dissenting in part). In vacating Hicks' conviction and sentence, this Court held that his guilty plea did not "dictate a different result" than that reached by the Circuit in *Bahlul I*. *Hicks*, 94 F.Supp.3d at 1248. Accordingly because all of the conduct which forms the

basis of Mr. al Qosi's guilty pleas occurred years prior to 2006, this Court should hold that the Circuit's decision in *Bahlul I* vitiates both charges to which Mr. al Qosi pled guilty.

Mr. al Qosi's conviction for providing material support to terrorism (Charge II) is the same offense as that vacated by the Circuit in *Bahlul I* and by this Court in *Hicks*. *Bahlul I*, 767 F.3d at 27; *Hicks*, 94 F.Supp. 3d at 1248. Mr. al Qosi's conviction for conspiracy to provide material support to terrorism (Charge I) must also be vacated because, as *Bahlul I* established, the object of the alleged criminal agreement (MST) is not an offense triable by military commission. 10 U.S.C. § 950t(29) (defining the conspiracy offense charged here as requiring an agreement "to commit one or more substantive offenses triable by military commission under this subchapter"); *see also United States v. Feola*, 420 U.S. 671, 693-94 (1975) (conspiracy is "the act of agreement to commit [a] crime")*; In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000) (if something is not a crime, a charge of attempting or conspiring to do the same thing "would be equally untenable."). As a consequence, this Court should vacate Mr. al Qosi's convictions and sentence. 10 U.S.C. § 950f(d); *Hicks*, 94 F.Supp. 3d at 1248.

III. IN ADDITION TO VIOLATING THE EX POST FACTO CLAUSE, MR. AL QOSI'S MILITARY COMMISSION EXCEEDED JURISDICTIONAL LIMITS IMPOSED BY THE DEFINE & PUNISH CLAUSE AND ARTICLE III OF THE CONSTITUTION.

The tribunal that convicted Mr. al Qosi was a law-of-war military commission, whose jurisdiction is limited to "try[ing] offenses against the law of war." *Bahlul I*, 767 F.3d at 7. Such military tribunals can only try offenses that are plainly established under "the rules and precepts of the law of nations, and more particularly the law of war." *Ex parte Quirin*, 317 U.S. 1, 28 (1942). By contrast, the crimes for which Mr. al Qosi was convicted are solely domestic offenses. Accordingly, the Court should vacate Mr. al Qosi's convictions and sentence because the military commission lacked jurisdiction over the offenses.

A. Standard of Review.

Mr. al Qosi filed timely jurisdictional challenges to the charges in his case. He specifically moved to dismiss on the ground that the military commission's exercise of jurisdiction over the material support charge violated the Define & Punish Clause and Article III. App. Ex. 63; App. Ex. 45 at 11 (para. 2.c.1). The military judge summarily denied this motion to dismiss. R. 291-293. Mr. al Qosi brought a similar jurisdictional motion on the conspiracy charge. App. Ex. 60. In a separate motion to dismiss, Mr. al Qosi argued that the commission lacked jurisdiction because material support to terrorism and conspiracy fall into "other offenses" under the MCA which can only be tried in an Article III court. App. Ex. 59.

Because, unlike in *Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016) ("*Bahlul II*"), Mr. al Qosi properly preserved these issues at trial, the Circuit's decision does not foreclose this Court's consideration of these constitutional questions. R.M.C. 905 and 907, Manual for Military Commissions, pt. II, at II-89-91 & II-95 (2012); *Bahlul I*, 767 F.3d 1, 29, 11 n. 6; *id*. at 78-79 (Kavanaugh, J., concurring in part and dissenting in part); *see also Bahlul II*, 840 F.3d at 838 (Rogers, Tatel, & Pillard, JJ., dissenting) ("Today's decision thus provides no precedential value for the government's efforts to divert the trial of conspiracy or any other purely domestic crime to law-of-war military commissions."); *see also United States v. Chin*, 75 M.J. 220, 222 (C.A.A.F. 2016). The Court reviews these issues *de novo*.

B. The Military Commission Lacked Jurisdiction Over the Offenses.

The Supreme Court has grounded military commissions' subject matter jurisdiction in Congress' power to "Define and Punish . . . Offenses against the Law of Nations." U.S. Const., art. I § 8, cl. 10. The Define and Punish Clause requires that for an offense to be punishable, it must already exist as a cognizable offense under international law. *See, e.g.*, *United States v.*

Palmer, 3 Wheat. 610, 641-42 (1818) (Johnson, J., concurring) ("Congress cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offenses."); *United States v. Arjona*, 120 U.S. 479, 488 (1887) ("Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by congress.").

In the three cases in which the Supreme Court has upheld the legality of law-of-war military commissions, it was because at least one of the offenses charged was plainly established under international law as an offense against the law of war. *Johnson v. Eisentrager*, 339 U.S. 763, 786-87 (1950); *In re Yamashita*, 327 U.S. 1, 14 (1946); *Quirin*, 317 U.S. at 43. Because material support to terrorism and conspiracy do not meet that standard, a fact that the government has readily conceded, *Bahlul I*, 767 F.3d at 23 & 27, Congress cannot presume to define these offenses as such or punish them in a law-of-war military commission.

Moreover, even where an offense may be recognized under international law, the Supreme Court has separately barred military commissions from exercising jurisdiction over infamous crimes recognized at common law. This constraint arises because law-of-war military commissions are Executive Branch tribunals that cannot encroach upon the Article III judicial power to try purely domestic crimes. "Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (quotation omitted). Where the three Supreme Court cases to affirm the use of military commissions did so because they were being used to try internationally-recognized war crimes, the four Supreme Court cases to invalidate military commissions did so, at least in part, because they had attempted to usurp the jurisdiction reserved to the courts at common law. *Hamdan v. Rumsfeld*, 548 U.S. 557, 602 (2006) (plurality

op.); *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946); *Ex parte Milligan*, 4 Wall. 110, 121 (1866); *Jecker v. Montgomery*, 13 How. 498, 515 (1851).

The Supreme Court strictly scrutinizes any apparent effort to vest the power of the Judicial Branch in a non-Article III tribunal. *CFTC v. Schor*, 478 U.S. 833, 848 (1986); *see also Stern*, 564 U.S. at 502-03 (courts must ensure the political branches do not "chip away at the authority of the Judicial Branch … 'Slight encroachments create new boundaries from which legions of power can seek new territory to capture.'") (quoting *Reid v. Covert*, 354 U.S. 1, 39 (1957)). Insofar as Congress intentionally diverted the prosecution of federal crimes, such as§ 2339B material support and conspiracy, to an Executive Branch tribunal, the 2009 MCA unconstitutionally circumvents the federal courts' exclusive jurisdiction over the "trial of all crimes." U.S. Const., art III § 2.

Therefore, the judgment below must be vacated as exceeding the subject-matter jurisdiction that law-of-war military commissions can constitutionally be given. *Bahlul II*, 840 F.3d at 838 (Rogers, Tatel, & Pillard, JJ., dissenting).

IV. THE MILITARY COMMISSIONS ACT OF 2009 DISCRIMINATES AGAINST ALIENS IN VIOLATION OF THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE. *BUT SEE BAHLUL II*, 840 F.3d AT 758.

A. Standard of Review.

The MCA conditions the personal jurisdiction of a military commission on the nationality of the accused. 10 U.S.C. §§ 948a(1), 948b(a), 948c (2009). Objections to the personal jurisdiction of a military tribunal are always reviewed *de novo* because "the status of the individual is the focus for determining both jurisdiction over the offense and jurisdiction over the person." *United States v. Ali*, 71 M.J. 256, 264 (C.A.A.F. 2012); *see also United States v. Marquez*, 291 F.3d 23, 27 (D.C. Cir. 2002) (jurisdictional challenges are reviewed *de novo*).

B. The MCA's System of *De Jure* Segregation Cannot Withstand Strict Scrutiny.

The segregation of non-citizens into military commissions cannot be "narrowly tailored to further compelling governmental interests." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). This is because there is no rational, let alone compelling, governmental interest that justifies discrimination against non-citizens in the application of the criminal law generally or the law of war, in particular.

The Supreme Court long ago held that American citizens are subject to the jurisdiction of law-of-war military commissions to the same extent as aliens. *Quirin*, 317 U.S. at 37-38. *Quirin's* holding is consistent with an unbroken tradition of American law-of-war military commissions, which prior to enactment of the 2006 MCA – and fully consistent with court-martial practice – have never made a jurisdictional distinction on the basis of national origin, and have in fact tried American citizens for violating the law of war. *See, e.g.*, *Hamdan*, 548 U.S. at 590; William Winthrop, *Military Law & Precedents*, 832 (2d ed. 1920).

The Supreme Court set aside the one previous attempt to establish a criminal justice system that facially discriminated on the basis of nationality. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). And since before the Founding, the military has consistently tried its American and alien enemies before the same military tribunals. Thus, the MCA violates the Constitution's equal justice requirements and an unbroken tradition of U.S. military practice.

C. The MCA's System of *De Jure* Segregation was Motivated by Irrational Animus.

Separate from the MCA's inability to withstand strict scrutiny, "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *United States v.*

Windsor, 133 S.Ct. 2675, 2693 (2013) (citation omitted). When disparate treatment is motivated by nothing more than "animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

In 2006, Congress for the first time in U.S. history created a segregated criminal justice system motivated by nothing more than animus toward non-citizens and the desire to avoid the political accountability that would result if citizen constituents were triable by military commission.[4] Segregating aliens into military commissions was based solely on a general feeling that Guantanamo detainees did "not deserve the same panoply of rights reserved for American citizens in our legal system." 152 Cong. Rec. S10395 (Sept. 28, 2006) (Sen. Cornyn).

Modern equal protection jurisprudence rests on the recognition that "more searching inquiry" is required when "the operation of those political processes ordinarily to be relied upon to protect minorities" is curtailed. *United States v. Carolene Prods. Co*., 304 U.S. 144, 152 n. 4 (1938). The Supreme Court has repeatedly offered aliens as "a prime example of a 'discrete and insular' minority for whom heightened judicial solicitude is appropriate." *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

By segregating non-citizens into an inferior criminal justice system, the law under which Mr. al Qosi was convicted is unprecedented and bears no rational relationship to any governmental interest the Constitution condones. Accordingly, the judgment must be vacated.

[4] *See, e.g.*, 152 Cong. Rec. S10250 (Sept. 27, 2006) (Sen. Warner) ("It is wrong to say that this provision captures any U.S. citizens. It does not. It is only directed at aliens – aliens, not U.S. citizens[.]"); *id*. at S10251 (Sen. Graham) ("Under no circumstance can an American citizen be tried in a military commission. The jurisdiction of military commissions does not allow for the trial of American citizens or lawful combatants, and those who say otherwise, quite frankly, have not read the legislation because there is a prohibition to that happening."); *id*. at S10274 (Sen. Bond) ("These people are not U.S. citizens, arrested in the U.S. on some civil offense; they are, by definition, aliens engaged in or supporting terrorist hostilities against the U.S.").

CONCLUSION

As this Court held in *Hicks*, a guilty plea to the offense of providing material support to terrorism does not foreclose relief for the Ex Post Facto Clause violation identified by the D.C. Circuit in *Bahlul I*. Thus, this Court should vacate the judgment in this case. Alternatively, the Court should vacate the military commission's judgment here because: 1) the commission lacked the subject-matter jurisdiction Congress attempted to give it under its Define & Punish Clause power; 2) Congress's diversion of these domestic offenses to this Article I tribunal violated Article III of the Constitution; and, 3) Congress segregated Mr. al Qosi into an inferior criminal justice system in violation of the Constitution's equal protection guarantee.

WHEREFORE, the Court should set aside the finding of guilt to both charges, and dismiss them, and vacate the sentence.

Dated: Feb. 13, 2017

Respectfully submitted,

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Dated: Feb. 13, 2017

Certificate of Service

I certify that a copy of the foregoing was emailed to BG Mark Martins, Michael J. O'Sullivan and Danielle Tarin at the Office of the Chief Prosecutor on the 13th day of February, 2017.

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